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UNCED [United Nations Conference on Environment and Development] Biodiversity

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*Re. India / UNED
Biodi - EC Resolution*



**British Embassy
Washington**

Trade Policy Department
3100 Massachusetts Ave N.W.
Washington D.C. 20008-3600

Telephone: (202) 898-
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Environmental and Energy Study Institute

122 C Street, N.W., Suite 700

Washington, D.C. 20001-2109

(202) 628-1400

*file w/ Biodi
Convention ~ CIESD
materials*

Prepublication Copy

**The United States
and the Biodiversity Convention:
The Case for Participation**

by

Gareth Porter

EESI Papers on Environment and Development

Number 1

November 1992



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*With the compliments
of
Joan Martin-Brown
Special Advisor
to the Executive Director
Chief, Washington Office*

*file w/ biodiversity &
UNEPD*

United Nations Environment Programme
1889 F Street, N.W. Ground Floor • Washington, D.C. 20006
Telephone: (202) 289-8456 • Fax: (202) 289-4267
—



UNITED NATIONS ENVIRONMENT PROGRAMME
PROGRAMME DES NATIONS UNIES POUR L'ENVIRONNEMENT



UNITERRA NAIROBI
230800 or 520800
Fax 254 2 226890/215787
Tx 22088 UNEP KE

P.O. Box 30552
Nairobi, Kenya

EPFAX 13725

Your Reference

11 November 1992

Sir, Our Reference

25

As a result of the successful conclusion of the negotiations for and the signing of the Convention on Biological Diversity by 159 Governments and the European Community, its ratification by two Governments, and pursuant to Resolution 2 adopted by the Conference for the Adoption of the Agreed Text of the Convention in Nairobi on 22 May 1992, an Intergovernmental Committee on The Convention on Biological Diversity (IGC) will be established by UNEP subject to its approval by the Governing Council in May 1993.

Resolution 2 invites the IGC to consider many issues (a copy of the Resolution is attached). To facilitate consideration of these issues by the IGC I am proposing the establishment of 4 Expert Panels to consider reports to be used as background/information material prior to their eventual presentation to the IGC. Each panel will be composed of 10-12 experts acting in their personal capacity with work divided among the panels according to the following scheme :

Panel 1: Priorities for action for conservation and sustainable use of biological diversity and agenda for scientific and technological research (to cover paragraphs 2(a)(i), 2(a)(ii), 2(a)(iv) and 2(b) of Resolution 2);

Panel 2: Evaluation of potential economic implications of conservation of biological diversity and its sustainable use and valuation of biological and genetic resources (to cover paragraph 2(a)(iii) of Resolution 2);

Mr. William Reilly
Administrator
United States Environmental
Protection Agency
401 M Street
Washington, D.C. 20460
U.S.A.

...../2

2

Panel 3: Technology transfer and financial issues (to cover paragraphs 2(c), 2(e), 2(f), 2(g), 2(h) of Resolution 2);

Panel 4: Need for, elements for inclusion in, and modalities of a protocol for transfer and handling of any living modified organism resulting from biotechnology (to cover paragraph 2(d) of Resolution 2).

The panels may need to convene 2-3 times before the first meeting of the IGC and each one of these panels may have to establish smaller working groups to consider detailed specific issues. It is envisaged that the work of the panels should be completed before 30 March 1993.

Keeping in mind the need for regional balance on each panel I intend to invite experts from the countries listed below:

Panel 1:	Norway (Co-Chairman) Switzerland United States Canada Australia Poland	India (Co-Chairman) Malawi Ghana Jordan Costa Rica Bahamas
Panel 2:	Sweden (Co-Chairman) United States Japan U.K. France Russia	Colombia (Co-Chairman) Zimbabwe Algeria Indonesia China Argentina
Panel 3:	Germany (Co-Chairman) U.K. United States Netherlands Finland Bulgaria Canada	China (Co-Chairman) Nigeria Kenya Malaysia Pakistan Brazil India
Panel 4:	Denmark (Co-Chairman) United States Spain EEC Romania	Ethiopia (Co-Chairman) Tanzania Thailand Bangladesh Venezuela Peru

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3

The Co-Chairmen of each panel will serve as the focal point in the preparation of an issue paper to be considered by the panel. They will be also responsible for the organization and co-ordination of the panel's activities and interaction with other panels, as appropriate. In view of the United States' active participation and interest displayed in the negotiations of the Convention on Biological Diversity, it is my pleasure to invite the United States to support the work of Panel 1. I am thinking of Mr. Henry Shands from your country for the membership of Panel 1, which will be co-chaired by Mr. P. Schei (Norway) and Mr. D.K. Biswas (India). I hope that your Government will support the exercise by allowing Mr. Shands to participate in the work of Panel 1.

In this regard, I am pleased to inform you that the first meeting of the panel, will take place at UNEP Headquarters in Nairobi from 9-12 December 1992. Panels 1, 2 and 4 will meet from 9-12 December 1992 and Panel 3 from 10-14 December 1992. A provisional agenda for the first meeting is attached and an annotated agenda will be circulated to panel members before the end of this month.

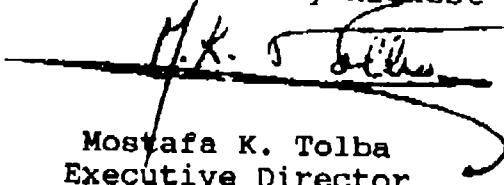
I shall be most grateful to receive your response by return fax at your earliest convenience on the willingness of your Government to allow Mr. Shands to participate in Panel 1.

Please address all communication concerning the above meeting to:

Mr. Hamdallah Zedan
Co-ordinator Biodiversity and Biotechnology
P.O. Box 30552
Nairobi, Kenya

Telephone: (254-2) 230800 or 520600
Telex: 22068 UNEP KE
Telefax: (254-2) 226886 or 226890

Accept Sir, the assurances of my highest consideration.



Mostafa K. Tolba
Executive Director

PROVISIONAL AGENDA PANEL 1

1. Opening of the meeting
2. Adoption of the agenda
3. Mandate of the panel
(Resolution 2 of the Final Act; paragraphs 2(a)(i), 2(a)(ii),
2(a)(iv) and 2(b))
4. Priorities for action for conservation
5. Priorities for sustainable use of biodiversity
6. Criteria for sustainable use
7. Organization of the preparation of an agenda for scientific
and technological research
8. Institutional arrangements ad interim for scientific
cooperation among Governments
9. The role of international cooperation in the topics covered by
Panel 1
10. Organization of further work of the panel
11. Closure of the meeting

- 7 -

Resolution 2

INTERNATIONAL COOPERATION FOR THE CONSERVATION OF
BIOLOGICAL DIVERSITY AND THE SUSTAINABLE USE OF
ITS COMPONENTS PENDING THE ENTRY INTO FORCE OF
THE CONVENTION ON BIOLOGICAL DIVERSITY

The Conference.

Having agreed upon and adopted the text of the Convention on Biological Diversity at Nairobi on 22 May 1992,

Noting that preparations are required for an early and effective operation of the Convention once it has entered into force,

Noting further that, in the interim arrangements, involvement in the negotiations of all Governments, particularly those that participated in the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, is desirable,

Noting with appreciation the work so far undertaken under the auspices of the United Nations Environment Programme in the first set of country studies conducted with national, bilateral and multilateral support,

Recognizing the ongoing joint programmes of the United Nations Environment Programme and other organizations that have mobilized the involvement, in each region, of all sectors to explore options for the conservation of biological diversity and the sustainable use of its components,

Further recognizing that the preparation of biological diversity country studies is the first systematic attempt to assist countries in establishing baseline information on their biological diversity and is the basis for national action programmes on conservation of biological diversity and the sustainable use of its components,

1. Calls upon all States and regional economic integration organizations entitled to consider signing the Convention during the United Nations Conference on Environment and Development in Rio de Janeiro or at the earliest subsequent opportunity and thereafter to consider the ratification, acceptance, approval of or accession to the Convention;

2. Invites the Governing Council of the United Nations Environment Programme to consider requesting the Executive Director of the Programme to convene meetings of an Intergovernmental Committee on the Convention on Biological Diversity starting in 1993, to consider the following issues:

(a) Assistance to Governments, upon request, in further work in the preparation of country studies in recognition of their importance in the development of their national biological diversity strategy and action plans, inter alia:

- (i) To identify components of biological diversity of importance for its conservation and the sustainable use of its components including the collection and evaluation of data needed for effective monitoring of those components;
- (ii) To identify processes and activities which have or are likely to have an adverse impact on biological diversity;

/...

- 8 -

- (iii) To evaluate the potential economic implications of the conservation of biological diversity and the sustainable use of biological and genetic resources and to ascribe values to biological and genetic resources;
 - (iv) To suggest priority action for the conservation of biological diversity and the sustainable use of its components;
 - (v) To review and, where appropriate, suggest revision of the draft guidelines for country studies on biological diversity;
 - (vi) To identify modalities for providing support to countries, in particular developing countries, undertaking studies;
- (b) Organization of the preparation of an agenda for scientific and technological research on conservation of biological diversity and the sustainable use of its components, including possible institutional arrangements *ad interim* for scientific cooperation among Governments for the early implementation of the provisions of the Convention on Biological Diversity before it has entered into force;
- (c) Consideration of the need for and modalities of a protocol setting out appropriate procedures including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity;
- (d) Modalities for the transfer of technologies, in particular to developing countries, relevant to the conservation of biological diversity and the sustainable use of its components, as well as technical cooperation in support of national capacity-building in those areas;
- (e) Provision of policy guidance to the institutional structure invited to undertake the operation of the financial mechanism in accordance with Article 21 of the Convention on an interim basis for the period between the opening of the Convention for signature and its entry into force;
- (f) Modalities for bringing into early effect the provisions of Article 21;
- (g) Development of the policy, strategy and programme priorities, as well as detailed criteria and guidelines for eligibility for access to and utilization of the financial resources, including monitoring and evaluation on a regular basis of such utilization;
- (h) Financial implications of and relevant arrangements in support of international cooperative action before the entry into force of the Convention, including voluntary contributions in cash and kind required for the operation of an interim secretariat and the meetings of the Intergovernmental Committee on the Convention on Biological Diversity;
- (i) Other preparations for the first meeting of the Conference of the Parties to the Convention;
3. Further requests the Executive Director of the United Nations Environment Programme to provide the secretariat on an interim basis until the Convention has entered into force and also requests the Executive Director to seek the full and active involvement of the Food and Agriculture Organization of the United Nations and the United Nations Educational, Scientific and Cultural Organization in the establishment and operations of the Interim Secretariat, as well as full cooperation with the secretariats of relevant conventions and agreements and the Consultative Group on International

- 9 -

Agricultural Research, the World Conservation Union and other relevant international organizations, taking into account relevant decisions of the United Nations Conference on Environment and Development.

4. Invites the Food and Agriculture Organization of the United Nations and the United Nations Educational, Scientific and Cultural Organization to provide full support to the establishment and operations of the interim secretariat;

5. Also requests the Executive Director of the United Nations Environment Programme to contribute to the financing of the costs of the preparations for and the holding of the meetings, subject to the availability of resources in the Environment Fund;

6. Invites Governments to contribute generously to the functioning of the interim secretariat and the successful conduct of the meetings of the Intergovernmental Committee on the Convention on Biological Diversity and to assist financially with a view to ensuring full and effective participation of developing countries;

7. Further invites Governments to inform the meetings of national action taken for the conservation of biological diversity and the sustainable use of its components consistent with the provisions of the Convention and pending its entry into force;

8. Also invites the secretariats of major international and regional environmental conventions, agreements and organizations to provide information to the Intergovernmental Committee on their activities, and the Secretary-General of the United Nations to provide the relevant sections of Agenda 21 that will be adopted at the United Nations Conference on Environment and Development in Rio de Janeiro.

Adopted on 22 May 1992

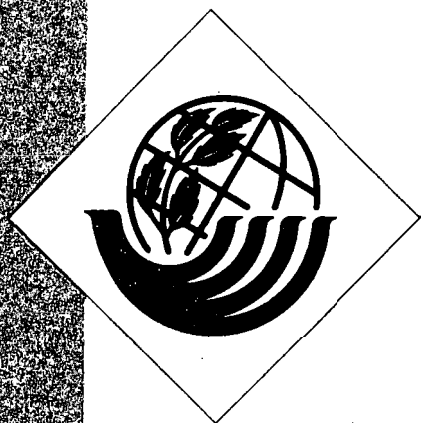
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EARTH SUMMIT

CONVENTION ON BIOLOGICAL DIVERSITY

**United Nations
Conference on
Environment and
Development**

**Rio de Janeiro
Brazil
3-14 June 1992**



UNITED NATIONS

FINAL TEXT



British Embassy
Washington

13 November 1992

Katie McGinty
Legislative Assistant
Office of Senator Gore,
SR-393 Russell Senate Office Building
Washington DC
20510-4202

Commercial Department
3100 Massachusetts Ave N.W.
Washington D.C. 20008-3600
Telephone: (202)
Telex: RCA 211427 or 216760-WU1 64224
Facsimile: (202) 898-4224

Dear Katie,

It was great to see you for lunch yesterday. I hope we can keep in touch during the next few hectic weeks. I will certainly try to arrange an opportunity for you to meet my successor, Mark Hammond, when he arrives in January. In the meantime, good luck with the preparations for the new Administration.

2. As promised, I attach copies of both the EC and UK Biodiversity declarations. Please do not hesitate to ask for more information if you need it. I also attach a copy of the British Government's Second Annual Report on its environmental policies and programmes - for all that free time you will have!

Yours,

S R Sklaroff
First Secretary
Environment, Energy
and Telecommunications

STATEMENT ON CONVENTION ON BIODIVERSITY
(AS AGREED IN COMMUNITY COORDINATION AT MINISTERIAL LEVEL ON
TUESDAY 9 JUNE 1992 AT 0900 H)

CONVENTION ON BIODIVERSITY
STATEMENT TO BE MADE BY MR ANIBAL CAVACO SILVA
PRIME MINISTER OF THE PORTUGUESE REPUBLIC
ON BEHALF OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES
ON THE OCCASION OF THE SIGNATURE BY THE COMMUNITY
OF THE CONVENTION

1. THE EUROPEAN COMMUNITY HAS TODAY SIGNED THE CONVENTION ON BIOLOGICAL DIVERSITY. THE EUROPEAN COMMUNITY AND ITS MEMBER STATES REAFFIRM THE FUNDAMENTAL IMPORTANCE THEY ATTACH TO THE CONSERVATION OF BIOLOGICAL DIVERSITY AND THE SUSTAINABLE USE OF ITS COMPONENTS. SAFEGUARDING ECOSYSTEMS AND THE SPECIES WITHIN THEM IS AN ESSENTIAL CONDITION FOR ACHIEVING SUSTAINABLE DEVELOPMENT.
2. THE COMMUNITY AND ITS MEMBER STATES HAVE FULLY SUPPORTED THE NEGOTIATING PROCESS LEADING TO THE CONVENTION ON BIODIVERSITY. ALTHOUGH NOT ENTIRELY MEETING INITIAL EXPECTATIONS, THIS CONVENTION, PROVIDES A PACKAGE OF MEASURES WHICH FORM A BASIS FOR PROGRESS ON THIS IMPORTANT SUBJECT. THE CONCERNS WHICH ARE NOT FULLY COVERED IN THE PRESENT TEXT WILL NEED FURTHER WORK BY ALL CONCERNED. THIS FURTHER WORK SHOULD START AS SOON AS POSSIBLE.
3. DURING THE NEGOTIATIONS THE COMMUNITY AND ITS MEMBER STATES GAVE WHOLE HEARTED SUPPORT TO APPOINTING THE GLOBAL ENVIRONMENT FACILITY AS THE CONVENTION'S FUNDING MECHANISM. THIS HAS NOW BEEN AGREED ON AN INTERIM BASIS. THE COMMUNITY AND ITS MEMBER STATES DRAW ATTENTION TO THE DECLARATION ON FINANCIAL QUESTIONS MADE BY MEMBER STATES AND OTHER STATES PRESENT IN NAIROBI WHEN THE AGREED TEXT WAS ADOPTED, AND STRESS THE NEED TO ENSURE THAT THE FINANCIAL PROVISIONS ARE IMPLEMENTED IN A SATISFACTORY WAY WHEN THE CONVENTION ENTERS INTO FORCE.
4. THE COMMUNITY AND ITS MEMBER STATES WELCOME THE PROVISIONS DEALING WITH ACCESS TO AND TRANSFER OF TECHNOLOGY, INCLUDING BIOTECHNOLOGY, PARTICULARLY IN PAVING THE WAY FOR INNOVATIVE ARRANGEMENTS FOR SHARING BENEFITS BETWEEN COUNTRIES PROVIDING GENETIC RESOURCES AND THOSE EXPLOITING THEM. AT THE SAME TIME, THE COMMUNITY AND ITS MEMBER STATES WISH TO EMPHASISE THE CRUCIAL NEED TO PROTECT INTELLECTUAL PROPERTY RIGHTS, WITHOUT WHICH THERE WOULD BE LITTLE INCENTIVE TO DEVELOP THE TECHNOLOGIES NEEDED TO CONSERVE BIOLOGICAL DIVERSITY, PARTICULARLY IN THE POORER COUNTRIES OF THE WORLD.



DECLARATION BY THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN
IRELAND AT THE TIME OF SIGNING THE CONVENTION ON BIOLOGICAL
DIVERSITY

The Government of the United Kingdom of Great Britain and Northern Ireland declare their understanding that Article 3 of the Convention sets out a guiding principle to be taken into account in the implementation of the Convention.

The Government of the United Kingdom of Great Britain and Northern Ireland also declare their understanding that the decisions to be taken by the Conference of the Parties under paragraph 1 of Article 21 concern "the amount of resources needed" by the financial mechanism, and that nothing in Article 20 or Article 21 authorises the Conference of the Parties to take decisions concerning the amount, nature, frequency or size of the contributions of the Parties under the Convention.

12 June 1992

pls. file w/ NCCD Staff.

THE CLIMATE CHANGE AND BIODIVERSITY CONVENTIONS: UPDATE ON SIGNATURES AND RATIFICATIONS

The United Nations Framework Convention on Climate Change and the Convention on Biological Diversity were both opened for signature at the UN Conference on Environment and Development - the Earth Summit- in Rio de Janeiro. During the Conference, the Climate Change Convention received 155 signatures and the Biodiversity Convention 157 (each including the European Community).

Since the Rio Conference, Libyan Arab Jamahiriya, Mali and Fiji have signed both conventions, bringing the total of signatories to 158 for the Climate Change Convention and 160 for the Biodiversity Convention.

States that have so far signed only one Convention are the following:

BIODIVERSITY (not Climate Change)

KUWAIT
MALAYSIA
PANAMA
QATAR
TURKEY
UNITED ARAB EMIRATES

CLIMATE CHANGE (not Biodiversity)

KIRIBATI
SINGAPORE
UNITED STATES
VIETNAM

States that have not yet signed either Convention are:

- | | | |
|---|----|----------------------------------|
| | 1 | ALBANIA |
| * | 2 | BOSNIA AND HERZEGOVINA |
| | 3 | BRUNEI DARUSSALAM |
| | 4 | CAMBODIA |
| | 5 | CZECHOSLOVAKIA |
| | 6 | DOMINICA |
| | 7 | EQUATORIAL GUINEA |
| * | 8 | GEORGIA |
| | 9 | GRENADA |
| | 10 | HOLY SEE |
| | 11 | IRAQ |
| * | 12 | KYRGYZSTAN |
| | 13 | LAO PEOPLE'S DEMOCRATIC REPUBLIC |
| | 14 | SAINT LUCIA |
| | 15 | SAINT VINCENT AND THE GRENADINES |
| | 16 | SAUDI ARABIA |
| | 17 | SIERRA LEONE |
| * | 18 | SOMALIA |
| * | 19 | SOUTH AFRICA |
| | 20 | SYRIAN ARAB REPUBLIC |

*	21	TAJIKISTAN
*	22	TONGA
*	23	TURKMENISTAN
*	24	UZBEKISTAN

Both Conventions will remain open for signature at UN Headquarters until June 1993. Countries which have not signed by that date may still become Parties to the Conventions by depositing with the UN Office of Legal Affairs an instrument of accession, acceptance or approval.

In order for the Conventions to enter into force, they must be ratified by national legislatures in at least 50 countries for the Climate Change Convention, and 30 countries, for the Biodiversity Convention. Thus far, Mauritius, Seychelles, Marshall Islands, Zimbabwe and Maldives have ratified both Conventions, and the United States has ratified the Climate Change Convention.

* States not present at UNCED.

9 November 1992.

Dear Katie -

Here is the study I've been threatening to get to you for so long. I hope you can take a look at it - I think Al should be aware of the arguments on the Biodiversity convention signing issue - at least in time for the first 100 days!

Hope all is going well - it sure looks that way!

Best regards
Gauther



MEMORANDUM

To: Nancy Carman
Jack Fowle
Steve Shimberg
Kate McGinty
Robert Davision
Eileen Lee/Rosemarie Gnam

From: John Fitzgerald and Cudlipp

Re: Biodiversity Treaty

Date: May 1, 1992

As promised. We will call Monday afternoon or Tuesday morning.

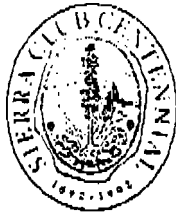
Thank you.

WJP

Please call - tell him we will ~~send~~ send the letter & memo of personal changes. However I will not be able to call other offices to get others to sign -- would need him to do that.

Thy.

SIERRA
CLUB



224-6580
408 C Street, N.E. Washington, D.C. 20002 202-547-1141

FACSIMILE TRANSMITTAL

To: Katie McGinty

From: Cathleen Fogel

of Attached Pages: 6 Date: 5/5/92

Notes: _____

Sierra Club, DC Office FAX Number: (202) 547-6009

SIERRA CLUB



408 C Street, N.E. Washington, D.C. 20002 202-547-1141

May 5, 1992

The Honorable Senator Albert Gore, Jr.
393 Senate Russel Bldg.
United States Congress
Washington, D.C. 20510

Dear Senator Gore,

It has come to our attention that there is a growing possibility that a global Biological Diversity Convention may be adopted at the 1992 "Earth Summit" in Rio de Janeiro this June. While the intent of such a Convention is the protection of biological diversity, the Convention is currently far too weak and vague in certain areas to ensure that this goal is achieved. We are writing to urge you to contact President Bush this week with the message that a weak, inadequate or even damaging Biological Diversity Convention will face close scrutiny when its ratification is considered in the Congress, and that the Administration must act now to strengthen the proposed Convention.

There are a number of areas in the current text that are "bracketed" and have not yet been agreed upon by the negotiating countries. A number of these are critical to a strong Convention. The bracketed areas should be strengthened to:

- * Prohibit species extinction, and ensure that signatories will take all efforts to minimize damages to ecosystems.
- * Require the creation of Global Lists of "Areas of Importance for the Conservation of Biodiversity" and "Species Threatened with Extinction of a Global Level" and action requirements for the protection of such areas and species.
- * Include substantive roles for non-governmental organizations and indigenous populations in all local, national and international biological diversity protection efforts.
- * Include strong regulations of the release of genetically modified organisms into the environment.

"When we try to pick out anything by itself, we find it hitched to everything else in the universe." *John Muir*
National Headquarters: 730 Polk Street, San Francisco, California 94109 (415) 776-2211

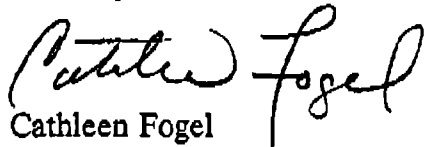
* Commit developed nations to the provision of new and additional financial resources to enable signatory developing countries to achieve the objectives of the Convention.

We have attached for your interest copies of information we have sent to Sierra Club members.

As the next and final Biological Diversity Convention negotiating session begins in Kenya on May 9, immediate action communicating the importance of the above points is critical. We urge you to write to the President immediately expressing your views. Please contact our office if we can be of any further assistance.

Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cathleen Fogel".

Cathleen Fogel
Associate International Representative

enc./



KEY POSITION POINTS ON THE BIOLOGICAL DIVERSITY CONVENTION

Sierra Club, U.S.A.

**United Nations Conference on Environment and Development
March 2, 1992**

The United States should support:

- 1) The creation of a Global List of Biogeographic Areas of Particular Importance for the Conservation of Biological Diversity and a Global List of Species Threatened with Extinction on a Global Level.
- 2) The establishment of a Scientific and Technical Committee with balanced regional representation to provide scientific and technical advice to the Conference of the Parties on the implementation of the Convention, including developing guidelines for determining the value of biological diversity, and reviewing national strategies and case studies for the protection of biological diversity.
- 3) Recognition that ownership and control of genetic resources resides with the nation of origin. Support for appropriate measures to ensure the fair and equitable sharing of the results of research and products developed from genetic resources with the country of origin.
- 4) Strong regulations on the release of genetically modified organisms into the environment, with the advance agreement of governments required for the release of such organism in all countries.
- 5) Strong regulations and management of processes and activities that have a significant adverse effect on biological diversity (such as draining or modifying wetlands and logging or conversion of ancient forests).
- 6) Ex-situ conservation of biological diversity to complement in-situ protection in the country of origin.
- 7) Social and economic incentives to encourage the conservation and sustainable use of biological diversity in the country of origin and by international institutions.
- 8) The provision of new and additional financial resources to enable developing countries to achieve the objectives of the Biological Diversity Convention.

SIERRA CLUB



408 C Street, N.E. Washington, D.C. 20002 202-547-1141

April 17, 1992

Dear Sierra Club Biodiversity Activists:

An international Biological Diversity Convention is being prepared for the United Nations "Earth Summit" Conference to be held in Brazil this June. If all the nations working on this convention can agree, a final text may be ready for signing during the Conference.

The current draft convention lays out a number of basic principles and calls for nations to take various actions to protect biodiversity. The draft represents a major advance in the efforts to protect our planet's biological heritage and, if strengthened and signed, will be extremely useful to local activists in all nations.

We are seeking your help to generate letters urging a strong U.S. position during the last Convention negotiating session from May 9 - 19, in Kenya. Unfortunately, the U.S. delegation is taking some positions that are detrimental to the goals of the Convention. Time is of the essence!

You can help ensure that the US works for a strong Biological Diversity Convention by writing now. Here are some points to bring up.

- * The Convention calls for global lists of endangered species and important biogeographic areas (Article 15). It also calls for an international body to publish these lists and, working with a scientific committee, to develop criteria for adding species and areas to the list, and to assist countries in managing areas and protecting species (Article 25). These lists are of fundamental importance to the protection of biodiversity, but the U.S. delegation is working for elimination of these articles! Please stress the importance of the lists and urge our delegation to support Articles 15 and 25 in full.

- * There is much debate over the need for additional funding for developing countries. It is essential that the developed nations, including the U.S., make a commitment to providing new and additional funding if signatory developing countries are to achieve the objectives of the Convention. The U.S. delegation must support strong and effective funding provisions in Articles 21 and 22.

- * Article 4 sets out the general obligations of signatory countries, and is being hotly contested. The basic text calls for countries to take all possible measures to conserve biological diversity and ensure the sustainable use of its components. It details a set of actions for countries to take, including developing standards and practices and ensuring that all possible measures are taken to conserve natural habitats and viable populations of species in natural surroundings. An alternative Article 4 has been proposed that offers much weaker protection. Please urge our delegation not to accept this alternative, but to support the original text of Article 4.

In addition, the Convention must include:

- * substantive roles for indigenous populations and non-governmental organizations in all local, national and international biological diversity protection efforts; and,
- * strong regulations on the release of genetically modified organisms into the environment.

"When we try to pick out anything by itself, we find it hitched to everything else in the universe." *John Muir*
 National Headquarters: 730 Polk Street, San Francisco, California 94109 (415) 776-2211

Finally, some basic biodiversity issues included in other U.N. "Earth Summit" documents are not yet in the draft Convention! They include recommendations to:

- * establish a global "early warning system" to monitor quantitative and qualitative changes in biodiversity.
- * define and implement sustainable use projects that provide alternatives to unsound biodiversity exploitation.
- * develop and implement national biodiversity conservation strategies.
- * establish sufficiently large reserves to ensure the viability of threatened populations of wild animals.
- * promote regional approaches to the conservation of biodiversity.

If you only have a minute, the points above are listed in order of importance.

Thank you for your help on this vital issue!

Send your letters to:

James A. Baker
Secretary of State
Department of State
2201 C St. N.W.
Washington, D.C. 20520
(202) 647-4910

For further information, contact Laurie Macdonald (813) 821-9585, John Hopkins (916) 756-6455, or Cathleen Fogel [International Program] (202) 675-6278.

Biodiversity Agreement Threatened Letters Needed Now!

Completion of the international Convention on Biological Diversity has reached a critical stage heading into the last negotiating session before the United Nations "Earth Summit" in June where the Convention may be ratified. Activists are needed to write letters advocating stronger United States positions prior to the May 9 meeting in Nairobi.

The Biodiversity Convention would commit signatory nations to general principles and programs of the conservation of biodiversity. However, the actual text is weak and would not guarantee real change in protection and recovery of threatened species and ecosystems unless it is strengthened.

Under the direction of the State Department's Eleanor Savage, the U.S. has attempted to weaken the convention during the last few negotiating sessions. To ensure true species protection, environmentalists urge the United States adhere to the following points:

- ✓ Prohibit species extinction, and ensure that signatories will take all efforts to minimize damages to ecosystems.
- ✓ Require the creation of a Global Lists of "Areas of Importance for the Conservation of Biodiversity" and "Species Threatened with Extinction of a Global Level" and action requirements for the protection of such areas and species.
- ✓ Include substantive roles for non-governmental organizations and indigenous populations in all local, national and international biological diversity protection efforts.
- ✓ Include strong regulations of the release of genetically modified organisms into the environment.
- ✓ Commit developed nations to the provision of new and additional financial resources to enable signatory developing countries to achieve the objectives of the Convention.

✉ WHAT YOU CAN DO: Express your concern to: Hon. James A. Baker, Secretary of State, Department of State, 2201 C Street NW, 20520. Tel: (202) 647-4910.

MEMORANDUM

TO: Staff of Members of Congressional Delegation to UNCED
(Addressee list attached)

FROM: Defenders of Wildlife (John Fitzgerald, 659-9510, or Kate Cudlipp, 387-6383)

SUBJECT: Convention on Biological Diversity

DATE:

The United States and other countries, under the auspices of the United Nations Environment Programme (UNEP), are in the process of negotiating a Convention on Biological Diversity, in hopes of having a document ready for the signatures of heads of state at the Earth Summit in Rio de Janeiro in June. The last negotiating session before the Summit will be May 11-20, in Nairobi.

Negotiations had proceeded quietly without attracting much attention within or outside the federal government until recently. There are now ongoing meetings within the Administration to determine what the U.S. negotiating position should be on a host of issues.

It seems likely, at this point, that the Administration position on issues contained in the latest draft of the convention will not move toward more explicit or protective provisions for conserving biodiversity. The task for those both in Congress and outside the government who support a strong convention will be, first, to find ways to exert a counter-pressure to those who wish to weaken or even kill the treaty, and, ultimately, to determine whether the draft that emerges from a final negotiating session deserves the support of the United States.

We have attached a letter to the President setting out four principles that should be incorporated in a final agreement, together with a more expansive memo to be used by those actually negotiating the convention. We believe that it is timely to have interested Members of the congressional delegation send these documents to the President and to his negotiators. The remainder of this memo gives the basis for the recommendations in the memorandum to the U.S. negotiators.

BACKGROUND

In 1987 the Assistant Secretary of State for Oceans and the Environment proposed development of an umbrella treaty to incorporate all the international wildlife-related conventions. That idea was never pursued, but an effort to produce a treaty that would fill in the gaps left by other agreements was initiated and has been shepherded along by the Executive Director of UNEP. Negotiations on substance began in June 1991, with the latest held

in February 1992.

The draft agreement addresses two major issues: conservation of biological diversity and the development, use, and access to benefits of, biotechnology. Many of the provisions that are problematic to the Administration pertain to the second topic and are not the subject of this memorandum. There are unresolved questions in the biodiversity sections of the draft agreement, however, the resolution of which could determine whether the convention is a net plus for conservation or a threat to it.

MAJOR ISSUES

(References in this section are to the Fifth Draft Convention on Biological Diversity, the product of the last negotiating session in February. There is an additional document that is also being used by the Administration, which consists of compromises proposed by UNEP's executive director and the chair of the negotiating sessions; this document is referred to as the "Informal Note.")

Relation to Other Laws

Relation to domestic law. In Article 5, there is a paragraph 2 which is in brackets (meaning there is some objection or reservation to it) and which explicitly states that each party to the convention may have stricter conservation requirements than those in the treaty. The deletion of this provision would not mean that stricter national laws or regulations are preempted but would suggest that may be the case. Any possibility that an international agreement could preempt stricter U.S. or state laws or regulations is a basis for rejecting the agreement. It is not likely that the Administration would agree to such preemption for federal law, but Members should go on record on this issue important issue.

Relation to international common law. The Fifth Draft contains bracketed material in several places, e.g., Article 14, "[whether within or beyond the limits of national jurisdiction]," which if dropped out, would mean a nation has no responsibility for its activities outside its borders. International environmental common law holds that a nation must ensure that entities or actions under its control do not harm the environment or resources of another nation or the global commons. The Administration is arguing in other contexts that U.S. responsibility extends only to activities within its own borders, not to those exercised by U.S. agencies abroad. It seems likely, therefore, that the Administration, without outside pressure, would argue for dropping the bracketed material and limit a nation's compliance with treaty obligations to activities within its borders.

Relation to other international agreements. Article 23,

"Relationship with Other International Conventions," explicitly states that this agreement does not affect the rights under any existing international agreement. A footnote points out that the phrasing leaves open the relation of this agreement to future agreements. If this is meant to be a "gap-filling" treaty, it would be good policy to clarify that future agreements, e.g., under CITES, take precedence over the Biological Diversity Convention.

Explicit Obligations of Contracting Parties

Article 3, Fundamental Principles, and Article 4, General Obligations, contain a variety of provisions that could be read to impose requirements on parties to the convention. Because of the possibility for ambiguity or conflict between these general provisions and more specific requirements that come later, the U.S. and other delegations would not mind if these earlier articles were dropped. The main thing to be preserved from these articles is the principle that each State has responsibility to see that its activities do not cause damage to biological diversity of other States or areas outside of national jurisdiction. The principle does not explicitly appear anywhere other than in Articles 3 and 4, (except that it might be inferred in Article 14 in relation to liability - see below).

Article 7 (c) is the only generic requirement that a nation manage its own biological resources so as to ensure their conservation. The Administration negotiators have suggested that this is a problem, in part because of its "sweeping" nature--e.g. "Does this mean that there must be conservation regulations for every species?" --and in part because it raises the hackles of state wildlife officials who see this as an excuse for the federal government to meddle in their affairs. Without this provision or one similar to it, there is no specific requirement for nations to conserve the biological resources within their territories.

Articles 15 and 25, pertaining to the creation of lists of biogeographic areas of importance and of threatened species, are problematic at this point. If the treaty negotiations are wrapped up in May, it is highly unlikely that responsible guidelines for the creation of these lists by contracting parties can be agreed upon. Seriously flawed guidelines would be worse than none. The U.S. negotiators seem to prefer to leave the decision of whether to create such lists and if so, how, to the first Conference of Parties. While not ideal, the best course for now may be to leave in the Articles with the direction that they should include lists and areas designated under current law and agreements but that the actual the process for designating areas and species and the initial listing itself should be deferred to the first Conference of the Parties.

Liability for Damage

In Article 14, sections (d), (e), and (g) which are bracketed, contain excellent provisions assigning responsibility for avoiding damage to biological diversity and for remedial action or compensation. This is one of the more controversial issues within the Administration and one that U.S. negotiators may wish to drop.

Conferences of the Parties

The current draft calls for no specific timing for convening Conferences of the Parties. (Article 24). Requiring a meeting every two years preserves continuity and accountability while avoiding the delegation of too much independent authority to administrators or executive committees. The right, as noted in the draft, of Non-government observers to participate should be retained.

May 6, 1992

The Honorable George Bush
The White House
Washington, D.C. 20500

Dear Mr. President:

As members of the congressional delegation to the United Nations Conference on Environment and Development-- the "Earth Summit"-- we wish to communicate to you our thoughts on the Convention on Biological Diversity, which we understand may be ready for signatures by heads of state at the Summit. We believe that the four principles set out below are important ones for U.S. negotiators to keep in mind as they work toward a final draft of the convention.

First, it is of central importance that the convention have as its primary goal with respect to biological diversity the conservation of biological resources. Use of resources, insofar as it is consistent with the primary goal of conservation, is also a worthy objective, but it should be very clear from the terms of the agreement that conservation of biological diversity is paramount. As a corollary to the principle of conservation, it should be made clear tht each nation that is a party to the convention accepts the responsibility to manage its biological resources, insofar as possible, so as to assure conservation.

Second, it should be kept in mind that the convention is intended to fill in gaps left by other international agreements on biological resources and should in no case be permitted to weaken any provisions in those other agreements. The convention should also make clear, as the current draft of the document does, that nations that are parties to the convention may adopt stricter conservation measures than those required by the convention.

Third, we strongly support affirmation of the principle of international environmental common law that a nation has responsibility for actions under its control, whether those actions take place within the geographic boundaries of the nation or outside. We believe that this principle, which is included in the most recent draft of the convention, should be incorporated into the final document.

Finally, we urge the negotiators to include provisions that assure that specific standards and requirements for identifying and protecting biological resources will be developed at an early stage by the conference of the parties and that these requirements will build upon provisions already in international and domestic law. As part of the provisions to protect biological resources, we believe it is imperative that the convention provide for establishment of a system of liability for damage to those resources.

We have elaborated on these principles in the enclosed memorandum which we hope may be of use to those who are negotiating the provisions of the convention on behalf of the United States.



United Nations Environment Programme



INTERGOVERNMENTAL NEGOTIATING COMMITTEE FOR A CONVENTION ON BIOLOGICAL DIVERSITY

Seventh negotiating session/Fifth session of INC
Nairobi, 11-19 May 1992

INFORMAL NOTE BY THE CHAIRMAN OF THE INC AND THE EXECUTIVE DIRECTOR OF UNEP REGARDING POSSIBLE COMPROMISE FORMULATIONS FOR THE FIFTH REVISED DRAFT CONVENTION ON BIOLOGICAL DIVERSITY

Explanatory Note

At the fourth plenary meeting of the sixth negotiating session/fourth session of the Intergovernmental Negotiating Committee (INC) for a Convention on Biological Diversity, the Chairman of the INC informed the Committee "that after consultation with the Executive Director on the outcome of this session, they would jointly try to help the final phase of the negotiations by coming up with some possible compromise formulations based on existing language in brackets". (UNEP/Bio.Div/N6-INC.4/4, paragraph 46).

As a result, the Chairman and the Executive Director are circulating this informal note in three languages (English, French and Spanish) with the hope that this will assist the INC in completing its work at the seventh negotiating session/fifth session of INC.

All the proposed formulations are based, to a large extent, on language already discussed during the six preceding negotiating sessions, as well as the language of previously negotiated and already existing international legal instruments such as the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (as amended) and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal.

The text of the fifth revised draft Convention on Biological Diversity (UNEP/Bio.Div/N7-INC.5/2 and Corr.1) reproduced in this informal note is in normal typeface, followed by proposed compromise formulations in parentheses and bold face type. Any newly proposed wording has been underlined.

In the Preamble, numbers preceding the 5th revised draft convention text have been added for ease of reference. The compromise formulations have also been numerically referenced to their order in the draft convention. When paragraphs have been merged the sources of the resulting compromise text have been referenced to the paragraph numbers in the text. Numbers have not been given to these proposed combined paragraphs. Under compromise formulations in a number of cases there are explanatory notes again in bold face type and in parenthesis.

Preamble :

The Contracting Parties,

(1) Recognizing that humanity shares the earth with other forms of life and accepting that these should exist independently of their benefits for humanity; (former paragraph 1)

(1) Recognizing that humanity shares the earth with other forms of life and accepting that these should exist independently of their benefits for humanity unless proven to be dangerous to human life;)

(2) Affirming that the conservation of biological diversity is a common concern of all peoples; (former paragraph 2)

(2) Affirming that the conservation of biological diversity is a common concern of humankind;)

(3) Stressing that in exercising their sovereign rights over their biological resources States have a responsibility to use and develop them in a sustainable manner and to conserve biological diversity; (former paragraph 8)

Insert before paragraph 3 the following provision contained in the second paragraph of the preamble to the 1985 Vienna Convention for the Protection of the Ozone Layer:

(..) Recalling the pertinent provisions of the Declaration of the United Nations Conference on the Human Environment, and in particular principle 21, which provides that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".)

(4) Conscious of the ever growing environmental, ecological, genetic, scientific, aesthetic, recreational, cultural, educational, social and economic values of biological diversity and its components; (former paragraph 3)

(5) Noting that biological diversity is being seriously reduced and that some species are threatened with extinction; (former paragraph 5)

(6) Accepting that the threats to these irreplaceable resources include degradation of the environment from habitat destruction and pollution, human population growth, unsustainable exploitation of some species and the unlawful taking of flora and fauna; (former paragraph 6)

(7) Noting the deterioration in quality of life caused by unwise use of biological resources; (former paragraph 7)

(If retained as a separate paragraph the following reformulation is proposed:

¹ The Group of 77 and China requested that the proposal contained in Appendix II to the fifth revised draft Convention on Biological Diversity be considered with the Preamble.

/...

(7) Noting the deterioration in quality of life caused by the unsustainable use of biological resources;)

(It is proposed to merge paragraphs 5, 6 and 7 as follows:

(...) Concerned that biological diversity is being seriously reduced and that some species are threatened with extinction (paragraph 5) through, inter alia, habitat destruction, pollution, human population growth, unsustainable exploitation of some species and the unlawful taking of flora and fauna (paragraph 6), leading to the deterioration in quality of life (paragraph 7) to the detriment of both present and future generations (UNEP/Bio.Div/N7-INC.5/CRP.1 by Malta);)

(It is proposed to add the following paragraphs based on the text in Article 3, paragraphs (5) and (6), respectively:

(...) Noting that remedying damage to biological diversity is important and aware that it is vital to anticipate, prevent and attack the causes of biological diversity reduction or loss at their source;

(...) Stressing to this end that where the threat of reduction or loss of biological diversity is significant, lack of full scientific certainty shall not be a reason for postponing the avoidance or minimization of the threat;)

(8) Aware that the conservation of natural habitats and the maintenance of viable populations of species in natural surroundings are vital components of the *in-situ* and *ex-situ* conservation of biological resources; (former paragraph 10)

(It is proposed to replace paragraph 8 with a slightly amended text of Article 3 paragraph (3) which would read as follows:

(8) Recognizing that the fundamental requirement for the conservation of biological diversity is the *in-situ* conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings while *ex-situ* measures, preferably in the country which provides the biological resources or the country of origin, when proved, also have an important role to play;)

(9) Recognizing to this end the need to set aside areas of natural habitat for the conservation of biological diversity and to pursue sustainable development outside these areas through planning and management which conserves biological diversity to the maximum extent possible; (former paragraph 11)

(9) Recognizing to this end the need to set aside protected areas of natural habitat for the preservation of biological diversity and to pursue sustainable development outside these areas through planning and management which conserves biological diversity to the maximum extent possible;)

(10) Aware that the conservation of biological diversity also requires special measures independent of natural surroundings [which are also vital]; (former paragraph 12)

(Paragraph 10 is redundant)

(11) Aware of the benefits from the sharing and diffusion of knowledge about biological diversity, its uses and developments, technologies and practices favourable to its conservation; (former paragraph 13)

/....

(12) *Recognizing* the close and traditional dependence of many local communities and indigenous populations on biological resources, their continuing interest in their conservation, and the need to reward their knowledge and innovations associated with the conservation and wise use of biological diversity and its components; (former paragraph 4)

(13) *Acknowledging* that special provision is required to meet the needs of developing countries, including the provision of additional financial resources and access to relevant technologies, bearing in mind that the funds can be expected to make a substantial difference in the world's ability to address the loss of biodiversity; (former paragraph 14)

(13) *Acknowledging* that special provision is required to meet the needs of developing countries, including access to relevant technologies and provision of additional financial resources, bearing in mind that these resources can be expected to make a substantial difference in the world's ability to address the loss of biodiversity;)

(14) *Accepting* that the developed countries and large industrial enterprises, including transnational corporations, have benefited from their significant role in the development and use of biological resources; (former paragraph 15)

(15) *Considering* that these countries and enterprises can help avoid additional costs and burdens for developing countries which forgo exploitation of their biological resources when acting in accordance with this Convention; (former paragraph 16)

(16) *Stressing* the importance of and need to promote cooperation among States and international governmental and non-governmental organizations in a coordinated and comprehensive regional and global approach for the conservation of biological diversity and sustainable use and development of its components in areas both under and beyond national jurisdiction and control; (former paragraph 9)

(17) *Stressing* the need for States, international organizations and non-governmental organizations to promote the conservation of biological diversity and the wise use and development of its components; (former paragraph 17)

(18) *Noting* that action by States and international organizations directly and jointly to conserve biological diversity and to use and develop its components in a sustainable manner will strengthen cooperative and friendly relations among States, and contribute to peace and security for all peoples; and (former paragraph 18)

(It is proposed to merge paragraphs 16, 17 and 18 as follows:

(...) *Stressing* the need for States, international organizations and non-governmental organizations to promote the conservation of biological diversity and the sustainable use and development of its components (paragraph 17) and the importance to this effect of cooperation among themselves (paragraph 16), thus strengthening friendly relations among States and contributing to peace and security for all peoples (paragraph 18); and)

(19) *Agreeing* that existing international arrangements dealing with biological resources do not cover, in spite of the progress achieved, all aspects of biological diversity, the sources of threats to it and the wise use and development of biological resources, (former paragraph 19)

/...

Have agreed as follows:

Article 1. Objectives

[The objective of this Convention is to conserve the maximum possible biological diversity for the benefit of present and future generations and for its intrinsic value, [and to provide for the fair and equitable sharing of the benefits of research in biotechnology arising out of conservation of the biological diversity. This is to be achieved] by ensuring that the use of biological resources is sustainable; [by providing adequate, new and additional funding to the developing countries] [by taking account of the need to share costs and benefits between developed and developing countries,] and by [securing] [providing] economic and legal conditions favourable for the transfer of technology [to them on preferential and non-commercial terms] necessary to accomplish this objective.]

(The objective of this Convention is to conserve the maximum possible biological diversity for the benefit of present and future generations and for its intrinsic value. This is to be achieved by ensuring that the use of biological resources is sustainable; by providing new and additional funding to the developing countries, Parties to this Convention; by providing for the equitable sharing of costs and benefits between developed and developing countries, Parties to this Convention; and by providing economic and legal conditions favourable for the transfer of the relevant technologies, in particular, to the developing countries, Parties to this Convention.)

(The deletion of the phrase "and to provide for the fair and equitable sharing of the benefits of research in biotechnology arising out of conservation of the biological diversity." is justified because the language "by providing for the equitable sharing ... Parties to this Convention;" covers all the benefits which may arise out of the Convention, including those from research in biotechnology. The words "on preferential and non-commercial terms" are deleted with the understanding that the economic and legal conditions of the transfer of relevant technology will be spelled out in detail in the body of the Convention. If this formulation is accepted then the title of the article should be "Objective" and not "Objectives".)

Article 2. Use of Terms for the Purpose of this Convention :

[For the purposes of this Convention:

"ALIEN SPECIES" means a species occurring in a particular country or area outside its historically known natural range, as a result of intentional or accidental dispersal by human intervention.

² Terms followed by "*" were proposed by a sub-working group of Working Group II but not discussed by the Working Group itself. The terms not followed by "*" were reviewed by a sub-working group of Working Group I. The recommendations of that sub-working group are contained in appendix I to the present draft Convention.

"BIOLOGICAL DIVERSITY (OR BIODIVERSITY)" means the variety of and variability among living organisms and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

BIOLOGICAL RESOURCES includes genetic resources, organisms or part thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.*

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

"CONSERVATION OF BIOLOGICAL DIVERSITY" means the preservation (or integral protection), maintenance, sustainable use, recovery and enhancement of the components of biological diversity.

"CONSERVATION": see conservation of biological diversity.

COUNTRY PROVIDING GENETIC MATERIAL/RESOURCES means the country supplying genetic resources collected from *in-situ* sources, including populations of both wild and domesticated species, or taken from *ex-situ* sources, which may or may not have originated in that country.*

COUNTRY OF ORIGIN OF GENETIC RESOURCE³ means the country which possesses those genetic resources in *in-situ* conditions.*

(COUNTRY OF ORIGIN OF GENETIC RESOURCES means the country regarding which there is scientific evidence that the genetic resource originated in it.)

"DOMESTICATED OR CULTIVATED SPECIES" means species in which the evolutionary process has been influenced by humans to meet their needs.

"ECOSYSTEM" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as an ecological unit.

"ENDANGERED SPECIES" means a species in danger of extinction and whose survival is unlikely if the causal factors continue operating.

"ENDEMIC SPECIES" means a species whose natural geographic distribution is restricted to a specific area or country.

EX-SITU CONSERVATION means the conservation of components of biological diversity (genetic material, organisms, populations) outside their natural surroundings.*

GENETIC MATERIAL means any material of plant, animal, microbial or other origin containing functional units of heredity.*

GENETICALLY MODIFIED ORGANISMS means organisms in which the genetic material has been altered in a way that does not occur naturally by mating, recombination, or natural selection.*

³ Definition proposed by the chairman of the sub-working group of WG.II on the basis of informal consultations with some members of the sub-working group.

GENETIC RESOURCES means genetic material of actual or potential value.*

"HABITAT" means the place or type of site where an organism or population naturally occurs.

"INDIGENOUS POPULATIONS": it is advised that the word "populations" be substituted by the word "people" when used for humans.

"INDIGENOUS SPECIES" means a species occurring in the wild in a particular area or country, within its known natural range.

IN-SITU CONSERVATION means 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 species, in the surroundings where they have developed their distinctive properties.*

"NONTERRESTRIAL SPECIES" means organisms not relying on the land for a significant aspect of their life cycle.

"PROTECTED AREA" means a geographically defined area which is designated or regulated, and managed to achieve specific conservation objectives.

"RATIONAL USE OF BIOLOGICAL DIVERSITY" means the use of components of biological diversity in a way and at a rate that does not lead to their long term decline.

"SPECIES THREATENED WITH EXTINCTION": see threatened species.

"TERRESTRIAL SPECIES" means organisms relying on the land for a significant aspect of their life cycle.

"THREATENED SPECIES" means species that are either endangered or vulnerable.

"UTILIZATION/USE OF BIOLOGICAL DIVERSITY": see rational use of biological diversity.

"WILD SPECIES" means a species which has not been deliberately modified by humans.

"(WILDLIFE) CORRIDORS" means routes or avenues to ensure completion of life cycles and unimpeded migrations and gene flows.]

[Article 3. *Fundamental Principles* ⁴

(Article 3. *Fundamental Principles and General Obligations*)

(It is proposed that Articles 3 and 4 be combined and titled "Fundamental Principles and General Obligations." The proposed paragraphs in Articles 3 and 4 are numbered consecutively to reflect their proposed placement in one combined article.)

⁴ The Group of 77 and China requested that the proposal contained in Appendix II to the fifth revised draft Convention on Biological Diversity be considered in conjunction with this Article.

The following fundamental principles shall guide the Contracting Parties in the achievement of the objectives of this Convention:

1. The conservation of biological diversity is a [matter of] common concern of all humankind and requires cooperation by all Contracting Parties.

(1. The conservation of biological diversity is a common concern of all humankind and requires cooperation by all Contracting Parties. International cooperation, in addition to national efforts, is essential for that conservation.)

2. The Contracting Parties have as States the sovereign right to exploit their own biological resources pursuant to their own environmental policies and the responsibility:

(a) For the conservation and sustainable use of their biological resources; and

(b) For ensuring that activities within their jurisdiction or control do not cause damage to the biological diversity of other States or of areas beyond the limits of national jurisdiction.

(2. Each Contracting Party as a State has the sovereign right to exploit its own biological resources pursuant to its own policies.)

(3. Each Contracting Party as a State has the responsibility for:

(a) The conservation and sustainable use of its biological resources; and

(b) Ensuring that activities within its jurisdiction or control do not cause damage to the biological diversity of other States or of areas beyond the limits of national jurisdiction.)

3. The fundamental requirement for the conservation of biological diversity is the in-situ conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings. Ex-situ measures, preferably in the country of origin, also have an important role to play.

(Delete paragraph 3 in this article and move its substance to the Preamble as proposed paragraph 8.)

4. Conservation of biological diversity, particularly of migratory species and their habitats, cross-border ecosystems and areas beyond the jurisdiction of each State Party, requires international cooperation in addition to the national effort that strengthens it.

(Paragraph 4 is not necessary in this article because its essence is contained in the proposed preambular paragraph which combines preambular paragraphs 9, 17 and 18 of the fifth revised draft Convention.)

5. While recognizing that remedying damage to biological diversity is important, it is vital to anticipate, prevent and attack the causes of reduction or loss of biological diversity at source.

(The substance of paragraph 5 is contained in the proposed preambular paragraph which comes after compromise paragraph 7 and

/...

which combines preambular paragraphs 5, 6 and 7 of the fifth revised draft Convention.)

6. Where there is a threat of [serious or irreversible damage to] [significant reduction or loss of] biological diversity, lack of full scientific certainty shall not be used as a reason for postponing [measures] [actions] to avoid or minimize such a threat.

(The substance of paragraph 6 in this article to be moved to the Preamble as a proposed additional paragraph.)

7. The value of the contribution of biological resources and of maintenance of biological diversity and the uneven distribution of these resources among countries are to be recognized and reflected in economic and financial arrangements among them, with the countries benefiting most from biological diversity carrying the main responsibility for the cost of its conservation. ⁵

(This paragraph was transferred from Working Group I to Working Group II. Its substance will therefore be considered in the context of the articles assigned to Working Group II.)

8. The benefits of research and development derived from biomaterial taken from developing countries are to be made available to those developing countries.

(This paragraph was also transferred to Working Group II for consideration.)

- [8. Countries providing genetic material located within their national jurisdiction shall share in benefits from the research and the development which make use of that genetic material.] ^{5,6}

9. Technology related to conservation of biological diversity and the sustainable use and development of its components is to be transferred to developing countries on a preferential and non-commercial basis. ⁵

10. Technology related to conservation of biological diversity and the sustainable use and development of biological resources is to be developed jointly by the owners of the resources and those with financial, scientific and technical resources. ⁵

(Paragraphs [8]-10 are now under consideration by Working Group II which may wish to consider the following combined formulation:

Countries Parties to this Convention and providing genetic material located within their national jurisdiction shall share in benefits from research and development which make use of that material. Technology related to conservation of biological diversity and the sustainable use and development of its components is to be transferred to these Parties on preferential, fair and most favourable terms or be developed jointly by the owners of the resources and those with financial, scientific and technical resources.)

⁵ Paragraphs 7-10 were transferred by WG.I to WG.II for consideration.

⁶ Provisional formulation to replace Article 3, paragraphs 8 and 12.

(The phrase "preferential, fair and most favourable" as applied to the conditions of technology transfer is one step beyond what has already been agreed to in the London Amendment to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, Article 10A - Transfer of Technology reading: "(b) that the transfers referred to in subparagraph (a) occur under fair and most favourable conditions". Where appropriate, the formulation "preferential, fair and most favourable" is used consistently in all compromise proposals.)

11. Countries are to gain directly from all the contributions that biological resources within their jurisdiction or control make to environment protection, economic development and better health and quality of life in other countries.

(There does not seem to be any new ideas presented in paragraph 11 and the general idea contained in this paragraph is found in articles such as Article 16 - [Regulated] Access to Genetic Resources, paragraph 6, Article 20 - Handling of Biotechnology and Distribution of its Benefits, paragraph 2, and Article 3 - Fundamental Principles, paragraph [8]. It can thus be deleted.)

12. Practices and innovations developed in the course of traditional life and by indigenous [peoples] [communities] [populations] which contribute to the wise and sustainable use of biological resources and conservation of biological diversity are to be recognized and rewarded.

(Paragraph 12 is not necessary here since its substance is covered in preambular paragraph 4 of the fifth revised draft Convention or paragraph 12 of the draft preamble.)

13. The additional burden on developing countries arising out of protection of their biological diversity requires new and additional funding to be provided by the developed countries through a new multilateral fund to be established under this Convention.

(The following modifications are proposed to paragraph 13 which would become paragraph 4 of the proposed combination of Articles 3 and 4:

4. The additional burden on Parties which are developing countries arising out of protection of their biological diversity requires new and additional funding to be provided by Parties which are developed countries through a multilateral financial mechanism to be controlled by the Parties to this Convention.)

14. Access to genetic material and substances and products derived from them or to technology related or contributing to the conservation of biological diversity which are within the jurisdiction or control of a State is to be [open] [on the basis of mutual agreements].

[14. Access to genetic material [and substances and products derived from them] or to technology related or contributing to the conservation of biological diversity which are within the jurisdiction or control of a State is to be [open] [on the basis of mutual agreements].]

⁷ Provisional formulation to replace Article 3, paragraph 14 with the text in the first set of square brackets (beginning with the words "and substances and") to be deleted.

/...

(The following can replace the above two paragraphs and this would become paragraph 5 of the proposed combined article:

5. Access to genetic resources or to technology related or contributing to the conservation of biological diversity which are within the jurisdiction or control of a State, Party to this Convention, is to be on the basis of mutual agreement.)

15. The application of biotechnology may involve risks and requires regulatory approaches involving safeguards for health and the environment.

16. Patent systems may have unwanted socio-economic effects for developing countries and small farmers.

17. Biotechnology contributes to the conservation and sustainable use of biodiversity, which requires a wide genetic base.⁸

[17. The maintenance of a wide genetic base is necessary for biotechnology to be able to contribute to conservation and sustainable use of biological diversity.]]⁹

(Paragraphs 15-[17] can be considered in the context of Articles 17 - Access to and Transfer of Technology and 20 - Handling of Biotechnology and Distribution of its Benefits, and not in the context of Article 3.)

[Article 4. General Obligations¹⁰

(As noted under Article 3, the proposal is to combine Articles 3 and 4.)

1. [Each Contracting Party] [The Contracting Parties] shall take [in accordance with [the means at [their] [its] disposal [,] [and]] [its] [their] capabilities] [and [its] [their] national plans, programmes and priorities], [all] [possible] [appropriate] measures [in accordance with the provisions of this Convention] [to ensure] [consistent with] the conservation of [the maximum possible] biological diversity and the sustainable use [and the development] of its components within [the area under] [its] [their] national jurisdiction [or control].

[They shall ensure that activities within their jurisdiction [or control] do not cause damage to the biological diversity of other States or of areas beyond the limits of national jurisdiction.]

(The above two paragraphs to be moved to Article 5 - Implementation Measures. Their substance can be found in proposed Article 5 paragraph 1 (a) and (c).)

⁸ As recommended by the Lawyers' Meeting, if retained, paragraphs 15, 16 and 17 should be relocated in the Preamble since they are statements of fact.

⁹ Provisional formulation to replace Article 3, paragraph 17.

¹⁰ The Group of 77 and China requested that the proposal contained in Appendix II to the fifth revised draft Convention on Biological Diversity be considered with this Article.

(They shall ensure that the [measures of] conservation of biological diversity and the sustainable use [and the development] of its components are [as far as possible appropriately integrated into national plans and policies.] [treated as an integral part of national [development] plans and are taken duly into account in all relevant sectoral policies and legislation.])

(The above paragraph is not necessary in this context because its substance is covered in proposed Article 5 (e).)

(The Contracting Parties shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through appropriate international organizations with a view to ensuring the conservation of biological diversity in areas beyond national jurisdiction.)

(The Contracting Parties shall cooperate on a global basis and, as appropriate, on a regional basis, with a view to ensuring the conservation of biological diversity in areas beyond national jurisdiction.)

The Contracting Parties shall cooperate with each other and with or through such international organizations as they may deem appropriate in coordinating their activities and in supporting and assisting each other in fulfilling their obligations under the present Convention [related to biological diversity and] [biotechnology] [relevant aspects of biotechnology] [including health, food and industrial processes].

(The above paragraphs need not be included here because their substance is covered in the Preamble.)

(It is proposed that a new paragraph be added based on paragraph 10 of the G-77 proposal contained in Appendix II of the fifth revised draft Convention and the agreed formulation in this respect found in the London Amendment to the Montreal Protocol. This would become paragraph 6 of the combined Articles 3 and 4 and would read as follows:

6. Developing the capacity to fulfill the obligations under this Convention by Parties who are developing countries will depend upon the effective provision of access to and transfer of technology in accordance with Articles 17 and 20 and of financial resources in accordance with Articles 21 and 22 of the present Convention.)

2. [To these ends, the Contracting Parties shall in accordance with the means at their disposal and their capabilities:]

(a) Cooperate in the development of agreed measures, procedures, technologies, practices and standards for the implementation of this Convention, [where appropriate with a view to the adoption of protocols and annexes];

(b) Foster favourable economic and legal conditions for the sustainable use and development of biological diversity and its components;

(c) Ensure measures are taken to conserve natural habitats and viable populations of species in natural surroundings;

(Paragraphs 2 (a)-(c) are not necessary here since their substance is adequately covered in the Preamble and in Article 5 - Implementation Measures.)

/...

(d) Provide, establish and implement procedures for assessing the impact on biological diversity of proposed policies, programmes and projects where such an impact may be significant;

(Paragraph 2 (d) is not necessary here since it is more appropriately covered in Article 14 - Impact Assessment. The essence of the paragraph can be found in paragraph 1 (a) of that Article.)

(e) Provide individually, or in cooperation with other States and international organizations, [new and additional] financial resources and other forms of cooperation for programmes which support implementation of the provisions of this Convention, taking into consideration the special situations and needs of developing countries [...] [and loss of opportunities for alternative uses of biological resources foregone because of measures taken pursuant to this Convention].

(Paragraph 2 (e) is not necessary in this context since its substance is covered in Article 21 - Financial Resources and may also be covered in Article ... Cooperation.)

(f) Promote and support scientific research individually and jointly with other Contracting Parties and international organizations;

(g) Promote public awareness of the need to conserve biological diversity and the wise use and development of its components through education and the dissemination of general information;

(h) Facilitate the exchange of information among themselves and with international organizations;

[(i) Taking into consideration the special needs of developing countries, cooperate with the aim of ensuring the capacity of developing countries to implement the provisions of the present Convention through national institutions and legislation.]]

(Paragraphs 2 (f)-(i) are not necessary here because their substance is covered in the following Articles: Article ... Cooperation; Article 12 - Research and Training; Article 13 - Public Education and Awareness; and Article 18 - Exchange of Information. As for paragraph 2 (i), the ideas covered in this sub-paragraph are covered in the Preamble, paragraph 12, the proposed compromise paragraph 7 of combined Articles 3 and 4 and paragraph 1 (d) of proposed Article 5.)

The text below contained in double square brackets is an alternative in lieu of the whole of Article 4.

[[Each Contracting Party shall, [in accordance with the means at its disposal and its national plans, programmes and priorities] [as far as possible and as appropriate,] [as far as practicable and as appropriate and consistent with Articles 5 to ... endeavour to] implement the measures set down in this Convention [with a view to ensuring] [to promote]:

(a) The conservation of [the maximum possible] biological diversity and the sustainable use of its components [in areas within the limits of national jurisdiction];

/...

(b) That activities under its jurisdiction or control do not cause damage to the biological diversity in areas within the limits of the national jurisdiction of other States or beyond the limits of national jurisdiction; and

(c) Through international including regional cooperation, the conservation and sustainable use of biological diversity in areas beyond the limits of national jurisdiction.]

[States shall implement this Convention and its protocols consistent with the rights and obligations reflected in the 1982 United Nations Convention on the Law of the Sea.]

[Article Cooperation

The Contracting Parties shall cooperate directly or through international organizations, where appropriate, in coordinating their activities in supporting and assisting each other in fulfilling their obligations under this Convention, particularly taking into consideration the needs of developing countries.]]

(This Article does not seem to add anything new and its substance is adequately covered in the Preamble. Thus it can be deleted.)

Article 5. Implementation Measures ¹¹

1. Each Contracting Party shall, in accordance with the particular conditions and capabilities in each country:

(a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned; and

(b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

[2. Each Contracting Party may take or maintain stricter conservation measures than those provided for in the present Convention.] ¹²

(1. Each Contracting Party shall, in accordance with the particular conditions and capabilities in each country:

(a) Adopt legislative and other appropriate measures to ensure the conservation of the maximum possible biological diversity, in particular threatened, species, populations and varieties, (from Article 7 (k)) within

¹¹ One delegation proposed the new title of Article 5 to read "General Conservation Measures". It was agreed that further consideration should be given to the title of this Article.

¹² Agreement on the content and location of this paragraph was delayed pending discussion of Article 23.

the area under its jurisdiction or control and the sustainable use of the components of that diversity (from Article 4 (1));

(b) Adopt measures for the recovery and rehabilitation of endangered species and for their reintroduction into their natural habitats under appropriate conditions (from Article 8 (c));

(c) Adopt legislative and other appropriate measures to ensure that activities within its jurisdiction or control do not cause damage to the biological diversity of other States or areas beyond the limits of national jurisdiction (from Article 4 (1));

(d) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned (from Article 5 (1,a)); and

(e) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies (from Article 5 (1,b)).

2. Each Contracting Party may adopt stricter regulations than those provided for in the present Convention.)

Article 6. Identification and Monitoring

Each Contracting Party shall, as far as possible and as appropriate in particular for the purposes of Articles 7 to 10:

(a) Identify components of biological diversity with respect to which it exercises sovereignty, sovereign rights or jurisdiction important for its conservation and sustainable use, [having regard to those identified in Annex ...] [and other international agreements to which it is a party];

((a) Identify components of biological diversity with respect to which it exercises sovereignty, sovereign rights or jurisdiction important for its conservation and sustainable use, having regard to those identified by a decision of the Conference of the Parties and in other international agreements to which it is a party;)

(b) Monitor through sampling and other techniques, the components of biological diversity identified pursuant to paragraph (a), and paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use;

(c) Identify processes and activities with respect to which it exercises sovereignty, sovereign rights or jurisdiction which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity [having regard to those processes and activities set down in Annex ...] and monitor through sampling and other techniques their effects;

((c) Identify processes and activities with respect to which it exercises sovereignty, sovereign rights or jurisdiction which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity having regard to those processes and activities identified by a decision of the Conference of the Parties and monitor through sampling and other techniques their effects;)

/...

(d) Maintain and organize by any mechanism data derived from identification and monitoring activities pursuant to paragraphs (a), (b) and (c) of this Article;

((d) Maintain and organize data derived from identification and monitoring activities pursuant to paragraphs (a), (b) and (c) of this Article;)

(e) [Cooperate] [Cooperate through mutual agreements] with other Contracting Parties, directly or [as appropriate] [where necessary] through relevant organizations, [if appropriate] in identifying and monitoring components of biological diversity, processes and activities pursuant to paragraphs (a) to (d) of this Article, in respect of transboundary matters and areas beyond national jurisdiction.¹³

((e) Cooperate with other Contracting Parties, directly or where necessary through relevant organizations, in identifying and monitoring components of biological diversity, processes and activities pursuant to paragraphs (a) to (d) of this Article, in respect of transboundary matters and areas beyond national jurisdiction.)

(It is proposed to use "cooperate" and to delete the text in the second set of brackets which is implicit in the meaning of the word "cooperate". It is also proposed to delete the bracketed words "[as appropriate]" which is contained in the chapeau.)

Article 7. *In-situ Conservation*

Each Contracting Party shall, as far as possible and as appropriate:

(a) Establish a system of protected areas [, and associated wildlife corridors for those components of biological diversity identified pursuant to Article 6] or areas where special measures need to be taken to conserve biological diversity;

((a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity. Criteria for identifying the latter areas shall be approved by the Conference of the Parties at its first meeting.)

(To be consistent with the language of sub-paragraph (b) below, it is proposed to delete the bracketed text with the understanding that areas where special measures need to be taken necessarily include wildlife corridors.)

(b) Develop where necessary guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;

(c) Regulate or manage biological resources whether within or outside protected areas with a view to ensuring their conservation [and] [,] sustainable use [and sustainable development];

¹³ Subparagraph (e) was not agreed upon. It was produced as a result of consultation with those two delegations who had difficulty with it and takes into account their concerns.

((c) Regulate or manage biological resources whether within or outside protected areas with a view to ensuring their conservation and sustainable use;)

(To be consistent with the language of the rest of the convention, it is proposed to use the term "sustainable use".)

[(d) Provide financial and other assistance for new and existing programmes supporting the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings, with particular attention to technology and the needs of developing countries;]¹⁴

(Subparagraph (d) can be moved to the articles dealing with financial resources and financial mechanism to be addressed there.)

(e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, *inter alia*, through the development and implementation of plans or other management strategies;

[(g) Regulate the development, use and release of genetically modified organisms which may have [adverse effects on health] [adverse effects on the conservation and sustainable use of biological diversity];]¹⁵

((g) Regulate the use and release of genetically modified organisms which may have adverse effects on the in-situ conservation and sustainable use of biological diversity;)

(In order to make paragraph (g) strictly relevant to Article 7 on in-situ conservation it is proposed to delete the terms "development" and "[adverse effects of health]" and the insertion of "in-situ" before "conservation" in the last line.)

(h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species;

(i) Endeavour to provide in so far as possible [on the basis of national legislation and in accordance with national programmes, plans and priorities] economic incentives, legislation, and the condition needed for compatibility between present uses [in all relevant sectors including agriculture, forestry and fisheries] and the conservation of biological diversity and the sustainable use of its components [taking into account the circumstances of

¹⁴ As recommended by WG.II, WG.I, during the sixth negotiating session/fourth session of INC, decided to postpone the discussion of this subparagraph until WG.II completes its work on Articles 21 and 22.

¹⁵ Provisionally accepted pending discussion of Article 20.

countries with economies in transition] [taking into account the needs of developing countries];¹⁶

((i) Endeavour to provide economic incentives, legislation, and the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;)

(It is proposed to delete "in so far as possible" as well as the first bracketed text because the chapeau covers these concerns. If the action to be taken is not in accordance with national programmes etc., then it is not possible or appropriate. It is proposed to delete the text in the final two brackets as unnecessary. Each Contracting Party is to endeavour to provide as far as possible and appropriate economic incentives, legislation and conditions. If the action is not possible because the Contracting Party is a developing country or one with an economy in transition its situation would be covered by the chapeau and the condition that the Contracting Party is endeavouring to provide the incentives etc. It is thus not necessary to specify particular types of Contracting Parties.)

(j) Subject to its national legislation¹⁷ respect, record, protect and promote the wider application of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity with the involvement of the holders of such knowledge, innovations and practices and to share equitably the benefits arising from the utilization of such knowledge, innovations and practices;

[(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species, populations and varieties [as identified in Article 6];]

(This paragraph is not necessary because its substance is covered by proposed subparagraph 1 (a) of Article 5.)

[(l) Regulate or manage processes and activities which have or are likely to have a significant adverse effect on biological diversity].

(Because this subparagraph overlaps with the proposed Article 5 paragraph 1 (d) and to some extent (a), its deletion is recommended.)

Article 8. *Ex-situ Conservation*

Each Contracting Party shall, as far as possible and as appropriate [, and for the purpose of complementing *in-situ* measures]:

¹⁶ Discussion of this paragraph was postponed pending the outcome of the discussion of Article 11.

¹⁷ The reference to national legislation at the beginning of the text was made to accommodate the specificity of the legal system of one State.

(Each Contracting Party shall, as far as possible and as appropriate, and for the purpose of complementing in-situ measures where providing adequate in-situ facilities is impracticable or not feasible;)

(In order to be consistent with the Preamble it is proposed to retain the bracketed text. The underlined addition was moved from the second part of subparagraph (a) for greater clarity.)

(a) Adopt measures for the ex-situ conservation of components of biological diversity [identified pursuant to Article 6] [preferably in the [country of origin] [country possessing such components of biological diversity in-situ]]

((a) Adopt measures for the ex-situ conservation of and establish and maintain facilities on (from subparagraph (b)) components of biological diversity identified pursuant to Article 6 preferably in the country possessing such components or, when proven, in the country of origin.)

[[to complement in-situ measures] [where providing adequate in-situ facilities to conserve the species [components of biological diversity] is impracticable or not feasible]];

(It is proposed to delete the above bracketed text because its substance is covered in the proposed chapeau.)

(b) Establish and maintain facilities for ex-situ conservation of and research on plants, animals and micro-organisms [preferably in the country of origin];

(It is proposed to delete this subparagraph because it is sufficiently covered in proposed subparagraph (a).)

(c) Adopt measures for the recovery and rehabilitation of endangered species and for their reintroduction into their natural habitats under appropriate conditions;

(This paragraph can be moved to Article 5 - Implementation Measures as paragraph 1 (c).)

(d) Regulate [manage or control] collection of biological resources from natural habitats for ex-situ conservation purposes so as not to threaten ecosystems and in-situ populations of species [ensuring that they are not exploited for commercial purposes];

((d) Regulate the collection of biological resources from natural habitats for ex-situ conservation purposes so as not to threaten ecosystems and in-situ populations of species and to ensure that they are not exploited for commercial purposes without mutual agreements.)

/...

[(e) Financial and other assistance to facilitate the establishment and maintenance of ex-situ conservation facilities in developing countries.] ¹⁸

(This paragraph can be considered with the articles on financial resources and the financial mechanism.)

[Article 9

For Contracting Parties which are developing countries the obligations under Articles 5, 7 and 8 of this Convention would be subject to the provision to them of technical resources, as appropriate, and of adequate, new and additional financial resources covering on a grant basis the entire cost to them for fulfilling their obligations under those articles.]

(The basic principle of this article as reflected in paragraph 10 of Appendix II of the fifth revised draft Convention be included with slight modification in the combination of Articles 3 and 4. It appears in the proposed text as Article 3, paragraph 6.)

Article 10. Sustainable Use of Components of Biological Diversity

Each Contracting Party shall, as far as possible and as appropriate:

- (a) Integrate consideration of the conservation and sustainable use of biological resources into national decision making;
- (b) Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity;
- (c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with sustainable use requirements;
- (d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced;
- (e) Encourage cooperation between governmental authorities and private sector in developing methods for sustainable use of biological resources.

[Article 11. Incentive Measures

1. Each Contracting Party shall, as far as possible and as appropriate, [consider] [take] effective economic and social incentive measures [as indicated in Annex] to encourage the conservation and sustainable use of biological diversity.

(1. Each Contracting Party shall, as far as possible and as appropriate, adopt economic and social policies which act as incentives to encourage the conservation and sustainable use of biological diversity.)

[2. In determining such measures, each Contracting Party shall take into account, *inter alia*:

¹⁸ As recommended by WG.II, WG.I, during the sixth negotiating session/fourth session of INC, decided to postpone the discussion of this sub-paragraph until WG.II completes its work on Articles 21 and 22.

(a) Economic and social policies which act as incentives to conserve biodiversity;

(b) The effect of:

- (i) Institutional arrangements;
- (ii) Systems of rights to use biological resources;
- (iii) International trade policies; and
- (iv) Pricing policies;

on the conservation and sustainable use of biological diversity.)

(The above text to be deleted.)

[3. The Conference of the Parties shall establish at its first meeting a group of experts to develop guidelines for determining the value [ecological, economic, aesthetic and cultural] of biological diversity. [National plans prepared in accordance with Article 5 may, where appropriate, contain case studies of the value of biological diversity.]]

(The following formulation of the above paragraph to be considered in the context of Article 16 - [Regulated] Access to Genetic Resources:

National plans prepared in accordance with Article 5 may, where appropriate, contain case studies of the value of biological diversity. The Conference of the Parties shall establish at its first meeting a group of experts to develop guidelines for determining the value of biological diversity.)

Article 12. Research and Training

The Contracting Parties taking into account the special needs of developing countries shall:

(a) Establish and maintain programmes for scientific and technical education and training in measures for the identification, conservation and sustainable use of biological diversity and its components and provide support for such education and training for the specific needs of developing countries;

(b) Promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, [inter alia, in accordance with decisions of the Conference of the Parties taken in consequence of recommendations of the Scientific Committee] [inter alia:

- (i) Increased knowledge of the components of biological diversity and their role in the functioning of ecosystems;
- (ii) Increased knowledge of the impact of natural and human factors affecting the conservation of biological diversity, including social studies;
- (iii) Application of this knowledge for sustainable use of biological diversity;

/...

- (iv) Development of technologies and other measures for the conservation and sustainable use of biological diversity [including of biotechnology in line with the objectives of this Convention]; and
- (v) Estimation of economic and social values of biological resources;]¹⁹

(The following reformulation of paragraph (b) is proposed; subparagraph (v) may be deleted because it is adequately covered by the provisions of Article 11, paragraph 3:

(b) Promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries Parties to this Convention, inter alia, in accordance with decisions of the Conference of the Parties to address issues including the:

- (i) Role of the components of biological diversity in the functioning of ecosystems;
- (ii) Impact of natural and human factors on the conservation of biological diversity;
- (iii) Application of existing knowledge for sustainable use of biological diversity;
- (iv) Development of technologies and other measures for the conservation and sustainable use of biological diversity including of biotechnology;)

(c) In keeping with the provisions of Articles 17, 19 and 21, promote and cooperate in the use of scientific advances in biological diversity research in developing methods for conservation and sustainable use of biological resources.²⁰

Article 13. Public Education and Awareness

The Contracting Parties shall:

(a) Promote and encourage understanding of the importance of and the measures required for the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes;

(b) Cooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.

¹⁹ Some delegations considered that, if there were to be a list, it should be located in an annex.

²⁰ The content of subparagraph (c) may be covered by one of the bracketed provisions of subparagraph (b).

Article 14. [Impact Assessment] [Minimizing Adverse Impacts]

(The second alternative title adequately reflects the article's content.)

Each Contracting Party, as far as possible and as appropriate shall:

(a) Introduce appropriate procedures requiring assessment of the environmental effects of proposed projects that are likely to have significant adverse effects on biological diversity [whether within or beyond the limits of national jurisdiction] with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.

(It is proposed to remove the square brackets in this subparagraph.)

(b) Introduce appropriate arrangements to ensure that the environmental consequences [whether within or beyond the limits of national jurisdiction] of programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.

(It is proposed to remove the square brackets in this subparagraph.)

(c) Promote, on the basis of reciprocity, notification, exchange of information and consultation about activities under their jurisdiction or control which are likely significantly to adversely affect the biological diversity of other States ²¹ or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements as appropriate. ²²

[(d) Those responsible for activities which threaten or could [damage] [cause significant loss of] biological diversity are responsible for the costs of avoiding that threat or damage and for remedial action directly or through financing where damage occurs.] ²³

((d) When responsible for activities which threaten or cause significant loss of biological diversity in another Contracting Party, assist that Contracting Party in kind or through financing in avoiding that threat or taking necessary remedial actions. The Conference of the Parties shall decide at its first meeting on criteria that define the nature of the threat and the magnitude of what constitutes a significant loss.)

[(e) In the case of imminent or grave danger or damage originating under its jurisdiction [or control] to biological diversity within the area under jurisdiction [or control] of other States or in areas beyond the limits of national jurisdiction [or control], notify immediately the potentially

²¹ Upon the next reading all paragraphs using words "Contracting Parties" or "States" need to be reconsidered to achieve consistency.

²² During the sixth negotiating session/fourth session of INC, the text "[as well as for the establishment of contingency plans to address situations affecting biological diversity]" was deleted from this subparagraph. While the importance of the issue of "contingency plans" was not contested, WG.I decided that, at the next reading, consideration should be given as to the precise location of the concept reflected in the deleted text.

²³ During the sixth negotiating session/fourth session of INC, this text was moved from Article 3, paragraph 11.

affected States of such danger or damage, and establish the necessary procedures for that purpose, as well as initiate [at source] action to prevent or minimize such danger or damage.)

((e) Notify immediately, according to procedures to be established by the Conference of the Parties at its first meeting, in the case of imminent or grave danger or damage resulting from activities originating in areas under their jurisdiction or control to biological diversity, within the area under jurisdiction or control of other States or in areas beyond the limits of national jurisdiction or control, the potentially affected State and the Secretariat of this Convention of such danger or damage and initiate appropriate actions to prevent or minimize such danger or damage.))

[Be responsible for the cost of avoiding or minimizing threats or damage to biological diversity beyond the limits of the areas under its national jurisdiction resulting from activities within its jurisdiction or control and, where such damage occurs for the costs of remedial action and, where it is not possible to return the biological diversity to the status quo ante, for compensation.]

(This subparagraph can be deleted because it is reflected in paragraph (d) of proposed Article 3 and overlaps with subparagraph (d) of this article.)

[Establish procedures for international cooperation for the control, mitigation of damage or restoration of biological diversity, when the affected Party or the Party of the origin of damage is not able to address it individually.]]²⁴

((Cooperate with other Contracting Parties to establish procedures for international cooperation for the control and mitigation of damage or restoration of biological diversity when the affected Party or the Party of origin of the damage is not able to address it individually according to the criteria to be established by the Conference of the Parties at its first meeting.))

[(f) Support and cooperate in the development and implementation of international arrangements for emergency responses to activities or events whether caused naturally or otherwise which [presents a grave and imminent danger to] [threaten] biological diversity;]²⁵

[(f) Support and cooperate in the development and implementation of national and international arrangements for emergency responses to activities or events whether caused naturally or otherwise which present a grave and imminent danger to biological diversity;]

[(g) The Conference of the Parties shall [adopt a protocol setting down rules of procedures] [consider the need to adopt measures] relating to liability and compensation for damage to biological diversity.]²⁶

²⁴ During the sixth negotiating session/fourth session of INC, this text was moved from Article 4, paragraph 2 (f).

²⁵ During the sixth negotiating session/fourth session of INC, this text was moved from Article 4, paragraph 2 (i).

²⁶ The location of this paragraph was not finalized by WG.I.

(The substance of this paragraph may be moved to a separate article entitled "Consultations on Liability". It is proposed to use the formula from Article 12 of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal modified as follows for this convention:

(g) The Contracting Parties shall cooperate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage to biological diversity.)

[Article 15. Global Lists ²⁷

Alternative 1

1. [A Global List of Biogeographic Areas of Particular Importance for the Conservation of Biological Diversity and a Global List of Species Threatened with Extinction on a Global Level shall be established pursuant to the procedures set down in Article 25.] [A List of [Components of] Biological Diversity of [Outstanding Global Importance] shall be established, pursuant to the procedures set out in Article 25.]
- [2. Inclusion of an area on the List of Biogeographic Areas of Particular Importance requires the consent of the State or States concerned.
3. Contracting Parties, in fulfilling their obligations under this Convention shall [, so far as possible, and as appropriate for each Contracting Party,] give priority to areas and species on the Global Lists.
4. Inclusion of areas or species on the Lists shall not prejudice the rights of States over areas in respect of which more than one State claims sovereignty or jurisdiction.]]

Alternative to paragraph 1 ²⁷

[A List of Areas of Outstanding Global Importance shall be established pursuant to procedures to be determined by the Conference of the Parties at its first meeting.]

(A Global List of Biogeographic Areas of Particular Importance for the Conservation of Biological Diversity and a Global List of Species Threatened with Extinction on a Global Level shall be established pursuant to a decision of the Conference of the Parties and according to procedures to be determined by it on the basis of scientific advice of one of its subsidiary bodies.)

Article 16. [Regulated] Access to Genetic Resources

(Language parallel to that in Article 17 may be used in this title. Therefore the title "Access to Genetic Resources" is preferable.)

²⁷ An alternative proposal was made to delete the whole of Article 15 with subsequent deletion of Article 25.

1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

2. Each Contracting Party shall 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.

3. Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.

4. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.

5. Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources [originating in other Contracting Parties and/or] provided by other Contracting Parties with the full participation of, and where possible in such Contracting Parties.

(5. Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by or, when proven, originating in other Contracting Parties with the full participation of, and where possible, in such Contracting Parties.

6. Each Contracting Party shall take the appropriate measures, in accordance with Articles 17 to 22 and where necessary through the financial mechanisms established by Articles 21 and 22, to [promote and advance] [ensure] fair and equitable sharing of the results of research [products developed] and the benefits arising from the [commercial and other] utilization of genetic resources with the Contracting Parties [of origin and/or the Contracting Parties] providing such resources.

(6. Each Contracting Party shall take the appropriate measures, in accordance with Articles 17 to 20 and where necessary through the financial mechanism established by Articles 21 and 22, to ensure the provision and/or facilitation of fair and equitable sharing of the results of research and development and the benefits arising from the utilization of genetic resources with the Contracting Parties providing or, when proven, of origin of such resources.

(It is proposed to use the wording "to ensure the provision and/or facilitation of" to be consistent with the language of paragraph 1 of Article 17 - Access to and Transfer of Technology". Also note that "research and development" includes products developed.)

Article 17. Access to and Transfer of Technology

1. Each Contracting Party, recognizing that technology includes biotechnology, and that both access to and transfer of technology among Contracting Parties are essential elements for the attainment of the objectives of this Convention, undertakes subject to the provisions of this Article to provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment.

/...

2. Access to and transfer of technology referred to in paragraph 1 to developing countries shall be provided and/or facilitated under [fair and reasonable] [fair and most favourable] [preferential and concessional] conditions and, where necessary, in accordance with the financial mechanism established by Articles 21 and 22.

(2. Access to and transfer of technology referred to in paragraph 1 to developing countries shall be provided and/or facilitated under most favourable conditions including concessional and preferential terms and, where necessary, in accordance with the financial mechanism established by Articles 21 and 22.)

3. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that Contracting Parties [in particular those] that are developing countries which [are of origin and/or] provide genetic resources are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms [notwithstanding patents and other intellectual property rights].²

(3. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that Contracting Parties, in particular those that are developing countries, which provide or, when proven, are the origin of genetic resources are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms.)

(It is proposed to retain the language "in particular those" which emphasizes the special situation of developing countries and at the same time recognizes that all Contracting Parties, both developed and developing, have genetic resources which may be transferred. It is proposed to delete the final bracketed text the concerns of which are adequately covered in paragraph 5 of this article.)

4. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that the private sector facilitates access to, joint development and transfer of technology referred to in paragraph 1 for the benefit of both governmental institutions and the private sector of developing countries and in this regard shall abide by the obligations included in paragraphs 1, 2 and 3 of this Article.

5. The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of the present Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to the objectives of this Convention.

² (The underlined text except for the word "most" is quoted from "The Cartagena Commitment" of the Eighth Session of UNCTAD dated 27 February 1992).

³ Some delegations stated that this paragraph may be subject to a review mechanism which may be introduced in this Article or at another appropriate place in this Convention.

Article 18. Exchange of Information

1. The Contracting Parties shall facilitate the exchange of information relevant to the conservation and sustainable use of biological diversity, taking into account the special needs of developing countries.
2. Such exchange of information shall include exchange of [publicly available] results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 17, paragraph 1. It shall also, where feasible, include repatriation of information.

(The Chairman and Executive Director will come back to this after clarifying the legal connotation of the bracketed words.)

Article 19. Technical and Scientific Cooperation

1. The Contracting Parties shall promote international technical and scientific cooperation in the field of conservation and sustainable use of biological diversity, where necessary through the appropriate international and national institutions.
2. Each Contracting Party shall promote technical and scientific cooperation with other Contracting Parties, in particular developing countries, in implementing this Convention, *inter alia*, through the development and implementation of national policies. In promoting such cooperation, special attention should be given to the development and strengthening of national capabilities, by means of human resources development and institution building.
3. The Conference of the Parties, at its first meeting, shall determine how to establish a clearing-house mechanism to promote and facilitate technical and scientific cooperation.
4. The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts.
5. The Contracting Parties shall, subject to mutual agreement, promote the establishment of joint research programmes and joint ventures for the development of technologies relevant to the objectives of this Convention.

**Article 20. Handling of Biotechnology and
Distribution of its Benefits**

1. Each Contracting Party shall take appropriate measures to [promote and advance] [ensure] the participation in biotechnological research activities by those Contracting Parties, especially developing countries, [of origin and/or those Contracting Parties] which provide the genetic resources for such research.

(1. Each Contracting Party shall take appropriate measures to ensure and/or facilitate the participation in biotechnological research activities by those Contracting Parties, especially developing countries, which provide or, when proven, are the origin of the genetic resources for such research.)

/...

(In order to be consistent with Article 17 and proposed Article 16, paragraph 6 the language "to ensure and/or facilitate is proposed.")

2. Each Contracting Party shall [ensure priority access] [promote and advance fair and equitable access] [take appropriate measures to promote and advance priority access] by Contracting Parties, especially developing countries, to the results and benefits arising from biotechnologies based upon genetic resources [originating in and/or] provided by those Contracting Parties. Such access shall be on mutually agreed terms.

(It is proposed to use similar language to that used in Article 17 (3) which would read as follows:

2. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that Contracting Parties, in particular those that are developing countries, which provided or, when proven, are the origin of genetic resources are provided access to the results and benefits arising from biotechnologies based upon these resources. Such access shall be on mutually agreed terms.)

3. Each Contracting Party shall require any natural or legal person under its jurisdiction who intends to introduce in another Contracting Party genetically modified organisms [biotechnology products] which may have an adverse impact on the [conservation and sustainable use of biological resources in] [environment of] that Contracting Party to obtain the [advance agreement] [prior informed consent] of that Contracting Party. Such [agreement] [consent] shall be in accordance with procedures to be established by the Conference of the Parties.

(3. Each Contracting Party shall require any natural or legal person under its jurisdiction who intends to introduce in another Contracting Party modified organisms resulting from biotechnology which may have an adverse impact on the conservation and sustainable use of biological resources in that Contracting Party to obtain the advance informed agreement of that Contracting Party. Such agreement shall be in accordance with simple, easy to implement procedures to be established by the Conference of the Parties at its first meeting.)

4. Each Contracting Party providing genetically modified organisms [biotechnology products] shall require any natural or legal person under its jurisdiction to provide any available information about the use and safety regulations required by that Contracting Party in handling genetically modified organisms [biotechnology products], as well as any available information on the potential adverse impact of the specific genetically modified organisms [biotechnology products] concerned to the Contracting Party into which those organisms [products] are to be introduced. ²⁰

(4. Each Contracting Party providing modified organisms resulting from biotechnology shall require any natural or legal person under its jurisdiction to provide any available information about the use and safety regulations required by that Contracting Party in handling those organisms, as well as any

²⁰ Some delegations expressed the view that the substance of paragraphs 3 and 4 were not needed.

available information on the potential adverse impact of the specific modified organisms resulting from biotechnology concerned to the Contracting Party into which those organisms are to be introduced.)

Article 21. Financial Resources ³¹

1. Each Contracting Party undertakes to provide, in accordance with its capabilities, financial support and incentives in respect of those activities which are intended to [achieve the objectives of this Convention] [contribute to the conservation and sustainable use of biological diversity] in accordance with its national plans, priorities and programmes. ³²

(1. Each Contracting Party undertakes to provide, in accordance with its capabilities, national plans, priorities and programmes, financial support and incentives in respect of those activities which are intended to achieve the objective of this Convention.

(If the INC agrees with the proposed formulation for Article 1 then the proposed text for paragraph 1 of this article is recommended. The proposed formulation gives a balanced commitment by both developed and developing Contracting Parties to the convention because it talks of "financial support and incentives which are intended to achieve the objective of this Convention." The objective of the convention as proposed in the proposed Article 1 balances responsibilities and obligations by both developed and developing countries.)

Alternative 1 for paragraph 2 to replace alternative 2

2. The Contracting Parties which are developed countries commit themselves to provide adequate new and additional financial resources to enable developing countries to achieve the objectives of this Convention. ³³ [Developed countries referred to above do not include countries with economies in transition.] ³⁴

Alternative 2 for paragraph 2 to replace alternative 1

2. The Contracting Parties, and in particular developed countries, undertake to provide [new and additional] financial [and other] resources to meet the agreed incremental costs to developing countries of [achieving the objectives] [fulfilling the obligations under Articles ...] of this Convention. ³⁵

³¹ Some delegations noted at the fifth negotiating session/third session of INC that the final outcome of this article would be closely related to the final text of Article 1 and Article 22.

³² Basic text proposed by an informal Sub-Working Group of WG.II at the fifth negotiating session/third session of INC.

³³ Basic text proposed by an informal Sub-Working Group of WG.II at the fifth negotiating session/third session of INC.

³⁴ Bracketed text proposed by Bulgaria, Czechoslovakia, Poland, Romania and the USSR at the fifth negotiating session/third session of INC.

³⁵ Proposal by the United Kingdom with modifications by the United States at the fifth negotiating session/third session of INC.

/...

(The Chairman and Executive Director will come back with a proposal regarding this paragraph after UNCED PrepCom IV.)

3. The extent to which developing countries are able to [meet the objectives] [fulfil the obligations under Articles ...] of this Convention will be subject to the availability of [such] resources [to meet agreed incremental costs.] ³⁶

(3. The extent to which developing countries are able to fulfil their obligations under this Convention will be subject to the availability of the resources referred to in paragraph 2 above.)

Article 22. Financial Mechanisms

Alternative 1 ³⁷

[1. There is hereby established a fund, hereinafter called the Biological Diversity Fund, for the achievement of the objectives of the Convention by developing countries. Contributions to the fund shall be mandatory for Contracting Parties which are developed countries according to the formula in Annex ... to this Convention. Voluntary contributions may also be made by the developed countries and by other countries and sources.]

[2. The Fund shall be administered [through an agency to be decided by the Conference of the Parties] [in the following manner].]

[3. Pursuant to the objectives of this Convention, the Conference of the Parties at its first meeting shall establish detailed criteria and guidelines for access to and utilization of the Fund, including monitoring and evaluation of such utilization.]

4. The Conference of the Parties shall review the effectiveness of the funding mechanism established under this Article, including the criteria and guidelines referred to in paragraph 3, not less than two years after the entry into force of this Convention and thereafter on a regular basis.

[5. The Contracting Parties shall consider strengthening existing financial institutions to provide financial resources for the conservation and sustainable use of biological diversity.]

Alternative 2 to paragraphs 1, 2, 3 and 5 above ³⁸

[1. The Contracting Parties, pursuant to the objectives of this Convention and taking into consideration the special needs of developing countries, shall establish a [fund] [financial mechanism] to provide the resources which Contracting Parties that are developing countries require to meet the agreed incremental costs for complying with the provisions of this Convention, access

³⁶ Basic text by an informal Sub-Working Group of WG.II with modifications by the United Kingdom and the United States at the fifth negotiating session/third session of INC.

³⁷ Text by an informal Sub-Working Group of WG.II at the fifth negotiating session/third session of INC.

³⁸ Proposal by the United Kingdom with modification by Mexico at the fifth negotiating session/third session of INC.

/...

to and transfer of technology referred to in Article 17 and the benefits of the provisions of paragraph 6 of Article 16. Contributions shall be assessed according to the formula in Annex ... to this Convention. Additional contributions may also be made by developed countries and by other countries and sources.]

[2. The [fund] [financial mechanism] shall be administered [through the evolving Global Environment Facility] [through a Multilateral Fund for Biological Diversity] [through an agency to be decided by the Conference of the Parties] [in the following manner ...].]

[3. Pursuant to the objectives of this Convention, the Conference of the Parties at its first meeting shall [confirm] [establish] criteria and guidelines [set out in Annex ... to this Convention] for access to and utilization of the [fund] [financial mechanism], including monitoring and evaluation of such utilization.]

[5. The Contracting Parties shall consider strengthening existing financial institutions to support the [fund] [financial mechanism] established under this Convention.]

(Article 22. Financial Mechanism)

1. The Contracting Parties, pursuant to the objectives of this Convention and taking into consideration the special needs of developing countries, hereby establish a financial mechanism, including a fund/special account, to provide the financial resources which Contracting Parties that are developing countries require to meet all agreed incremental costs for fulfilling their obligations under this Convention, access to and transfer of technology referred to in Article 17 and the benefits of the provisions of paragraph 6 of Article 16. Contributions shall be paid according to a formula to be adopted by the Conference of the Parties at its first meeting. Additional contributions may also be made by developed countries and by other countries and sources.

2. The fund shall be administered through an agency to be decided by the Conference of the Parties at its first meeting and may be reviewed thereafter by subsequent meetings of the Conference of the Parties.

3. Pursuant to the objectives of this Convention, the Conference of the Parties at its first meeting shall establish detailed criteria and guidelines for access to and utilization of the Fund, including monitoring and evaluation of such utilization.

4. The Conference of the Parties shall review the effectiveness of the financial mechanism established under this Article, including the criteria and guidelines referred to in paragraph 3, not later than two years after the entry into force of this Convention and thereafter on a regular basis.

5. The Contracting Parties shall consider strengthening existing financial institutions to provide financial resources for the conservation and sustainable use of biological diversity.)

/...

Article 23. Relationship with Other International Conventions

[1. The provisions of the present Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement relating to the conservation and sustainable use of biological diversity.]³⁹

(It is proposed to delete this paragraph.)

2. Any existing international agreement relating to the conservation and sustainable use of biological diversity may be renegotiated as a protocol to the present Convention.⁴⁰

(It is proposed to delete this paragraph.)

3. The Contracting Parties shall invite the Parties to any international agreement relating to the conservation and sustainable use of biological diversity to agree on arrangements for facilitating joint actions, coordination, and exchange of information.]⁴¹

(This paragraph can be moved to Article 24 - Conference of the Parties as new subparagraph (h) of paragraph (4) with its language modified slightly to be consistent with the subject matter of that article.)

[1. The provisions of the present Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement compatible with the conservation and sustainable use of biological diversity.]

(This paragraph can be kept as the only paragraph in Article 23.)

Article 24. Conference of the Parties

1. A Conference of the Parties is hereby established. The first meeting of the Conference of the Parties shall be convened by the Executive Director of UNEP not later than one year after the entry into force of this Convention. Thereafter, ordinary meetings of the Conference of the Parties shall be held at regular intervals to be determined by the Conference at its first meeting.

2. Extraordinary meetings of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at the written request of any Party, provided that, within [six] [three] months of the request being communicated to them by the Secretariat, it is supported by at least one third of the Parties.

³⁹ The language in paragraph 1 leaves open the question of the relationship of this Convention with future agreements. The Committee may want to make an express provision for this.

⁴⁰ The Lawyers' Meeting felt that this paragraph has the character of a recommendation and would invite the Committee to consider the necessity of retaining it.

⁴¹ If retained, the Lawyers' Meeting felt this paragraph might more appropriately be located in Article 24 as a function of the Conference of the Parties.

(Since extraordinary meetings of the Conference of the Parties are convened on matters requiring urgent attention, a three, rather than six, month communication period is proposed.)

3. The Conference of the Parties shall by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules governing the funding of the Secretariat. At each ordinary meeting, it shall adopt a budget for the financial period until the next ordinary meeting.

4. The Conference of the Parties shall keep under review the implementation of the present Convention, and, for this purpose, shall:

(a) Establish the form and the intervals for transmitting the information to be submitted in accordance with Article 28 and consider such information as well as reports submitted by any subsidiary body;

[(b) Review [and approve] scientific [information] [technological advice] on biological diversity provided by the Scientific Committee in accordance with Article 27;]

(b) Review scientific and technological advice on biological diversity provided by the subsidiary bodies established in accordance with Article 27;

(c) Consider and adopt, as required, in accordance with Articles 32 and 33, amendments to this Convention and its annexes;

(d) Consider amendments to any protocol, as well as to any annexes thereto, and, if so decided, recommend their adoption to the parties to the Protocol concerned;

(e) Consider and adopt, as required, in accordance with Article 33, additional annexes to this Convention;

(f) Consider and adopt, as required, protocols in accordance with Article 31;

(g) Establish such subsidiary bodies as are deemed necessary for the implementation of this Convention;

(Insert the following paragraph from Article 23 paragraph 3 as new paragraph (h) of Article 24. It has been slightly modified as follows:

(h) Shall invite the Parties to any international agreement relating to the conservation and sustainable use of biological diversity to agree on arrangements for facilitating joint actions, coordination, and exchange of information.)

(h) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation.

5. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not Party to this Convention, may be represented as observers at meetings of the Conference of the Parties. Any other body or agency, whether governmental or non-governmental, qualified in fields relating to conservation and sustainable use of biological diversity which has informed the Secretariat of its wish to be represented as an

/...

observer at a meeting of the Conference of the Parties, may be admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.

[Article 25. Procedures for Global Lists ⁴²

The Conference of the Parties shall:

- (a) Receive from the Contracting Parties inventories of biogeographic areas within the limits of their national jurisdiction of particular importance for the conservation of biological diversity and inventories of species found within the limits of their national jurisdiction which are threatened with extinction on a global level;
- (b) Select, taking into account the recommendations of the Scientific Committee, from the inventories forwarded pursuant to subparagraph (a), areas and species to be included in the Global Lists;
- (c) Publish the Global Lists;
- (d) Establish, taking into account the recommendations of the Scientific Committee, guidelines to assist Contracting Parties to select areas and species for inclusion in the inventories to be forwarded to the Conference of the Parties pursuant to subparagraph (a);
- (e) Establish, taking into account the recommendations of the Scientific Committee, criteria for selecting areas and species for inclusion in the Global Lists pursuant to subparagraph (b) [so that they may contain areas and species representative of the greatest feasible proportion of biological diversity, with particular regard to threatened areas and species];
- (f) Establish and publish, taking into account the advice of the Scientific Committee, guidelines to assist the Contracting Parties to manage areas and species on the Global Lists;
- (g) Establish and publish guidelines for the provision of financial and other assistance to Contracting Parties where it considers this desirable or necessary in connection with areas and species on the Global Lists; and
- (h) Ensure that arrangements made in relation to the Global Lists complement and strengthen the conservation activities of Contracting Parties and international organizations developed and implemented under other international agreements.]

(It is proposed to delete all Article 25 since its substance is covered by the proposed amendments to Article 15.)

Article 26. Secretariat

1. A Secretariat is hereby established. Its functions shall be:

⁴² A proposal was made to delete Article 25 subsequent to deletion of Article 15 (Global Lists).

(a) To arrange for and service meetings of the Conference of the Parties provided for in Article 24;

(b) To assist the Conference of the Parties and the Scientific Committee in performing their functions with regard to establishment and functioning of the Global Lists pursuant to the provisions of Article 15 of the present Convention as well as assist in facilitating and promoting transfer of technology and knowledge and technical cooperation pursuant to the provisions of Articles 17 and 19 of the present Convention;]

(It is proposed to split subparagraph (b) as follows:

(b) To assist the Conference of the Parties and its subsidiary bodies in performing their functions;

(c) To assist in facilitating and promoting transfer of technology and knowledge and technical cooperation pursuant to the provisions of Articles 17 and 19 of the present Convention;)

[(c) To maintain the Global Lists referred to in Article 15 of the present Convention;]

((d) To maintain any global list that may be established pursuant to the provisions of Article 15 of the present Convention;)

(d) To perform the functions assigned to it by any Protocol;

(e) To prepare reports on the execution of its functions under this Convention and present them to the Conference of the Parties;

(f) To coordinate with other relevant international bodies, and in particular to enter into such administrative and contractual arrangements as may be required for the effective discharge of its functions;

(g) To perform such other functions as may be determined by the Conference of the Parties.

2. The secretariat functions will be carried out on an interim basis by the Secretariat of the United Nations Environment Programme until the completion of the first ordinary meeting of the Conference of the Parties held pursuant to Article 24. At its first ordinary meeting, the Conference of the Parties shall designate the secretariat from amongst those existing, competent international organizations which have signified their willingness to carry out the secretariat functions under this Convention.

*Article 27. [Scientific] and [Technical] [Technological] [Committee]
[Subsidiary Bodies for Scientific and Technological Cooperation]*

(The second alternative title beginning with "Subsidiary Bodies ..." is preferred.)

Alternative 1

[The Conference of the Parties shall at its first meeting establish such subsidiary bodies for providing scientific and [technical] [technological] advice as required for the implementation of the Convention.]

/...

Alternative 2

[[1. The Conference of the Parties shall at its first meeting establish a Scientific and [Technical] [Technological] Committee with a balanced regional representation.]

[1. A Scientific and [Technical] [Technological] Committee is hereby established. The Conference of the Parties shall, at its first meeting, appoint the members of the Committee with a balanced regional representation.]

[, whose advice will be based on the considerations outlined in Annex ...

ANNEX ...

- Considerations for the Scientific and Technical Committee

Pursuant to Article 27, the Scientific and Technical Committee will provide scientific and technical advice to the Conference of the Parties taking into account the following considerations:

1. Articles 5 - ... of this Convention;
 2. National, regional and global concerns;
 3. National, regional and global plans, lists and priorities;
 4. Other regional and global agreements, mechanisms, technologies and sources of funding;
 5. The relative significance among species, subspecies, ecosystems and areas;
 6. Conservation management effectiveness.]
2. The Committee shall under the direction of the Conference of the Parties provide scientific and [technical] [technological] advice to assist the Conference of the Parties to promote the objectives of the Convention.]

(It is proposed to modify alternative 1 as follows and to keep it as the sole paragraph of Article 27:

The Conference of the Parties shall at its first meeting establish such subsidiary bodies with a balanced regional representation for providing scientific and technological advice as required for the implementation of the Convention. The Conference of the Parties shall define the mandates of these subsidiary bodies.)

Article 28. Reports

Each Contracting Party shall, at intervals to be determined by the Conference of the Parties, [submit] [present] to the Conference of the Parties, reports on:

The actions which it has taken for the implementation of this Convention [[including, in particular, those pursuant to Articles 5 and 17-21 of this Convention] [and its view on the effectiveness of those actions and on the state of components of biological diversity within the limits of its national jurisdiction]].

/...

(Each Contracting Party shall, at intervals to be determined by the Conference of the Parties, submit to the Conference of the Parties, reports on the actions which it has taken for the implementation of this Convention and its view on the effectiveness of those actions and on the state of components of biological diversity within the limits of its national jurisdiction.)

Article 29. Operational Cost

1. Expenses incurred in respect of the technical and scientific cooperation referred to in Article 19 shall be borne by the Biological Diversity Fund. The expenses incurred in operating the Biological Diversity Fund shall also be borne by that Fund.

Article 30. Settlement of Disputes ⁴

1. In the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned shall seek solution by negotiation.

2. If the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.

3. When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory:

(a) Arbitration in accordance with the procedure laid down in [Part 1 of] Annex I;

(b) Submission of the dispute to the International Court of Justice.

4. Alternative 1. If the parties to the dispute have not, in accordance with paragraph 3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Annex I, part 2 unless the parties otherwise agree.

Alternative 2. If the parties to the dispute have not, in accordance with paragraph 3 above, accepted the same or any procedure, a party which has not made a declaration under paragraph 3 above shall be deemed to have accepted arbitration in accordance with the procedure laid down in Annex I. If the parties to a dispute have not accepted the same means of dispute settlement, the dispute shall be submitted to arbitration in accordance with the procedure laid down in [Part 1 of] Annex I.

5. The provisions of this Article shall apply with respect to any protocol except as otherwise provided in the protocol concerned.

⁴ Although most environmental conventions provide a single system of dispute resolution for all articles (e.g., Vienna Convention for Protection of the Ozone Layer), some environmental conventions have limited the applicability of some dispute resolution mechanisms to specified articles (e.g., Protocol on Environmental Protection to the Antarctic Treaty, Articles 19 and 20; U.N. Convention on the Law of the Sea, Articles 286, 297-298).

(Alternative in lieu of paragraphs 3 and 4)

3. If the Parties concerned cannot reach agreement through the mechanisms set down in paragraph 2, they shall submit the dispute to arbitration in accordance with the procedure laid down in Part 1 of Annex I, unless the dispute is submitted to the International Court of Justice (ICJ) in accordance with its Statute.

4. When ratifying, accepting, approving or acceding to this Convention or at any time thereafter, a state or regional economic integration organization may declare in writing to the Depositary that it does not accept paragraph 3 as binding.

5. If a party to the dispute has made a declaration pursuant to paragraph 4, the dispute shall be submitted to conciliation in accordance with Part 2 of Annex I [, unless the Parties otherwise agree].

(Since the settlement of disputes issue has been thoroughly negotiated during the elaboration of the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, it is strongly recommended to use language similar to that used in these conventions. It would read as follows:

1. In the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned shall seek solution by negotiation.

2. If the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.

3. When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory:

(a) Arbitration in accordance with the procedure laid down in Part 1 of Annex I;

(b) Submission of the dispute to the International Court of Justice.

4. If the parties to the dispute have not, in accordance with paragraph 3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Annex I, part 2 unless the parties otherwise agree.

5. The provisions of this Article shall apply with respect to any protocol except as otherwise provided in the protocol concerned.)

Article 31. Adoption of Protocols

1. The Contracting Parties shall cooperate in the formulation and adoption of protocols to this Convention.

/...

2. Protocols shall be adopted at a meeting of the Conference of the Parties.⁴⁴

3. The text of any proposed protocol shall be communicated to the Contracting Parties by the Secretariat at least six months before such a meeting.

Article 32. Amendment of the Convention or Protocols

1. Amendments to this Convention may be proposed by any Contracting Party. Amendments to any protocol may be proposed by any party to that protocol.

2. Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. Amendments to any protocol shall be adopted at a meeting of the Parties to the protocol in question. The text of any proposed amendment to this Convention or to any protocol, except as may otherwise be provided in such protocol, shall be communicated to the Parties to the instrument in question by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate proposed amendments to the signatories to this Convention for information.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention or to any protocol by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a two-third majority vote of the Parties to the instrument in question present and voting at the meeting, and shall be submitted by the Depositary to all Parties for ratification, acceptance or approval.

4. Ratification, acceptance or approval of amendments shall be notified to the Depositary in writing. Amendments adopted in accordance with paragraph 3 above shall enter into force among Parties having accepted them on the one hundred and eightieth day after the deposit of their instruments⁴⁵ of ratification, acceptance or approval by at least two-thirds of the Contracting Parties to this Convention or of the Parties to the protocol concerned, except as may otherwise be provided in such protocol. Thereafter the amendments shall enter into force for any other Party on the [ninetieth] [one hundred eightieth] day⁴⁶ after that Party deposits its instrument of ratification, acceptance or approval of the amendments.

5. For the purposes of this Article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

⁴⁴ One country agreed with the text as adopted by WG.I during the sixth negotiating session/fourth session of INC with a reservation on the procedure for the adoption of protocols.

⁴⁵ To achieve uniformity of the paragraph's formulation, an alternative period of 180 days was introduced into the text as recommended by the Legal Drafting Group established by the INC at its fourth session/sixth negotiating session. It was further recommended that a final decision be taken by the INC at its fifth session/seventh negotiating session. To achieve consistency between the procedures described in the paragraph, the Legal Drafting Group recommended substituting the phrase "deposit of their instruments" for the phrase "receipt by the Depositary of notification".

Article 33. Adoption and Amendment of Annexes

1. The annexes to this Convention or to any protocol shall form an integral part of this Convention or of such protocol, as the case may be, and, unless expressly provided otherwise, a reference to this Convention or its protocols constitutes at the same time a reference to any annexes thereto. Such annexes shall be restricted to procedural, scientific, technical and administrative matters.

2. Except as may be otherwise provided in any protocol with respect to its annexes, the following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Convention or of annexes to any protocol:

(a) Annexes to this Convention or to any protocol shall be proposed and adopted according to the procedure laid down in Article 32;

(b) Any Party that is unable to approve an additional annex to this Convention or an annex to any protocol to which it is Party shall so notify the Depositary, in writing, within one year from the date of the communication of the adoption by the Depositary. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous declaration of objection and the annexes shall thereupon enter into force for that Party subject to paragraph (c) below;

(c) On the expiry of one year " from the date of the communication of the adoption " by the Depositary, the annex shall enter into force for all Parties to this Convention or to any protocol concerned which have not submitted a notification in accordance with the provision of subparagraph (b) above.

3. The proposal, adoption and entry into force of amendments to annexes to this Convention or to any protocol shall be subject to the same procedure as for the proposal, adoption and entry into force of annexes to the Convention or annexes to any protocol.

4. If an additional annex or an amendment to an annex is related to an amendment to this Convention or to any protocol, the additional annex or amendment shall not enter into force until such time as the amendment to this Convention or to the protocol concerned enters into force.

Article 34. Right to Vote

1. Except as provided for in paragraph 2 below, each Contracting Party to this Convention or to any protocol shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Contracting Parties to the Convention or the relevant protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

" The "one year" time period was introduced in this paragraph to achieve consistency with the preceding paragraph (b) as recommended by the Legal Drafting Group established by the INC during its fourth session/sixth negotiating session. The phrase "of the adoption" was introduced by the Legal Drafting Group to achieve consistency with paragraph (b).

Article 35. Relationship Between the Convention and Its Protocols

1. A State or a regional economic integration organization may not become a Party to a protocol unless it is, or becomes at the same time, a Contracting Party to the Convention.
2. Decisions under any protocol shall be taken only by the Parties to the protocol concerned. Any Contracting Party that has not ratified, accepted or approved a protocol may participate as an observer in any meeting of the parties to that protocol.

Article 36. Signature

This Convention shall be open for signature at ... by all States and any regional economic integration organizations from ... until

Article 37. Ratification, Acceptance or Approval

1. This Convention and any protocol shall be subject to ratification, acceptance or approval by States and by regional economic integration organizations. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.
2. Any organization referred to in paragraph 1 above which becomes a Contracting Party to this Convention or any protocol without any of its member States being a Contracting Party shall be bound by all the obligations under the Convention or the protocol, as the case may be. In the case of such organizations, one or more of whose member States is a Contracting Party to the Convention or relevant protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligation under the Convention or protocol, as the case may be. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention or relevant protocol concurrently.
3. In their instruments of ratification, acceptance or approval, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Convention or the relevant protocol. These organizations shall also inform the Depositary of any relevant modification in the extent of their competence.

Article 38. Accession

1. This Convention and any protocol shall be open for accession by States and by regional economic integration organizations from the date on which the Convention or the protocol concerned is closed for signature. The instruments of accession shall be deposited with the Depositary.
2. In their instruments of accession, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Convention or the relevant protocol. These organizations shall also inform the Depositary of any relevant modification in the extent of their competence.
3. The provisions of Article 37 paragraph 2, shall apply to regional economic integration organizations which accede to this Convention or any protocol.

/...

Article 39. Entry Into Force

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the [twentieth] instrument of ratification, acceptance, approval or accession.
2. Any protocol shall enter into force on the ninetieth day after the date of deposit of the number of instruments of ratification, acceptance, approval or accession, specified in that protocol, has been deposited.
3. For each Contracting Party which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the [twentieth] instrument of ratification, acceptance, approval or accession, it shall enter into force on the ninetieth day after the date of deposit by such Contracting Party of its instrument of ratification, acceptance, approval or accession.
4. Any protocol, except as otherwise provided in such protocol, shall enter into force for a Contracting Party that ratifies, accepts or approves that protocol or accedes thereto after its entry into force pursuant to paragraph 2 above, on the ninetieth day after the date on which that Contracting Party deposits its instrument of ratification, acceptance, approval or accession, or on the date on which the Convention enters into force for that Contracting Party, whichever shall be the later.
5. For the purposes of paragraph 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

Article 40. Reservations ⁴⁷

[No reservations may be made to this Convention.]

⁴⁷ Some environmental conventions contain a clause prohibiting reservations (e.g. Vienna Convention for Protection of the Ozone Layer; Protocol on Environmental Protection to the Antarctic Treaty). Some do not (e.g. London Dumping Convention; Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region). Some permit only specified reservations, an approach provided for in the Vienna Convention on the Law of Treaties and customary international law (e.g. Convention on the Conservation of Migratory Species of Wild Animals).

In accordance with the Vienna Convention on Treaties and customary international law, when a multilateral convention does not address the topic of reservations, the usual presumption is that states may formulate reservations that are not incompatible with the object and purpose of the Convention.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal presents another approach. It prohibits reservations but allows to a State or political and/or economic integration organizations "declarations or statements ... with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of (the) Convention", provided that any such declaration or statement is not tantamount to a reservation.

/...

Article 41. Withdrawals

1. At any time after two years from the date on which the present Convention has entered into force for a Contracting Party, that Contracting Party may withdraw from the Convention by giving written notification to the Depositary.
2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.
3. Any Contracting Party which withdraws from this Convention shall be considered as also having withdrawn from any protocol to which it is party.

Article 42. Depositary

The Secretary-General of the United Nations shall assume the functions of Depositary of this Convention and any protocols.

Article 43. Authentic Texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

Done at..... on the day of.....

/...

Annex I

Part 1

ARBITRATION

Article 1

The claimant party shall notify the Secretariat that the parties are referring a dispute to arbitration pursuant to Article 30 of the Convention. The notification shall state the subject-matter of arbitration and include, in particular, the articles of the Convention or the Protocol, the interpretation or application of which are at issue. [If the parties do not agree on the subject matter of the dispute before the President of the tribunal is designated the arbitral tribunal shall determine the subject matter.] The Secretariat shall forward the information thus received to all Contracting Parties to the Convention or to the Protocol concerned.

Article 2

1. In disputes between two parties, the arbitral tribunal shall consist of three members. Each of the parties to the dispute shall appoint an arbitrator and the two arbitrators so appointed shall designate by common agreement the third arbitrator who shall be the President of the tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.
2. In disputes between more than two parties, parties in the same interest shall appoint one arbitrator jointly by agreement.
3. Any vacancy shall be filled in the manner prescribed for the initial appointment.

Article 3

1. If the President of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Secretary-General of the United Nations shall, at the request of a party, designate the President within a further two-month period.
2. If one of the parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other party may inform the Secretary-General who shall make the designation within a further two-month period.

Article 4

The arbitral tribunal shall render its decisions in accordance with the provisions of this Convention, any protocols concerned, and international law.

Article 5

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure.

/...

Article 6

[The arbitral tribunal may, at the request of one of the parties, recommend essential interim measures of protection.]

Article 7

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

- (a) Provide it with all relevant documents, information and facilities; and
- (b) Enable it, when necessary, to call witnesses or experts and receive their evidence.

Article 8

The parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.

Article 9

Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the costs of the tribunal shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its costs, and shall furnish a final statement thereof to the parties.

Article 10

Any Contracting Party that has an interest of a legal nature in the subject-matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal.

Article 11

The tribunal may hear and determine counterclaims arising directly out of the subject-matter of the dispute.

Article 12

Decisions both on procedure and substance of the arbitral tribunal shall be taken by a majority vote of its members.

Article 13

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or a failure of a party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the arbitral tribunal must satisfy itself that the claim is well founded in fact and law.

/...

Article 14

The tribunal shall render its final decision within five months of the date on which it is fully constituted unless it finds it necessary to extend the time-limit for a period which should not exceed five months.

Article 15

The final decision of the arbitral tribunal shall be confined to the subject-matter of the dispute and shall state the reasons on which it is based. It shall contain the names of the members who have participated and the date of the final decision. Any member of the tribunal may attach a separate or dissenting opinion to the final decision.

Article 16

The award shall be binding on the parties to the dispute. It shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.

Article 17

Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the final decision may be submitted by either party for decision to the arbitral tribunal which rendered it.

Part 2

CONCILIATION

Article 1

A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall, unless the parties otherwise agree, be composed of five members, two appointed by each Party concerned and a President chosen jointly by those members.

Article 2

In disputes between more than two parties, parties in the same interest shall appoint their members of the commission jointly by agreement. Where two or more parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.

Article 3

If any appointments by the parties are not made within two months of the date of the request to create a conciliation commission, the Secretary-General of the United Nations shall, if asked to do so by the party that made the request, make those appointments within a further two-month period.

Article 4

If a President of the conciliation commission has not been chosen within two months of the last of the members of the commission being appointed, the Secretary-General of the United Nations shall, if asked to do so by a party, designate a President within a further two-month period.

Article 5

The conciliation commission shall take its decisions by majority vote of its members. It shall, unless the parties to the dispute otherwise agree, determine its own procedure. It shall render a proposal for resolution of the dispute, which the parties shall consider in good faith.

Article 6

A disagreement as to whether the conciliation commission has competence shall be decided by the commission.

/...

Appendix I

RECOMMENDATIONS OF THE WORKING GROUP I SUB-WORKING GROUP
ON DEFINITIONS AND USE OF TERMS

I. Recommended text for inclusion in Article 2

"ALIEN SPECIES" means a species occurring in a particular country or area outside its historically known natural range, as a result of intentional or accidental introduction through human intervention.

"BIOLOGICAL DIVERSITY (OR BIODIVERSITY)" means the genetic, taxonomic and ecological variability among living organisms; this includes the variety and variability within species, between species and of biotic components of ecosystems.

"CONSERVATION OF BIOLOGICAL DIVERSITY" means the preservation (or integral protection), maintenance, sustainable use, recovery and enhancement of the components of biological diversity.¹

"CONSERVATION": see conservation of biological diversity.

"DOMESTICATED OR CULTIVATED SPECIES" means species in which the evolutionary process has been influenced deliberately by humans to meet human needs.

"ECOSYSTEMS" means a dynamic complex of plant, animal and micro-organism communities and their non-living environments interacting as a functional unit.

"ENDANGERED SPECIES" means a species in danger of extinction and whose survival is unlikely if the casual factors continue operating.

"ENDÉMIC SPECIES" means a species whose natural geographic distribution is restricted to a specific area or country.

"EX-SITU CONSERVATION" means the conservation of components of biological diversity (genetic resources, organisms, populations) outside their natural surroundings.

"HABITAT" means the place or type of site where an organism or population naturally occurs.

"IN-SITU CONSERVATION" means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings.²

¹ There was a strong feeling in the sub-working group that "sustainable use" should be excluded from this definition; however, since at this stage in the draft text of the Convention it is not decided whether conservation and sustainable use should go together, the sub-working group recommends that this matter be dealt with later.

² The sub-working group considered a definition of "in-situ conservation" formulated by Working Group II which includes domesticated species. No consensus was reached on whether that definition should be accepted, whether domesticated species should be dealt with in a separate definition, or whether the present formulation should stand.

/...

"PROTECTED AREA" means a geographically defined area which is designated, or regulated, and managed to achieve specific conservation objectives.

"(WILDLIFE) CORRIDORS" means routes or avenues to ensure completion of life cycles and unimpeded migrations and gene flows.³

II. Other Recommendations

The sub-working group recommends:

1. The exclusion from Article 2 of the terms:
 - "INDIGENOUS SPECIES", "NONTERRESTRIAL SPECIES", "RATIONAL USE OF BIOLOGICAL DIVERSITY", "TERRESTRIAL SPECIES", and "WILD SPECIES", as they no longer appear in the text of the draft Convention.
 - "THREATENED SPECIES" and "SPECIES THREATENED WITH EXTINCTION", since they need not be defined, as is the case with IUCN and CITES.
 - "INDIGENOUS POPULATIONS", since it does not fall within the terms of reference of this sub-working group.
2. That if the term "UTILIZATION/USE OF BIOLOGICAL DIVERSITY" is to be defined in Article 2, it should be dealt with from the point of view of sustainable use of biological diversity.
3. That the term "REGIONAL ECONOMIC INTEGRATION ORGANIZATION", defined as "an organization constituted by sovereign States to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve, formally confirm or accede to it", as well as other terms such as "MONITOR" and "SPECIES" (including marine species, as suggested by one delegation) be dealt with should Working Group I so decide.
4. That the term "SIGNIFICANT" as proposed by one delegation should not be defined.

³ There was a feeling that the text of this term should be finalized after finalization of the text of Article 7 of the draft Convention.

/...

Appendix II

ELEMENTS FOR INCLUSION IN THE PREAMBLE/FUNDAMENTAL PRINCIPLES/GENERAL
OBLIGATIONS AS PROPOSED BY THE GROUP OF 77 AND CHINA

1. *Sovereignty and responsibility (Fundamental principle)*

1.1 *Sovereignty and responsibility for damage.*

State sovereignty over own resources. Responsibility for activities in their jurisdiction not to damage biodiversity of other States or beyond national jurisdictions.

1.2 Responsibility of each Party for conservation and sustainable use of own biodiversity resources.

2. *Funding (Fundamental principle)*

2.1 Adequate new and additional funding by developed countries for additional burden to developing countries of biodiversity conservation.

3. *Technology transfer*

3.1 Benefits from research and development to be shared by countries providing genetic material.

3.2 Transfer of biotechnologies to developing countries on preferential and non-commercial basis. (*Fundamental principle*)

4. *Access to technology and to genetic material (Fundamental principle)*

Access to both genetic materials and conservation technologies to be subject to mutual agreement.

5. *International cooperation (Fundamental principle)*

5.1 International cooperation in addition to national efforts is necessary for conservation.

6. *Prevention (Preamble or obligation)*

Prevention of damage to biodiversity is essential. The precautionary principle (lack of full scientific certainty is not a reason for avoiding or minimizing threat of significant reduction or loss of biodiversity), and the principle of action at source complete the mission of prevention.

7. *Common concern (Preamble)*

Conservation of biodiversity is common concern of all mankind.

8. *Conservation (Preamble or objectives)*

In-situ and ex-situ conservation.

/...

9. Recognition and reward of traditional knowledge of local communities which contribute conservation and sustainable use of biodiversity. (Preamble or general obligation)

10. The fulfilment of the obligations under this Convention by developing countries would be subject to the effective provision to them of adequate, new and additional resources and of technology transfer to them on preferential and non-commercial terms. (General obligation, Article 4)

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Table of Contents

Acknowledgements	i
Executive Summary	ii
Introduction	1
The Negotiations: Background and Context	6
The Biotechnology Industry's View	16
IPR in the Biodiversity Convention	20
Other Arguments for Rejecting the Convention	35
Conclusion	42
Annex 1: Chronology of Negotiations on a Biological Diversity Convention ...	45
Endnotes	46

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This study has benefitted from the willingness of five members of the U.S. delegation to the biodiversity negotiations to share their knowledge of the negotiations. Assistant Secretary of State E. U. Curtis Bohlen consented to discussing with me the process of formulating of U.S. policy toward the convention.

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Executive Summary

The Bush administration justified its rejection of the biodiversity convention at the Earth Summit in Rio by arguing that the provisions regarding the financial mechanism and biotechnology safety regulations were unacceptable. The administration argued that the text would infringe on patent protection and other intellectual property rights (IPR) of U.S. companies and would retard the development of biotechnology. The biotechnology industry, which includes pharmaceutical companies, as well as those devoted exclusively to biotechnology products, supported the administration's stance. Administration and industry officials have claimed that the agreement would:

- Obligate the United States to coerce companies to transfer patented technologies unwillingly to developing countries on non-commercial terms;
- Give international legal authority to violations of patent rights by developing countries and thus weaken the U.S. position in pushing for stronger protection of IPR in the Uruguay Round of the General Agreement of Tariffs and Trade (GATT).

This study contends that the charges are based on a misreading of the text, its negotiating history and the wider context of the IPR protection issue. The study reaches the following conclusions:

- In the final round of the negotiation, the United States won a major concession -- a sentence calling for "adequate and effective protection"

of IPR in any technology transfer carried out under the agreement -- which neutralizes both alleged threats to U.S. business interests. The phrase "adequate and effective protection" is a term of art in international trade law that signifies a minimum set of norms for protection of intellectual property rights demanded by the United States of its trading partners, including narrowly restricting the use of compulsory licensing, which is the primary concern of biotechnology industry officials who oppose the convention.

- Nothing in the convention text would obligate the United States to force U.S. companies to license technologies in any country or otherwise transfer technology against their will.
- The negotiating history of the convention's technology transfer provisions shows that efforts by India on behalf of other developing countries to undermine protection of intellectual property rights in the convention were defeated.
- The biological diversity text will not affect the outcome of the negotiations on a GATT agreement on norms for stronger IPR protection, as argued by the biotechnology industry. Developing countries will decide on whether or not to accept the present draft based on their perceived economic stake in the GATT package agreement as a whole, including phasing out developed country protectionist policies on textile imports and agricultural exports.

- The United States already has exercised considerable leverage on developing country trade partners regarding their policies toward IPR protection through the threat of trade retaliation.
- The United States can better protect the interests of the biotechnology industry by signing the biodiversity agreement and participating in discussions on a protocol on international biotechnology safety regulation than by remaining outside those discussions.
- Although the financial provisions of the convention are vague and impractical, they cannot be used to force donor countries to contribute to projects against their will, because of the need for procedures in the conference of the parties to be decided by consensus.
- The Bush administration's suggestion that the United States can successfully demand renegotiation of certain provisions of the biodiversity agreement is highly risky and could lead to even more embarrassment for the United States.

The study concludes that U.S. interests would be best served by signing the biological diversity convention. That course would put the United States in the best position to protect the interests of the biotechnology industry as well as to insure that a workable funding mechanism is created by the conference of the parties.

Introduction

The Convention on Biological Diversity, which was signed by 153 countries and the European Community at the U.N. Conference on Environment and Development (UNCED) in Rio de Janeiro in June 1992, is the first international treaty to deal with the problem of conservation of biological resources at the global level.

Although the conservation provisions of the agreement are weakened by the phrase "as far as possible and as appropriate," they require a number of actions that are central to a global approach to saving the earth's genetic resources. Among them are:

- Development of national plans, strategies or programs for the conservation and sustainable use of biodiversity (Article 6).
- Inventory and monitoring of components of biodiversity and of processes affecting it adversely (Article 7).
- Restoration of degraded ecosystems and recovery of endangered species (Article 8).
- Preservation of indigenous and local systems of biological resources management and equitable sharing of benefits with such communities (Article 8).

Perhaps even more important is the convention's provision³ on access to genetic resources, which are aimed at providing economic incentives for developing countries to conserve those resources. Article 15 of the convention recognizes that a state has

the sovereign right to determine access to the genetic resources within its territory, and that such access will be on "mutually agreed terms." Moreover, it calls for "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." Previously, developing countries had no economic incentive for biodiversity conservation efforts, because they had no way of capturing any significant proportion of the economic benefits derived from those resources.¹

The Bush administration's decision not to sign the biodiversity convention creates an unprecedented situation: for the first time, a major global environmental agreement lacks the participation of the world's most influential environmental actor. The United States was the only country to reject the convention, spurring widespread criticism. Even its commitment to the success of the Earth Summit was called into question. Environmental Protection Agency Administrator William Reilly later said, "In public relations terms, we never recovered from it."² The U.S. decision sends a strong signal about the role the United States intends to play in the global environment in the future. The negative image that comes with a refusal to participate is a heavy political burden which should be borne only if it clearly advances vital U.S. interests.

An even more significant consequence of the U.S. refusal to join the convention, however, could be to constrain U.S. access to genetic resources in the developing countries participating in the convention. Venezuela has already set a precedent by temporarily suspending the signing of new agreements for scientific collaboration

with U.S. institutions that have undertaken research on genetic resources there in the past, in response to the U.S. rejection of the biodiversity convention. Other countries may follow the Venezuelan lead.³ A number of countries are now considering legislation regulating access to genetic resources, and some may refuse to export genetic materials to any country that is not a party to the convention.⁴

The United States was instrumental in getting the negotiations on a biodiversity convention started, and after announcing its decision against signing it, the Bush administration was quick to point out that the United States supported and would exceed the conservation objectives of the convention. But U.S. rejection of the convention could hurt the financing of global conservation of biological resources. It is not clear that the United States would make the same financial contribution through the GEF as a non-signatory that it would make if it were a party to the convention. It might withhold some or all of its contribution to the global funding mechanism in an effort to leverage changes in the text.

The initial State Department explanation of the U.S. unwillingness to sign the convention referred to three issues: intellectual property rights (IPR), the financial mechanism and biotechnology. But as the president prepared to go to Rio, the administration framed the decision in more dramatic terms as a choice to maintain American jobs, arguing that the text of the convention would harm highly competitive U.S. industries. Then Secretary of State James A. Baker declared that the "so-called biodiversity treaty ... would put people out of work in this country," because it would infringe on patent protection for biological inventions.⁵ And then White House Counsellor for Domestic Policy Clayton Yeutter, in a letter published in *The*

Washington Post, said the treaty "demands the transfer of our technology to the developing world. We believe it also could lead to the pirating of technology that we do not transfer voluntarily."⁶ Finally, President George Bush himself declared in his address at the Earth Summit that the biodiversity convention would "retard biotechnology and undermine the protection of ideas."⁷

This paper examines each of the three issues cited by the Bush administration as reasons for not signing the convention -- intellectual property rights, biotechnology safety regulation and the financial mechanism. But the main focus of the paper is the convention's provisions bearing on IPR. The paper analyzes the text of the agreement, notes relevant points about the negotiating history of the document -- the main method of interpreting an international legal text when it is ambiguous -- and puts them in the context of global negotiations on IPR.

The paper concludes that the United States can best advance conservation of biological resources as well as the interests of its own businesses by signing the convention as is. It finds that the fears of both the Bush administration and the biotechnology industry about the text fail to take sufficient account of several major factors. U.S. negotiators won significant concessions on intellectual property rights protection and biotechnology safety regulation in the final round of negotiations in May 1992, eliminating or neutralizing the potential harm of language in previous drafts. And although the provisions regarding the financial mechanism may be flawed, they do not prevent donor countries from exercising control over how much money they will commit to biological diversity projects. U.S. refusal to sign the agreement, moreover, does nothing to advance the interests of this country's

biotechnology industry. Signing the agreement, on the other hand, would ensure that the United States has the greatest influence on debates and decisions regarding key issues related to the convention. Meanwhile, the United States is suffering a serious loss of respect worldwide, which would be alleviated by a decision to sign the agreement.

The Negotiations: Background and Context

The negotiations for a Convention on Biological Diversity, begun in November 1990 under the auspices of the United Nations Environment Programme (UNEP), required six convention drafts and seven negotiating sessions. (See Annex 1: "Chronology of Negotiations") Although political divisions did not always form along North-South lines (Nordic countries and Australia sometimes sided with developing countries), the negotiations did produce acute conflict between developing country and developed country interests. Developing countries felt even more strongly about issues of North-South equity in this convention than they did about similar issues in negotiations on ozone depletion or climate change, in part because it pertained to use of their natural resources. As the Malaysian delegation chief said, "Climate was theirs; biodiversity is ours."⁸

A key issue in the negotiations was the relationship between intellectual property rights and developing countries' access to technologies derived from their own genetic resources, which has been a source of conflict between North and South for at least a decade. Plant genetic resources found in tropical countries were regarded in the past as a "common heritage of mankind," which should be available to researchers and foreign companies without restriction. But by the early 1980s, developing countries increasingly felt that it was unjust to allow multinational corporations to obtain free genetic resources to develop patented products that were then sold back to the developing countries at high prices. One response by developing countries was to expand the definition of plant genetic resources that should be freely

available to include those created by plant breeders. Under that proposal the "elite lines" of seeds created by plant breeders, which had been protected by intellectual property rights, would lose such protection and could be sold without any royalty.

Such an amended concept of the "common heritage of mankind," supported by virtually every developing country, was incorporated into an "International Undertaking on Plant Genetic Resources" that was adopted by the U.N. Food and Agriculture Organization's Commission on Plant Genetic Resources in 1983. Developed countries, most of which have seed companies whose intellectual property rights were at stake, agreed to the undertaking only after an "Agreed Interpretation" was issued in 1989, stating that the rights of plant breeders to intellectual property protection "are not incompatible" with the undertaking. That meant that the undertaking was no longer a potential means for developing countries to gain preferential access to commercial products based on plant genetic resources.

By the time the negotiations on the biodiversity convention began in 1991, therefore, developing countries had begun to shift their strategy and abandoned the concept of the "common heritage of mankind."⁹ They sought to link multinational corporations' access to genetic resources in the South to developing countries' access to products developed in the North from those genetic materials. So they embraced the idea that access to genetic resources should be a matter for "mutual agreement between countries."¹⁰

The developing countries' decided to place access to plant genetic resources under the principle of sovereign control by states, thus forcing the corporations to negotiate with the state itself for access to the resources. The success of that strategy

was reflected in the adoption in the biodiversity convention's Article 15 of the recognition of the "sovereign rights of states over their natural resources." The same article gave national governments "authority to determine access to genetic resources."

But the developing countries were not willing to rely entirely on commercial deals between companies and national governments. They wanted the biodiversity convention to commit the developed countries to ensuring that companies taking advantage of their genetic resources both shared the profits equitably and gave them access to technologies they developed from those resources. "They believe the companies are too powerful, so the playing field will have to be tilted," said a U.S. official involved in the negotiations.¹¹

The precursor to the first draft of the convention included a proposal that industrial countries have an "obligation" to transfer technology to developing countries on a "non-commercial" and "preferential" basis. It also demanded an "undertaking by the parties, through national policy and legislation, to ensure that private enterprises within their jurisdiction transfer technology to the poorer developing countries, while protecting the interests of the private sector."¹²

It was not the first time that the developing countries had tried to get industrial countries to agree to use their power over corporations to force the transfer of patented technologies. In the negotiations on the amendments to the Montreal Protocol on the Protection of the Ozone Layer in June 1990, India, Brazil, China and Malaysia argued that developed country governments should intervene to force private companies to turn over patented replacement technologies for CFCs

(chlorofluorocarbons) to the developing countries. Those countries led an unsuccessful effort to get language in the text that would have made fulfillment of legal obligations by developing countries conditional on both financial assistance and transfer of technology on "preferential and non-commercial" terms.¹³

Many developing countries view patents and other intellectual property rights as a way of both denying them access to technologies and raising the prices of those technologies. As one observer has commented, "There is a predilection among many of the [developing country] negotiators to view intellectual property protection as a barrier to the transfer of technology, rather than as a basis upon which such transfers can and do take place."¹⁴

Like other developed countries, the United States has long insisted that it cannot force private companies to transfer technology and that adequate protection for IPR is the most effective form of technology transfer.¹⁵ Along with most other industrial countries, the United States opposed the inclusion of any obligation to transfer patented technologies in the biodiversity convention. And as the negotiating draft took shape in the second half of 1991, the U.S. delegation was dismayed at the provisions on technology transfer proposed by the developing countries, led by India and Malaysia, because they would have required just such coercion and curtailing of patent rights.¹⁶

IPR and the GATT

Meanwhile, a related diplomatic struggle was being waged in another arena - the General Agreement on Tariffs and Trade (GATT). From the beginning of the

GATT "Uruguay Round" of negotiations in 1987, the United States acted to advance the interests of U.S. businesses by pushing for the negotiation of an agreement on "Trade Related Intellectual Property Rights" (usually referred to as TRIPS) that would impose legal obligations on countries belonging to the GATT to provide minimum standards of IPR protection.¹⁷

Developing countries like India, Thailand and Brazil -- and some industrial countries as well -- permit the unlicensed reproduction and sale of pharmaceuticals, audio and video recordings, and other patented products and use "compulsory licensing" laws to force companies to license their inventions to private firms within the country under a wide range of circumstances. India and Brazil led the resistance by developing countries in the Uruguay Round to the imposition of such new norms for IPR protection. They argued that the appropriate forum for changing existing regimes was not the GATT but the World Intellectual Property Organization.¹⁸

The demand for a TRIPS agreement brought to the forefront a long-simmering debate over the advantages or disadvantages to developing countries of adopting strong IPR protection systems. Some developing countries expressed the fear that patenting and protecting proprietary technologies would increase their royalties to developed countries significantly, draining their foreign exchange reserves, and would increase consumer prices dramatically. They viewed the extension of stringent IPR protection regimes to developing countries through the GATT as another massive transfer of resources from poor people and nations to rich people and nations.¹⁹

A major argument by industrial country officials for extending strong IPR protection to all developing countries was that companies owning technologies have

little incentive to transfer their proprietary knowledge through licensing arrangements to countries that lack such protection. Another was that strong IPR regimes stimulate innovation and increase domestic research and development in developing countries. The validity of these arguments varies from one developing country to another, however, and from one type of technology to another. For example, companies have done licensing in South Korea, despite a lack of full IPR protection. Moreover, factors other than IPR regimes appear to count more heavily in determining the pace of technological innovation in developing countries. Some economies, such as Taiwan, have achieved technological dynamism prior to instituting such IPR protection.²⁰

In 1989, the United States prevailed in getting TRIPS included in the Uruguay Round negotiations.²¹ And in December 1991, the chairman of the GATT, Arthur Dunkel, released a draft of a comprehensive Uruguay Round trade agreement, including a detailed text on TRIPS.²² As had been proposed by the United States, the draft sharply restricts the freedom of countries to infringe on intellectual property rights, establishing minimum norms on which countries would base their national legislation. For example, the draft narrowly restricts the circumstances under which states can compel companies to license their technologies within the country.

After the Dunkel draft was distributed, the U.S. delegation to the biodiversity convention negotiations was acutely aware of the potential value of that document to its objective of strong guarantees of IPR protection in the convention. It also was wary of any possible negative impact that the convention's provision on technology transfer might have on the TRIPS agreement and the whole GATT package. Several

times in the course of the final round of discussions, therefore, the U.S. delegation argued that technology transfer provisions should be strengthened on the grounds that they were inconsistent with the draft TRIPS agreement.²³ The Indian delegation was also aware of a potential linkage between the two sets of negotiations, and one of the main dynamics of the final round was the interplay of the conflicting strategies of India and the United States for such linkage.

The Final Round and U.S. Policy

The U.S. delegation went to the final round of biodiversity convention negotiations in May 1992 hoping to obtain concessions that would allow the United States to sign it in Rio. But the pressure to get an agreement completed in time for signature at the Rio Conference in June was an obstacle to the achievement of that aim. "It was the will of every other country that we had to come to a decision before UNCED," recalls a member of the U.S. delegation.²⁴ Although they shared U.S. concerns with some elements of the draft text, other industrial countries did not want to be in the position of blocking the agreement in the final round of negotiations. Those delegations agreed with the United States that there were problems with the technology access and transfer provisions of the agreement, but they expressed doubt that it would be possible to get a satisfactory solution before Rio.²⁵

A number of developing countries felt strongly that the United States should not be allowed to delay the completion of the convention. They believed that the biodiversity convention could be successfully implemented even without U.S. support.²⁶ So the developing countries were not ready to give up negotiating

objectives to which they were most heavily committed (a separate fund for biodiversity and some language favorable to greater access to patented biotechnology) in order to get the U.S. signature on the convention.

Despite these obstacles, the United States did secure important concessions from developing countries in the final round of negotiations, with regard to biotechnology regulation, IPR and other issues. The changes that were achieved on IPR-related provisions were so significant that some delegations from industrial countries that had previously been seriously concerned with the text told the U.S. delegation they now found it acceptable.²⁷

On the provisions regarding the financial mechanism, however, the developing countries actually hardened their position in the final round. Developing countries had wanted a funding mechanisms controlled by the "Conference of the Parties" for each global environmental convention, rather than having the independent Global Environment Facility (GEF) serve as the funding mechanism, as favored by the industrial countries. In the climate convention negotiations that had concluded in May, the developed countries had succeeded in getting agreement to designate the GEF as the interim financial mechanism. Some key developing countries -- especially India, Pakistan and Malaysia -- felt that they had been pressured into accepting that provision, and they were determined to achieve the original aim of a separate funding mechanism in the final round of biodiversity negotiations.²⁸

UNEP Executive Director Mostafa Tolba played a key role in crafting the final text of the biodiversity convention's provisions on the financial mechanism. Two days before the end of negotiations, he drafted his own version of that section and handed

it to the U.S. delegation. The U.S. objected to Tolba's formulation of the financial provisions, but Tolba was unmoved, and U.S. officials concluded that he had already sent it to be printed for the final text.

Different sections of the whole agreement were being negotiated by subgroups without knowing what was being negotiated in other subgroups. The full text of the agreement became available only 30 minutes before the meeting that would formally adopt the convention.²⁹ In its declaration at the meeting to adopt the final text, the United States complained that the "hasty and disjointed approach to the preparation of this convention has deprived delegations of the ability to consider the text as a whole before adoption."³⁰ The U.S. delegation also said it found the treatment of biotechnology, IPR protection, finances and technology transfer in the text "particularly unsatisfactory."³¹

Immediately after the negotiations, the U.S. State Department sent out cables to industrial country governments to get their reactions to the final text of the agreement. The responses received from several governments indicated that they had serious concerns as well. Based on those responses, E. U. Curtis Bohlen, assistant secretary of state for oceans, environment and science, was convinced that the United States would not be alone if it refused to sign the agreement at the Earth Summit.³²

As the Bush administration moved quickly to make its decision on whether or not to sign the final agreement, there was a strong presumption against U.S. participation. The vice president's office was strongly opposed to the biotechnology and technology transfer provisions, and the Interior Department, supported by the vice president's staff, also objected to one of the convention's conservation

provisions.³³ Moreover, Assistant Secretary of State Bohlen, normally the main advocate in the administration for global environmental agreements, believed that the financial provisions were unacceptable.³⁴ Meanwhile, executive branch officials who had helped overcome resistance within the White House to signing the climate convention a few weeks earlier were not prepared to make a similar effort for what they regarded as a lesser treaty.³⁵

Signing the agreement with reservations -- the rejection of specific provisions of a treaty -- was ruled out by Article 37 of the convention, which prohibits reservations altogether. With no bureaucratic interests engaged in counterbalancing the pressures to reject the convention, the administration's position was a foregone conclusion. On May 29, the State Department announced the U.S. decision not to sign the agreement. In the end the other industrial countries decided to sign the agreement and U.S. isolation at the Rio conference became unavoidable.

The Biotechnology Industry's View

The U.S. biotechnology industry includes both long-established pharmaceutical and chemical companies which create biotechnology products and new firms which produce only biotechnology products. The U.S. biotechnology industry is the acknowledged world leader in this new high-tech field, with an expected \$4 billion in sales in 1992 and the prospect of as much as \$50 billion annually by the end of the decade.³⁶ The United States is far ahead of European and Japanese companies in agricultural applications of biotechnology.³⁷

Biotechnology products, which range from oil-eating microbes to improved seeds and fertilizer to pharmaceuticals based on genetic resources, are heavily dependent on the protection of intellectual property rights. Pharmaceuticals, in particular, involve significant capital investment to produce but, once on the market, are very easily duplicated. The pharmaceutical industry worldwide loses an estimated \$6 billion annually from the pirating of patented pharmaceuticals.³⁸

Officials of the Industrial Biotechnology Association (IBA), which represents 80 percent of the U.S. market in biotechnology products, were convinced that the developing countries intended to use the biotechnology industry to boost their technological base and finance their development. They feared that the biodiversity agreement would obligate the U.S. government to force companies to give away their patented technologies and trade secrets not only to governments but to other companies located in the developing countries, according to an industry official.³⁹

Some in the industry were afraid U.S. courts would find something in the biodiversity convention text that would obligate the United States to force transfer of technology through compulsory licensing or that language in the convention would be used to justify legislation to deny patents for plants and animals. "We had to think in terms of a worst case interpretation of the convention," explained one industry official.⁴⁰

Another industry fear was that the convention on biodiversity would interfere with the goal of achieving minimum standards of protection for intellectual property rights for their biotechnology products in developing countries through the TRIPS negotiations. Both biotechnology and pharmaceutical groups were particularly pleased that the December 1991 draft text on TRIPS would severely limit the use of compulsory licensing. At the same time, they were unhappy that the text would allow at least another decade of theft of U.S. pharmaceutical innovations and permit the export of counterfeit and substandard drugs, because it would permit all developing countries a transitional period of five years, with another five years added for the least developed countries.⁴¹ The biotechnology industry also was upset that the Dunkel draft allowed countries to choose not to patent plants and animals (other than microorganisms).⁴²

Before the final round of biodiversity negotiations the IBA wrote to the head of the U.S. negotiating team to urge that intellectual property should be addressed in the convention "consistently with solutions agreed to in other more appropriate international treaties, such as GATT." The IBA wanted the United States to amend the draft text to state that "the provisions of this convention are subordinate to these

other agreements including GATT."⁴³ It believed that, without such language, the convention would condone existing violations of intellectual property rights, especially the misuse of compulsory licensing laws, thus giving such violations new legal status.

Trade associations representing biotechnology firms were persuaded by the Bush administration's negative view of the convention. After the administration had announced its position on the convention and just before the president went to the Earth Summit, they wrote letters to the White House supporting the administration's decision against signing the biodiversity convention.⁴⁴ In its letter to Bush, IBA asserted that the text "contains provisions permitting developing countries to disregard the patent rights of biotechnology companies and mandates that companies transfer their inventions to developing countries on 'concessional,' 'preferential,' and 'most favorable' terms." The letter from the U.S.-based Pharmaceutical Manufacturers Association letter said that "unclear language" on access to and transfer of technology transfer could be "code words" for "compulsory licensing and other forms of property acquisition." The Association of Biotechnology Companies, an international trade association with 300 -- mostly American -- member companies, said in its letter that the agreement would "reduce protection for biotechnology."

This industry opposition to the final text of the convention on the ground that it does not provide adequate IPR protection caused some Members of Congress to be very cautious about calling for the United States to sign the convention without revision. But it should not be assumed that the industry's judgment was based on adequate understanding of the text and its negotiating history or that its position necessarily advances the best interests of the industry itself. The IBA did not have

access to the final text of the convention until after the Bush administration announced its decision on May 29, so it had very little time to analyze the text before adopting and announcing its position.⁴⁵ Its reaction to the final text appears to reflect disappointment that the language does not subordinate the biodiversity agreement to the TRIPS agreement in regard to IPR -- an objective that was neither realistic nor necessary to meet their most urgent concerns. In any case, the industry's assessment of the legal effects of provisions of the agreement on IPR is inaccurate in every case.

Biotechnology industry associations elsewhere in the industrialized world did not share the U.S. biotechnology industry's dim view of the convention. While most European and Japanese biotechnology companies apparently remained unfamiliar with the specific language of the text even after the Rio conference, industry officials who were able to examine it carefully did not see dire consequences resulting from its ratification. The head of Britain's BioIndustry Association, which represents more than 200 small biotechnology firms, reported that his members initially supported the U.S. biotechnology industry's position on the convention. But they changed their minds after seeing the text, because it did not seem "drastic enough for a president not to sign."⁴⁶ Similarly, the Italian industry association's director-general said he could find no basis for the U.S. refusal to sign.⁴⁷

IPR in the Biodiversity Convention

The two main arguments by Bush administration and U.S. industry officials against signing the biodiversity convention are that the language of Article 16, dealing with "Access to and Transfer of Technology," could force companies to give up patented technologies and trade secrets and that it could threaten the progress made in the TRIPS negotiations. But these arguments gloss over the considerable diplomatic victory won by the United States in getting strong language on protection of IPR into Article 16. They also fail to take account of the previous usage of key phrases in the article, the interrelationships among the paragraphs and the negotiating history of the provisions in question. Finally, these arguments ignore the larger political and economic context of the issue of reforming systems for protecting intellectual property rights. When all these factors are taken into account, the picture of Article 16 that emerges is very different from that painted by the Bush administration and U.S. industry.

The U.S. Victory on IPR

In the final round of negotiations, the United States won the most important diplomatic struggle over the issue of how IPR protection would be treated in the convention by securing a sentence in Article 16 that plainly rules out violations of intellectual property rights in the terms of access to or transfer of technology. The sentence, in paragraph 2, provides that, "In the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on

terms which recognize and are consistent with the adequate and effective protection of intellectual property rights."

The significance of this sentence can hardly be overstated. U.S. negotiators had insisted on the phrase "adequate and effective protection" because it had become a term of art in international trade law. The most important document in which the phrase is used is the text on TRIPS in the Dunkel draft of the Uruguay Round multilateral trade agreement. The first sentence of that text refers to the need to "promote effective and adequate protection of intellectual property rights..."⁴⁸ The United States used the "adequate and effective" standard and spelled out what it meant in specific terms in a May 1990 draft TRIPS agreement and in previous submissions to the group negotiating on TRIPS.⁴⁹

The phrase "adequate and effective protection" also was used in the introductory paragraph of a "model IPR agreement" that was developed by the United States as it defined its negotiating position in the TRIPS. Based on that model, the United States has signed a series of bilateral agreements on improved intellectual property rights protection and IPR annexes to scientific and technical cooperation agreements.⁵⁰ All of those documents begin with the statement that the parties "agree to provide adequate and effective protection and enforcement of intellectual property rights. ..." The most recent such bilateral IPR agreement was signed with Sri Lanka in September 1991.⁵¹

Finally, the phrase "adequate and effective protection" had been inserted into Section 301 of the Omnibus Trade and Competitiveness Act of 1988, which had been used to retaliate against countries whose IPR laws did not conform to U.S. standards.

The concrete meaning of the term had been developed through the series of findings by the office of the U.S. Trade Representative that various countries had failed to provide such "adequate and effective protection."⁵²

All the U.S. documents elaborating on its "adequate and effective" standard for IPR laws as well as the bilateral IPR agreements had included detailed norms on those issues of greatest concern to the U.S. biotechnology industry, including patentable subject matter, terms of protection, transitional protection and compulsory licensing. These documents had spelled out the same kind of stringent limitations on the use of compulsory licensing as are in the draft TRIPS agreement.

The phrase "adequate and effective protection" as used in U.S. and bilateral trade documents had been used for several years to signify a demand that other countries' IPR protection laws worldwide be brought into conformity with U.S. law.⁵³ India, Brazil and other developing countries involved in the biodiversity convention negotiations understood, therefore, that their acceptance of this sentence in the convention was a major concession to the United States.⁵⁴

Obligations on the United States

The fear that the convention's technology transfer provisions could be used to force U.S. companies to transfer technology are not borne out by a careful reading of the text. In fact, the obligations in the convention to facilitate technology transfer require only policies that the United States has already accepted and gives wide latitude in choosing when, or whether, to carry them out. Paragraph 1 of Article 16 requires that each contracting party "provide and/or facilitate access for and

transfer to other contracting parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources. ..." This access to and transfer of technology is to be "provided and/or facilitated," according to paragraph 2, under "fair and most favorable terms, including concessional and preferential terms where mutually agreed. ..." The phrase "concessional and preferential terms," meaning that companies would obtain less than a fair market price for a licensing arrangement or other technology transfer, is neutralized by the phrase "where mutually agreed," meaning that it cannot happen without the consent of the party transferring the technology.⁵⁵

The phrase "fair and most favorable," which applies to all terms for access to or transfer of technology, has been criticized by U.S. and industry officials as being so ambiguous that it opens the door to demands for non-commercial terms for technologies. But the use of the phrase already has a precedent in global environmental law, having been adopted in the 1990 amendments to the Montreal Protocol on protection of the ozone layer. The text of the protocol requires industrialized countries to "ensure that the best available, environmentally safe substitutes and related technologies are expeditiously transferred ... under fair and most favorable conditions."⁵⁶ The head of the U.S. delegation to those negotiations, Richard Benedick, confirms that the phrase was clearly understood by the negotiators of that text as meaning conditions that depended on the operation of a free market, without government coercion.⁵⁷

The obligations in paragraphs 3 and 4 of Article 16 are even less stringent than those in the first two paragraphs, because they have huge loopholes through which

industrial countries can escape. Paragraph 3 states that contracting parties are to "take legislative, administrative or policy measures, as appropriate, with the aim that contracting parties, in particular those that are developing countries which provide genetic resources are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms. ..." Paragraph 4 calls for "measures, as appropriate, with the aim that the private sector facilitates access to, joint development and transfer of technology referred to in paragraph 1 above for the benefit of both governmental institutions and the private sector of developing countries. ..."

The phrase "as appropriate" used in both paragraphs gives parties to an international agreement wide discretion in deciding whether and how to carry out the terms of the provision to which it applies. In negotiations on the scope of the TRIPS agreement, for example, developing countries agreed only to "elaborate *as appropriate* new rules and disciplines" (emphasis added) regarding intellectual property protection. The developing countries insisted on that phrase in order to allow themselves maximum freedom to decide which new rules and disciplines, if any, they would accept as negotiable.⁵⁸ It is clear, therefore, that states are under no obligation to apply the "measures" referred to in any case they feel is not "appropriate."

The United States and other industrial countries could, if they chose, fulfill the terms of paragraph 3 without any coercion of the private sector by purchasing patents or licenses on commercial terms for sale to developing countries on non-commercial terms. The United States already endorsed that form of government-to-government technology transfer in negotiating the chapter on "Transfer of Environmentally Sound

Technology, Cooperation and Capacity Building" of the UNCED's Agenda 21 workplan.⁵⁹

Another measure that would fulfill the terms of the paragraph would be financial assistance to developing countries for such commercial purchases, as strongly suggested by references in both paragraph 2 and paragraph 4 to the financial mechanism established in Articles 20 and 21. Or the United States could create or enhance fiscal or other economic incentives for transfer of technologies. The United States and other industrial countries would be legally obligated by the present draft GATT agreement on TRIPS to provide just such incentives to private enterprises for the transfer of technology to the least developed countries.⁶⁰

Compulsory Licensing and the Indian Ploy

During the negotiations, India and some other developing countries suggested an entirely different interpretation of paragraphs 3 and 4. They declared that they would interpret the convoluted text of paragraphs 3 and 4 to give them the authority to use compulsory licensing laws and other limitations on intellectual property rights as a means of providing access to and joint development and transfer of technology to developing countries and their private sectors.⁶¹

Although the sentence in paragraph 2 requiring "adequate and effective protection" of IPR in any transfer of patented technology would appear to bar such measures, India and other developing countries tried to undermine that statement by insisting on the addition of another sentence at the end of paragraph 2. The sentence states, "The application of this paragraph shall be consistent with

paragraphs 3, 4 and 5 below." India argued that this sentence vitiates the language in paragraph 2 requiring "adequate and effective protection" of IPR in the terms of all transfer of technology.⁶²

Article 16. Access to and Transfer of Technology

1. Each Contracting Party, recognizing that both access to and transfer of technology among Contracting Parties are essential elements for the attainment of the objectives of this Convention, undertakes subject to the provisions of this Article to provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment.
 2. Access to and transfer of technology referred to in paragraph 1 above to developing countries shall be provided and/or facilitated under fair and most favourable terms, including on concessional and preferential terms where mutually agreed, and where necessary in accordance with the financial mechanism established by Articles 20 and 21. In the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights. The application of this paragraph shall be consistent with paragraphs 3, 4 and 5 below.
 3. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that Contracting Parties, in particular those that are developing countries, which provide genetic resources are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms, including technology protected by patents and other intellectual property rights, where necessary through the provisions of Articles 20 and 21 and in accordance with international law and consistent with paragraphs 4 and 5 below.
 4. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that the private sector facilitates access to, joint development and transfer of technology referred to in paragraph 1 above for the benefit of both governmental institutions and the private sector of developing countries and in this regard shall abide by the obligations included in paragraphs 1, 2 and 3 above.
 5. The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.
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Nothing in paragraphs 3 and 4, however, suggests that those provisions represent *exceptions* to the "adequate and effective protection" requirement. Indeed, the end of paragraph 4 explicitly says that each contracting party shall abide by the

obligations in paragraph 2, which include the "adequate and effective protection" sentence.⁶³ And paragraph 3 ends with the requirement that the measures to be taken must be "consistent with paragraphs 3, 4 and 5," thus including the reference in paragraph 4 to obligations in paragraph 2. The sentence added to paragraph 2 that the IPR protection requirement is to be applied "consistent with" those paragraphs does not, therefore, nullify its applicability to them. Furthermore, the negotiating history of these paragraphs again indicates that the U.S. position on protection of IPR was upheld against efforts to subvert it. India and other countries had proposed in earlier negotiating sessions to add to paragraph 3, after "on mutually agreed terms," the phrase "notwithstanding patents and other intellectual property rights," indicating that access and transfer of IPR should not be conditioned on protection of IPR. But that clause was subsequently dropped from the text.⁶⁴

The argument that Article 16 does not protect IPR rests heavily on paragraph 5 of the article, which U.S. officials have claimed "subordinates" intellectual property rights to the objectives of the convention, including technology transfer.⁶⁵ But while India intended that the final paragraph do precisely that, the text as adopted does not. The one-sentence paragraph states, "The contracting parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives."

Those who would reject the convention argue this sentence means that such rights stifle technology transfer and must be given less protection in order to avoid

a clash with the objectives of the convention. That is indeed the point of view asserted by some developing countries. But the text also can be read as suggesting that IPR regimes that are too weak would be an obstacle to technology transfer, as the United States and other countries had argued during the negotiations.⁶⁶

The negotiating history does not support the claim that the parties intended to nullify the "adequate and effective protection" standard when they accepted paragraph 5. The negotiators had eliminated from the text an earlier Indian formulation that called on contracting parties to "minimize any negative effects" of patents and other IPR on the "implementation of the present convention."⁶⁷ And in an earlier draft, paragraph 1 had included a sentence formulated by the Indian delegation that required that "contracting parties shall also eliminate ... and refrain from imposing restrictions such as patents and property rights that run counter to the principles of this convention."⁶⁸

The United States tried unsuccessfully to amend paragraph 5 to state that "intellectual property rights are essential for the successful transfer of proprietary technology." The text proposed by the United States also would have stated that international cooperation should "ensure that such rights are recognized and given adequate and effective protection by contracting parties to this convention."⁶⁹ This formulation would have gone further than paragraph 2 (which only required IPR protection standards acceptable to the United States in regard to any *technology transfer* under the convention) to endorse the U.S. demand for the adoption of IPR laws based on the U.S. model.

The formulation that was accepted in the final draft, with slight modification, was submitted as a compromise by Norway.⁷⁰ The negotiating history shows, therefore, that the language adopted in paragraph 5 was crafted in an effort to paper over fundamental differences between developing countries and the United States on the relationship of intellectual property rights to the aims of the convention. Given the compromise nature of the final text, neither side can make a clear case that the other had accepted its views. That the final paragraph is deliberately opaque on the issue of whether stronger IPR protection facilitates or obstructs technology transfer does not, however, alter the decided tilt in the paragraph as a whole toward safeguarding IPR in any technology transfer transaction.

At the conference adopting the text in Nairobi, the United States chose not to make an interpretive declaration that it understood Article 16 as providing protection for intellectual property rights in any terms of technology transfer, even though it could have done so legitimately. Instead, its interpretative declaration said that "Article 16 fails to recognize the positive role of intellectual property systems in facilitating technology transfer and cooperative research and development by private entities."⁷¹ The statement failed to reflect the fact that efforts to include anti-IPR language in the agreement failed and that the United States prevailed on the most crucial issue of IPR protection in the agreement.

The Biodiversity Convention and Trade Negotiations

One of the main argument for U.S. rejection of the text by the biotechnology industry was that the text condones existing violations of intellectual property rights and gives them international status by not taking a stronger stand on the issue. IBA President Richard Godown asserts that, if it signed the biodiversity agreement, the United States would "weaken its intellectual and moral position" in pushing for enhanced patent protection in the TRIPS agreement and in bilateral agreements. Developing countries wanting to maintain regimes that permit violations of IPR are certain to cite the biodiversity convention as an excuse for wanting to narrow the scope of IPR protection in these negotiations, according to Godown.⁷²

As noted above, some developing countries which would like to avert a new IPR regime such as that called for by the TRIPS agreement already have indicated that they will argue that the biodiversity convention text authorizes their continued restrictions on IPR. Godown is suggesting that the United States would disarm itself in resisting that argument by signing the agreement. However, because the biodiversity convention has become international law, despite U.S. refusal to sign, the most effective U.S. riposte to the argument would be to assert that the agreement does *not* support the claims of India and others. Rejecting the convention and suggesting that the Indian interpretation of Article 16 may well be valid does exactly the opposite of what the biotechnology industry has asserted.

In the final analysis, however, a tortured interpretation of the biodiversity convention by the developing countries would not be enough to water down the Dunkel draft on TRIPS or alter the outcomes of negotiations of U.S. bilateral

agreements with trading partners on IPR protection. The outcome of both kinds of negotiations will be determined by the economic interests of the countries participating, rather than by the tortured arguments of some countries to portray the biodiversity convention as upholding their view of IPR. India and other countries that have resisted the kind of IPR protection norms in the current draft of the TRIPS agreement will go along with that agreement if, and only if, they feel they are getting sufficient economic benefits from other parts of the GATT Uruguay Round package in return. And similarly, developing countries wishing to take advantage of market-opening benefits will have to accept the TRIPS agreement as part of the price.⁷³

The Dunkel draft of the GATT agreement was tabled with the explicit understanding that, "No single element of the draft final act can be considered as agreed [until] the total package is agreed."⁷⁴ In other words, developing countries are likely to go along with the TRIPS agreement and other parts of the package of interest to the developed countries, primarily because of their fear of growing tendencies toward protectionism in developed countries.⁷⁵ Some of the most important economic benefits to developing countries from the Uruguay Round package, should it finally be adopted by contracting parties to the GATT, will come from the phase-out of the Multifiber Arrangement (MFA) by the end of the century, which is now included in the Dunkel draft.⁷⁶ Textiles are the single largest source of manufacturing employment in the developing world, and the phase-out of the MFA within a relatively few years would do more to create jobs in textile and apparel exporting countries than anything else that could happen in North-South economic relations. Significantly, some of the countries, including India and Brazil that have

continued to resist strong protection for IPR, would also benefit the most from a phase-out of the MFA.⁷⁷

Another significant economic benefit to developing countries from the adoption of the Dunkel draft would be the liberalization of world-wide agricultural trade by a reduction in subsidies for industrial country agricultural exports and import barriers. That would make developing country agricultural exports more competitive in the world market and raise incomes for farmers in those countries. Developing countries could expect an increase in income from agricultural exports estimated by some specialists at \$60 billion annually from the removal of these barriers, and again India would be one of the big winners.⁷⁸ Those countries know that both the United States and the EC have made the acceptance of the TRIPS by the developing countries one of the conditions for agreeing to the phase-out of the MFA and liberalization of agricultural trade.⁷⁹

The policies of developing countries toward protection of IPR also have been heavily influenced by the U.S. threat to deny their access to U.S. markets under a provision in the U.S. trade act known as "Special 301." Under this provision, the United States targets countries that do not meet what the U.S. considers adequate standards of protection of IPR for trade retaliation. The United States has used that provision to put pressure on developing countries to adopt patent protection compatible with U.S. law. Under the law, once a country has been named as having inadequate protection for IPR in its laws, it has six months to demonstrate progress toward resolving the issue either through changes in its laws or through negotiation of an agreement on IPR protection. During the Uruguay Round, the United States

Trade Representative (USTR) has identified 25 countries on either a "priority watch list" or a "watch list" in this regard. Included on these two lists have been all the major developing country trading states (India, Brazil, China, Mexico, Chile, Egypt, Columbia, Indonesia, Malaysia, Pakistan and Venezuela).

In October 1988, the United States imposed a 100 percent punitive tariff increase against \$39 million in goods imported from Brazil as the result of a complaint by the U.S. pharmaceutical industry and an investigation of Brazil's refusal to grant patent protection to pharmaceuticals. The United States has also threatened to take away trade benefits under the Generalized System of Preferences (GSP) to developing countries in retaliation for non-protection for IPR. Since 1986, U.S. economic pressures have helped persuade a number of developing countries, including Korea, Taiwan, Indonesia, Chile, China and Mexico -- as well as Canada -- to pass legislation to improve IPR protection. Other countries, including Brazil, Argentina, Thailand and Venezuela, also have considered some reforms in their IPR laws in response to those threats.⁸⁰

The United States holds strong cards in multilateral and bilateral negotiations on IPR protection, and arguments made by India and others about the alleged meaning of the convention cannot change the broader forces that are shaping their outcomes. The irony of the present U.S. posture is that by refusing to recognize the language of the convention as a U.S. victory, the Bush administration only makes it awkward for the United States to refute the arguments by India and others that the TRIPS agreement should be weakened. A decision to sign the biodiversity convention

and to adopt the analysis outlined above would put the United States in a stronger position to protect its interests on IPR protection.

Other Arguments for Rejecting the Convention

Biotechnology Safety Regulation

The only statement by the Bush administration on the biotechnology safety provisions of the convention was in the State Department's May 29 press release. The statement simply said, "The convention does not treat biotechnology and biosafety appropriately." IBA President Richard Godown commented in his letter to President Bush that the convention "contains regulatory provisions that would tend to delay the development of new products."⁸¹

An industry official noted that the concern of the IBA was focused on the provision regarding international regulation (paragraph 19.3) rather than on the one dealing with domestic regulation (paragraph 8(g)). According to this official, the IBA did not believe that the domestic regulation paragraph would require any change in the domestic regulatory system but feared that the international regulation could do so.⁸²

The language of paragraph 19.3 represents another compromise between two diametrically opposed views of the issue of biotechnology safety. The United States has long disagreed with most of the other countries in the world, including both European countries and developing countries, on the question of whether biotechnology poses fundamentally different risks to health or the environment from those posed by other types of technology. Other countries have argued that genetically modified organisms require special regulations to ensure their safe use.

The U.S. position has been that the risks arising from biotechnology have been exaggerated, and that no special regulations are required.⁸³

In the biodiversity negotiations, countries which took the former view proposed that the conference of the parties have the authority to adopt procedures for obtaining "prior informed consent" to the introduction of genetically modified organisms which may have an adverse impact on the environment of a contracting party.⁸⁴ That provision might indeed have delayed the introduction of new biotechnology products by creating some international mechanism for studying those products. The United States tried unsuccessfully to remove the entire paragraph from the text.⁸⁵

But after intensive negotiations in the final round, U.S. negotiators achieved a significant modification of the text. Sweden offered a compromise that calls for parties to "consider the need for and modalities of a protocol" to deal with that issue. In effect, the issue of a protocol is to be considered later by the parties. The United States accepted the language with a statement interpreting it as making no presumption that such a protocol is actually needed. Other countries disagreed with that interpretation, suggesting that the need for a protocol was presumed.⁸⁶

What is clear is that the whole subject of a protocol is to be discussed further, and that the United States and other countries will continue to have differences over whether there should be a protocol. U.S. refusal to sign the agreement will not prevent other countries from agreeing on such a protocol in the future if they choose to do so. Some biotechnology and administration officials concede privately that the United States could protect its interests better by participating in those discussions

rather than by being absent.⁸⁷ Even if such a protocol were adopted, the United States would have the option of not participating in it, since it would be a separate legal instrument.

The IBA objected to this language, however, according to an industry source, because it believed that the members of the Organization for Economic Cooperation and Development (OECD), comprising the developed countries of the world, were making progress on international harmonization of national principles on biotechnology regulation based on the U.S. model. Therefore, the industry did not want a separate forum, in which developing countries also would be represented, to consider the issue.⁸⁸ However, as in so many other issues, refusing to associate the United States with a process does not mean that it will not go forward.

The Financial Mechanism

The provisions of the biodiversity convention on a funding mechanism do create a serious practical problem. They appear to conflict with the general thrust of the relationship between the Global Environment Facility (GEF) and the conferences of the parties to global environmental conventions envisioned at the April 1992 meeting of GEF participants. They also leave open the possibility that a developing country majority could determine funding levels for the convention. Finally, they leave the door open for the conference of the parties to the convention to create an entirely new fund for biodiversity independent of the GEF, because the GEF is designated as the financial mechanism only on a temporary basis until the conference of the parties to

the biodiversity convention meets (no later than one year after the convention's entry into force).

Article 21.1 of the biodiversity text would have the financial mechanism "function under the authority and guidance of ... the conference of the parties. ...". The relationship between the GEF and the conferences of the parties to global environmental conventions was not agreed to by GEF participants at their April 1992 meeting, and donor countries have no objection to the conference of the parties for each convention determining policy and strategy and program priorities for funding within its issue area. But they do envision the GEF as having some authority independent of the conference of the parties as well.⁸⁹ What the United States and other donor countries fear is that the developing country-dominated conference of the parties to the biological diversity convention would assume the authority to make decisions regarding funding levels and specific project decisions on the basis of one-country, one-vote without the consent of the donor countries.⁹⁰

Article 21.1, which provides that "contributions" will be "in accordance with the amount of resources needed to be decided periodically by the conference of the parties ...," can be read as giving the conference of the parties the power to decide what levels of financial resources must be contributed by contracting parties which are developed countries. The donor countries all agreed that the provision would be unacceptable if given that interpretation. Eighteen delegations, including the U.S. delegation, joined in a declaration made after the adoption of the agreed text on May 22 stating their "understanding that the decision to be taken by the conference of the parties under article 21.1 of the convention refers to the 'amount of resources needed'

by the financial mechanism, not to the extent or nature and form of the contributions of the contracting parties."⁹¹ The British Secretary of State for Environment, Michael Howard, repeated that understanding of the text of article 21.1 in a declaration when he signed the agreement in Rio.⁹²

That declaration cannot by itself eliminate the possibility that a majority vote in the conference of the parties could determine the amount of assistance to be provided by the donor countries or usurp some of the authority of the GEF's participants' assembly or the GEF implementing agencies (UNDP, UNEP and the World Bank). Developing countries could seek to bring the final GEF agreement on governance into conformity with the language of the biodiversity convention. Or they could propose at the first meeting of the conference of the parties to create a new financial mechanism clearly under the authority of the conference of the parties.

But donor countries in the GEF cannot be forced to put the GEF under the authority of the biodiversity convention. Under the plan agreed to by GEF participants in April, a participants' assembly would be established with a voting system in which the "funding efforts" of donor countries would be given "due weight," such as a "double majority mechanism" requiring a majority both of all participants and of donor countries.⁹³ The details of the system of GEF governance are to be worked out at a conference in Cote d'Ivoire in December 1992. But it is clear that the GEF participants' assembly will not make decisions by simple majority and that any changes would have to have a majority of developed countries to pass.

Nor can the developing countries impose on donor countries a new financial mechanism under the authority of the conference of the parties to the biodiversity

convention that would make decisions by majority vote. There is no provision in the convention for decision-making by majority vote. As noted by the United Kingdom (UK) in signing the biodiversity convention in Rio, the conference of the parties must, according to Article 23, adopt its rules of procedure "by consensus," meaning that they must have the concurrence of all the parties. The UK said it was "possible to argue that decisions on financial issues arising under the convention should ... be subject to consensus so as to avoid the danger of financial obligations being imposed on us beyond what we are prepared to agree."⁹⁴

The requirement for consensus gives the donor countries the power to bargain for amending the convention's financial mechanism to bring it into line with the GEF participants' agreement. The donor countries could insist that decisions regarding the creation of the funding mechanism must be made by consensus in order to force a reconsideration of the provision that the funding mechanism is to be subordinated to the conference of the parties. In short, article 23 provides sufficient safeguards for the United States to sign the agreement without prior renegotiation of the text.

The UK's point about the veto power inherent in the requirement for adopting rules of procedure by consensus was not made until the Rio conference itself -- too late to influence U.S. decision-making on whether or not to sign the convention in Rio. It is unlikely, however, that it would have made any difference in U.S. policy, even if had been made earlier. The State Department remains wary of any policy that would depend on other donor countries joining the United States in a united front in international negotiations.⁹⁵ With the UK already having staked out a public position on the issue, and the time pressure of the Rio conference no longer a factor,

it would appear to be in the obvious self-interest of other donor countries to cooperate with the United States in taking advantage of the requirement for consensus on the rules of procedure in the conference of the parties. The risks to the United States from the financial provisions, therefore, appear to be minimal or non-existent.

Conclusion

The Bush administration's argument that the biodiversity convention signed in Rio failed to protect the intellectual property rights of U.S. companies ignores the main features of the text in question as well as the broader political and economic realities of the issue. The convention does not obligate any contracting party to compel private industry to transfer patented technologies. Nor does it give international legal status to the misuse of compulsory licensing as a means of technology transfer. The convention's text will not materially affect the outcome of the TRIPS and bilateral trade negotiations, which will determine whether or not many countries will provide stronger IPR protection in the future -- unless the United States decides, unnecessarily, to accept the Indian interpretation of the text.

The other problems with the convention cited by the administration in its initial announcement of the decision against signing -- the biotechnology regulation provisions and the financial mechanism -- do not justify the U.S. decision either. The United States would be in a better position to protect the interests of the biotechnology industry against regulatory procedures that would delay product development by being a signatory to the pact than by staying outside it. And the provision on the financial mechanism, which remains to be clarified and spelled out, is rendered harmless by the requirement for adoption of rules of procedure by consensus.

EPA Administrator Reilly has suggested that the solution to the present U.S. predicament is the revision of those paragraphs of the text that allegedly threaten

U.S. interests in the form of a protocol that could be agreed to before the convention itself comes into force. He also has expressed his belief that the parties to the convention will accommodate U.S. concerns by revising the agreement.⁹⁶ But such a policy would be very risky. The effort by Reilly at the Earth Summit to explore, through a Brazilian diplomatic intermediary, the possibility of getting agreement on some changes to the text, was aborted by the White House before any extensive consultations took place.⁹⁷ But even had the effort gone forward, there is no reason to believe that Brazil could have gotten agreement from the Group of 77 to make changes to satisfy the United States. Many developing countries feel that they have already made significant compromises to accommodate U.S. concerns, only to have the resulting agreement be rejected by Washington. Moreover, those countries tend to feel that the convention does not require U.S. adherence to operate successfully. Demanding that they acquiesce in further changes in the text merely to satisfy the United States could invite an embarrassing rebuff. UNEP Executive Director Tolba warned the U.S. State Department in September 1992 that the signatories to the agreement would not accommodate U.S. demands for renegotiation of the convention text.⁹⁸

There is no need for the United States to demand renegotiation of the text of the biodiversity agreement before signing it. U.S. interests would be better served by signing the convention first and then seeking adjustment or clarification, where necessary, through diplomatic efforts. It could work with other developed countries to seek adjustments in the financial provisions in the negotiations on adopting rules of procedure for the conference of the parties.

On the issue of a protocol on biotechnology safety, the United States could make a more persuasive argument as a contracting party participating in the debates in the conference of parties. And on the IPR issue, the United States could best protect the interests of the biotechnology industry by signing the agreement and by stating clearly at the time it signs that it does not accept the view that Article 16 offers any legal support to violations of intellectual property rights in the name of technology transfer.

The U.S. stance on the biodiversity convention underlines a lesson that the United States must learn well in the new world order of the 1990s and beyond: U.S. withdrawal from active participation in regimes for global environmental protection and sustainable development is not only bad for the rest of the world, but bad for the United States. When the United States is tempted to defy the rest of the world and reject a global environmental agreement, it is probably ignoring the considerable opportunities it has to protect its interests through participation in the agreement.

Annex 1: Chronology of Negotiations on a Biological Diversity Convention

1987

June: UNEP Governing Council resolution to form *ad hoc* working group to explore idea of a convention on biological diversity.

1988

November: Meeting of *ad hoc* working group.

1989

May: UNEP Governing Council Resolution to initiate work to negotiate a convention.

July: IUCN draft document presented to *ad hoc* group.

1990

February: Meeting of *ad hoc* working group.

July: Meeting of *ad hoc* working group.

August: UNEP Governing Council reaffirms priority of convention.

November 19-23: First Negotiating Session of the Ad Hoc Working Group of Legal and Technical Experts (AHWG) in Nairobi.

1991

February 25-March 6: Second Negotiating Session of the AHWG in Nairobi.

June 24-July 3: Third Negotiating Session/First Session of Intergovernmental Negotiating Committee for a Convention on Biological Diversity (INC) in Madrid.

September 23-October 3: Fourth Negotiating Session/Second Session of the INC in Nairobi.

November 25-December 4: Fifth Negotiating Session/Third Session of the INC in Geneva.

1992

February 6-15: Sixth Negotiating Session/Fourth Session of the INC in Nairobi.

May 11-21: Seventh Negotiating Session/Fifth Session of the INC in Nairobi.

May 22: Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity in Nairobi.

1. See Roger A. Sedjo, "Property Rights and Protection of Plant Genetic Resources," in Jack R. Kloppenburg, Jr., ed., Seeds and Sovereignty: The Use and Control of Plant Genetic Resources (Durham, N.C.: Duke University Press, 1988), pp. 293-324.
2. William Reilly, "Memorandum to All EPA Employees," July 15, 1992, reprinted in Daily Environment Report, July 29, 1992, p. E2.
3. Letter from Brian M. Boom, Vice-President for Botanical Science, The New York Botanical Garden, to EPA Administrator William Reilly, July 22, 1992.
4. Walter V. Reid, "The High Price of Leadership," Wall Street Journal, forthcoming.
5. The Washington Post, June 7, 1992, p. A28.
6. "The President's Trip to Rio," The Washington Post, June 12, 1992, p. A22.
7. See "Excerpts from Speech by Bush on 'Action Plan'", New York Times, June 13, 1992.
8. Telephone interview with member of the U.S. delegation to the biodiversity convention negotiations, August 4, 1992.
9. This shift in view is described in "Report on the UNEP Ad Hoc Working Group of Experts on Biological Diversity," by Eleanor Savage, U.S. Department of State, March 12, 1990. The report describes the meeting that took place in Geneva, February 19-23, 1990.
10. Genetic Resources Action International, "Overcoming the Obstacles to a Global Agreement on Conservation and Sustainable Use of Biodiversity," Briefing on Biodiversity no. 2, Barcelona, February 1992, p. 6; David Cooper, "Towards a New Convention," Ecoforum (Nairobi) 14, November 1990, pp. 1, 3.
11. Interview with member of the U.S. delegation to the biodiversity convention negotiations, July 8, 1992.
12. Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity, First Session, Nairobi, November 19-23, 1990, "Elements for Possible Inclusion in a Global Framework Legal Instrument on Biological Diversity," UNEP/Bio.Div/WG.2/1/3, September 24, 1990, VII (a) and (B), pp. 15-16.

13. Richard Benedick, Ozone Diplomacy (Cambridge, Mass. and London: Harvard University Press, 1991), pp. 188-189.
14. Richard C. Wilder, "Note: Negotiations Concerning the Convention on Biological Diversity: Implications for Intellectual Property Rights," unpublished, no date. Wilder is with the law firm of Finnegan, Henderson, Garbow, Garrett and Dunner, Washington, D.C.
15. Statement by Deputy Assistant Secretary of State Jane Becker to UNCED Preparatory Committee 2 regarding Technology Transfer, August 17, 1990; "Statement by the U.S. Delegation on Technology Cooperation," UNCED Preparatory Committee 3, August-September 1991, Paper 53.
16. Russ Hoyle, "Deep-Sixing Biodiversity," Biotechnology, vol. 10, August 1992, p. 848.
17. Harvey E. Bale, Jr., "Uruguay Round Negotiations on Intellectual Property: A Step Forward?" Remarks to the Third Annual Conference on International Trade and Law, Washington College of Law of The American University, October 3, 1991, p. 21.
18. Wells, "Intellectual Property and Developing Countries," p. 7; Lenore Sek, "Trade Negotiations: The Uruguay Round," CRS Issue Brief, August 6, 1990, p. 6; Chakravarthi Raghavan, Recolonization: GATT, the Uruguay Round and the Third World (London, New Jersey and Penang, Malaysia: Zed Books and Third World Network, 1990), pp. 120-132.
19. Louis T. Wells, Jr., "Intellectual Property and Developing Countries," Policy Focus (Washington, D.C.), no. 5, 1989, pp. 2-3.
20. For a survey of the literature on this issue, see Carlos Primo Braga, "The Developing Country Case for and against Intellectual Property Protection," in Wolfgang E. Siebeck, ed., Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature, World Bank Discussion Papers no. 112 (Washington, D.C.: The World Bank, 1990), pp. 69-87.
21. Wells, "Intellectual Property and Developing Countries," p. 7.
22. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, December 20, 1991.
23. Interview with member of the U.S. delegation to the biodiversity convention negotiations, July 8, 1992.
24. Telephone interview with member of the U.S. delegation, August 4, 1992.

25. Interview with member of the U.S. delegation to the biodiversity convention negotiations, July 8, 1992.
26. International Environment Reporter, May 20, 1992.
27. Telephone interview with member of the U.S. delegation to the biodiversity convention negotiations, August 4, 1992. Some developed country delegations, however, told the U.S. delegation privately that they would sign the agreement but might not ratify it.
28. Telephone interview with member of the U.S. delegation to the biodiversity convention negotiations, August 4, 1992.
29. Interview with member of the U.S. delegation to the biodiversity convention negotiations, August 4, 1992.
30. "Declaration of the United States of America" at the Diplomatic Conference for the Adoption of the Convention on Biodiversity, May 22, 1992.
31. Ibid.
32. Interview with Bohlen, August 25, 1992.
33. These officials argued that Article 8 (f), which provided that each Contracting Party shall "rehabilitate and restore degraded ecosystems and promote recovery of threatened species...", went beyond what is practical or appropriate, since it does not specify that the ecosystem must be severely degraded. Despite the "chapeau" for the Article, which qualifies the obligation with the phrase "as far as possible and as appropriate," the Interior Department feared that the text of Article 8 (f) might be used by environmentalists to argue for new U.S. conservation laws, particularly to manage old-growth forests so as to save the spotted owl. Telephone interviews with four officials involved in interagency meetings on the biodiversity convention, all of whom spoke on background.
34. Interview with Bohlen, August 25, 1992.
35. For further discussion of the politics underlying the Bush administration's decision not to sign the agreement, see Russ Hoyle, "Deep-sixing Biodiversity," Biotechnology, vol 10, August 1992, pp. 848-849.
36. Graeme Browning, "Biodiversity Battle," National Journal, August 8, 1992, p. 1828.
37. Interview with Val Giddings, U.S. Department of Agriculture, August 18, 1992. See also U.S. Congress, Office of Technology Assessment, Biotechnology in a Global Economy (Washington, D.C.: U.S. Government Printing Office, 1991), pp. 19-21.

38. Private communication from Tom Bombelles, Pharmaceutical Manufacturers Association, August 3, 1992.
39. Interview with official of the Industrial Biotechnology Association, July 21, 1992.
40. Ibid. As an example of what it feared, the IBA cited the success of Green Party delegates to the European Parliament, who have opposed patenting of biological inventions, to get an opinion from the legal affairs committee on whether a draft European Community directive on patenting such inventions would be inconsistent with the biodiversity convention's provisions on technology transfer. Biotechnology Newswatch (New York), August 17, 1992, p. 14. One problem with the opponents' efforts to derail the draft directive by this means, however, was that the convention text takes no position on patenting biological inventions
41. Harvey E. Bale, Jr. "New GATT Draft Text is a Potential Step Backwards for Intellectual Property Rights," Washington Legal Foundation, Legal Backgrounder, Vol. 7, no. 9, March 6, 1992, p. 3.
42. Letter from IBA President Richard Godown to Deputy Assistant Trade Representative Emory Simon, March 30, 1992.
43. IBA Memorandum to Eleanor Savage, U.S. Department of State, April 30, 1992.
44. Congressional Record, June 17, 1992, pp. S8375-8376; letter from William E. Small, Executive Director of Association of Biotechnology Companies, to President Bush, June 10, 1992.
45. Telephone interview with a biotechnology industry official, July 30, 1992.
46. Galina Vroman, "Europe Drug Firms Say Bio-Diversity Pact Harmless," Reuter dispatch, London, June 22, 1992
47. "Industry Officials Call Biodiversity Treaty Vague, See Little Impact on Competitiveness, Other Areas," International Environment Reporter, July 29, 1992, p. 512.
48. "Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods," MTN. TNC/W/FA, in Draft Final Act, p. 58.
49. See "Uruguay Round Negotiating Group on Trade-Related Intellectual Property Rights, Including Trade in Counterfeit Goods: Submission by the United States," MTN.GNG/NGII/W/7, May 29, 1987; "Draft Agreement on the Trade-Related Aspects of Intellectual Property Rights," MTN.GNG/NG11/W/70, May 11, 1990; "Suggestion by the United States for Achieving the Negotiating Objective," MTN.GNG/NG11/W/14/rev. 1, October 17,

1988. All documents of the Multilateral Trade Negotiations, The Uruguay Round.

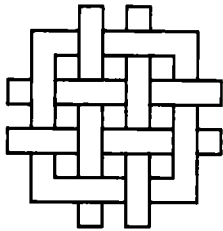
50. Telephone interview with official of the Office of the U.S. Trade Representative (USTR), September 23, 1992.
51. Copies of the "Model IPR Agreement" and the IPR agreement between the United States and Sri Lanka were provided by the USTR.
52. Telephone interview with Carmen Suro-Bredie, Assistant U.S. Trade Representative for Intellectual Property and the Environment, September 17, 1992.
53. See Wells, "Intellectual Property and Developing Countries," p. 5.
54. Interview with member of the U.S. delegation to the biodiversity convention negotiations, Rio de Janeiro, June 8, 1992.
55. Richard Godown, President of the IBA has said that this language would "tie the hands of negotiators: when they sat down to make a deal there would be an enormous slub of mandatory contract language ... it would result in a bum deal for food and agricultural companies." Quoted in Steve Usdin, "Biotechnology Industry Played Key Role in U.S. Refusal to Sign BioConvention," Biodiversity, vol. 8, no. 2, 1992, p. 9. This comment appears to ignore the key conditional phrase "where mutually agreed."
56. Congressional Record, June 17, 1992, pp. S8375-8376.
57. Telephone interview, July 28, 1992.
58. Chakravarthi Raghavan, Recolonization, pp. 126-127.
59. That document calls on governments to "promote, facilitate, and finance, as appropriate, the access to and transfer of environmentally sound technologies and corresponding know-how. ..." One of the means agreed upon to accomplish that objective is the purchase of patents and licenses "on commercial terms ... taking into account the need to protect intellectual property rights." United Nations Conference on Environment and Development, Agenda 21, Chapter 34, A/CONF.151/4 (Part IV), Paragraph 34.18 (i) and (iii), pp. 6-7.
60. Draft Final Act, Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Article 66, p. 87.
61. Telephone interview with member of the U.S. delegation to the biodiversity convention negotiations, August 26, 1992.

62. Ibid.
63. India intended in drafting paragraph 4 to make the private sector abide by all of the obligations assumed by states in the previous three paragraphs. But because the parallelism in this tortured sentence is between the first verb phrase ("shall take ... measures" and the last verb phrase (shall abide by ... obligations"), the paragraph actually provides that the contracting parties, rather than the private sector must abide by the obligations in the first three paragraphs -- including the obligation that the terms of technology transfer must provide "adequate and effective protection" for IPR. Interview with member of U.S. delegation to the biodiversity negotiations, August 26, 1992.
64. Fifth Revised Draft Convention on Biological Diversity, UNEP/Bio.Div/N7-INC.5/2, February 20, 1992, Article 17.3, p. 18. Developing countries were dissatisfied with the formula that was adopted. The head of the Malaysian delegation to the negotiations, Ambassador Ting Wen Lian, declared at the Earth Summit that her government was still considering whether it would sign the convention, because it did not assert "special and concessional rights" of developing countries to patents." "South wants a price for biodiversity," Earth Summit Times, June 2, 1992, p. 11.
65. Briefing for U.S. House of Representatives delegation to the Rio Conference by members of the U.S. delegation to the biodiversity negotiations, June 5, 1992; Interview with member of the U.S. delegation to the biodiversity negotiations, July 8, 1992.
66. Interview with member of U.S. delegation to the biodiversity negotiations, Rio de Janeiro, June 8, 1992; appendix to letter to E. U. Curtis Bohlen from Richard Wilder, June 2, 1992, p. 3. Wilder, who is with the law firm of Finnegan, Henderson, Farabow, Garrett and Dunner in Washington, D.C., presents what he admits is a "worst case" interpretation of the convention regarding intellectual property rights.
67. For the Indian formulation, see "Third Revised Draft Convention on Biological Diversity," UNEP/Bio.Div/N5-INC.3/2, October 9, 1991, Article 15.4, p. 18.
68. Ibid. Article 15.1, p. 17.
69. "United States of America proposed changes to the Fifth Revised Draft Convention on Biological Diversity," UNEP/Bio.Div/N7-INC.5/CRP.3, May 11, 1992, p. 2.

70. Ibid., note 10. The Nordic countries had joined the United States, Japan, the EC, and Switzerland in advancing proposals on intellectual property rights protection in the GATT negotiations. See Raghavan, Recolonization, p. 121.
71. "Report of the Intergovernmental Negotiating Committee for a Convention on Biological Diversity on the Work of its Seventh Negotiating Session/Fifth Session of the INC," UNEP/Bio.Div/N7-INC.5/4, May 27, 1992, p. 35.
72. Telephone interview, June 26, 1992.
73. Sheila Page with Michael Davenport and Adrian Hewitt, The GATT Uruguay Round: Effects on Developing Countries (London: Overseas Development Institute, 1992), p. 47.
74. Draft Final Act (cover page).
75. See Stuart K. Tucker and Sylvia Saborio, Countdown to Brussels: Developing Countries and the Uruguay Round (Washington, D.C.: Overseas Development Council, 1991), pp. 5-6.
76. "Draft Final Act," Agreement on Textiles and Clothing, Article 8C, p. 04.
77. See William R. Cline, The Future of World Trade in Textiles and Apparel (Washington, D.C.: Institute for International Economics, 1990), p. 143.
78. Pratap Chatterjee, "GATT Countdown Begins," Development Forum (New York), September-October 1990, p. 14. For a carefully documented estimate that the total gain to developing countries of liberalized trade in food would be \$33 billion annually, see Kym Anderson, "Effects on the environment and welfare of liberalizing world trade: the cases of coal and food," in Kym Anderson and Richard Blackhurst, eds., The Greening of World Trade Issues (Ann Arbor: The University of Michigan Press, 1992), Figure 8.2, p. 151.
79. Raghavan, Recolonization, p. 285,
80. Bale, "New GATT Draft Text...", p. 1; Raghavan, Recolonization, pp. 271-273; Primo Braga, "The Developing Country Case for and against Intellectual Property Protection," p. 84.
81. Letter to President Bush, June 8, 1992.
82. It should be noted, however, that the international regulatory issue was much less a concern for the biotechnology industry than IPR protection: the IBA's letter to the U.S. delegation prior to the final round of negotiation did not even refer to the issue of regulation as a significant concern. IBA

- memorandum to Eleanor Savage, U.S. Department of State, April 30, 1992.
83. These differences were outlined by Eleanor Savage, head of the U.S. delegation to the biodiversity negotiations, in conversations during UNCED Preparatory Meetings in Geneva and New York in 1991 and 1992, in which the same issue had to be negotiated out.
 84. "Fifth Revised Draft. ..." Article 20.3, p. 20.
 85. Telephone interview with Val Giddings, U.S. Department of Agriculture, who negotiated on the biotechnology provisions of the convention for the U.S. delegation, August 18, 1992.
 86. Ibid.
 87. Telephone interview with IBA official, July 30, 1992; Telephone interview with member of the U.S. delegation to the biodiversity convention negotiations, August 17, 1992.
 88. Telephone interview with IBA official, July 30, 1992.
 89. Global Environment Facility, The Pilot Phase and Beyond, Working Paper Series, no. 1, p. 8.
 90. See "UNCED's Crumbling Pillar: The Biodiversity Convention," Global Environmental Change Report, Vol. IV, no. 11, June 11, 1992, p. 2.
 91. "Declaration Made After Adoption of Agreed Text of the Biodiversity Convention, Nairobi, 22 May 1992. To be Included in the Final Act."
 92. "Declaration by the United Kingdom of Great Britain and Northern Ireland at the Time of Signing the Convention on Biological Diversity," June 12, 1992. Document provided by the British Embassy, Washington, D.C.
 93. Global Environment Facility, The Pilot Phase and Beyond, p. 7.
 94. "Note to Editors" appended to UK Department of Environment News Release no. 405, "Convention on Biological Diversity, June 9, 1992.
 95. Interview with Bohlen, August 25, 1992.
 96. Reilly suggested the possibility of a protocol to the biodiversity convention, to be negotiated prior to the convention itself coming into force, at a meeting with non-governmental organizations in Rio, June 10, 1992, attended by the author. His statement about revision to accommodate U.S. concerns is in his "Memorandum to all EPA Employees," in Daily Environment Report, July 29, 1992, p. E3.

97. For an account of Reilly's attempted probe, see The New York Times, June 4, 1992. The text of the revisions proposed by Reilly, without authorization from the White House are found in an attachment to the cable from William K. Reilly to Clayton Yeutter, June 3, 1992 (Declassified by Reilly on June 4 and made available to the press in Rio).
98. Remarks by Tolba at an informal meeting with NGOs in Washington, D.C., September 21, 1992.



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*File w/ UNCED
Staff - Biodiversity*

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Dear Friend:

I thought you would find of interest Walt Reid's Op-ed, *Bush Biodiversity Policy Risks Dangerous Side Effects*, which appeared in the Wall Street Journal on October 8.

The article develops the idea that by creating a system of regulated access to genetic resources the Biodiversity Convention will serve both the interests of industry and the goal of conservation.

Your comments and reaction would be welcomed.

Sincerely,

Donna Wise
Vice President, Policy Affairs

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Bush Biodiversity Policy Risks Dangerous Side Effects

President Bush has spent much of the current campaign drawing a distinction between being pro-business and pro-environment. On behalf of U.S. business, the administration stood alone in opposition to the Biodiversity Convention at the Earth Summit. But business may lose more than it gains from that decision. Other countries are likely to retaliate by sharply restricting U.S. access to key raw materials: the genetic and biochemical resources used in agriculture, medicine and industry.

The genes and chemicals found in nature are important resources for the American economy. All of the major crops grown in the U.S. originated in other countries, and all depend on infusions of

free flow of genetic resources will be erected. The Biodiversity Convention didn't anticipate the prospect of a trade moratorium, but other international agreements have. The 1987 Montreal Protocol on Substances That Deplete the Ozone Layer includes an article banning all trade of ozone-depleting chemicals with nonsignatory nations. Vicente Sanchez, chair of the International Negotiating Committee for the Biodiversity Convention, has noted that after the convention enters into force, it can be amended to include provisions such as those in the Montreal Protocol.

Individual countries could be even tougher. One by one, they could bar biodiversity prospecting by companies or individual citizens of nations not party to the convention. They could refuse to export to nonsigners genetic material or chemical extracts used in the search for pharmaceuticals. Or, they could simply require that corporations and public agencies meet the terms of the convention in order to gain access to the biodiversity in the country.

Soon after the U.S. decision was announced, Venezuela suspended collaboration with the U.S. biodiversity collectors, and seven Central American presidents signed a resolution encouraging the enactment of laws regulating access to genetic resources. Similar legislation is now being considered by Costa Rica's National Assembly. Other countries, such as Chile and Ethiopia, have already strictly regulated the export of genetic resources. When these countries are faced with requests for collecting permits, preference will be given to signatory countries.

Multinational companies will no doubt consider an end-run around such tactics, collecting material through European subsidiaries and then developing and patenting the final product in the U.S. But the negotiators were alert to this possibility. The convention stipulates that access to

genetic resources will be on "mutually agreed terms." Developing countries are sure to stipulate that genetic resources collected in the country cannot be sold or transferred to nonsignatory nations.

The most obvious casualty will be the drug-screening programs of the U.S. National Institutes of Health. The U.S. will see no more painkillers like Epibatidine, a chemical found in Ecuadorean frogs and a product of NIH work. And the \$8 million National Cancer Institute drug-screening program—which recently located anti-HIV activity in an extract from a vine in Cameroon—will be dealt a major blow.

The U.S. Agriculture Department's in-

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ternational plant-collecting activities will also be brought up short. Breeders of our major crops will be forced to search ever-shrinking pools of diversity for new disease-resistant and yield-improving genes. And how will the U.S. pharmaceutical and biotechnology industries compete with European and Japanese firms that will have far greater access to the resource base of biodiversity?

The supreme irony of the U.S. position is that the public and private institutions that the administration thought it was defending were already meeting the convention's requirements. The National Cancer Institute's draft policy on collecting activities, for example, states that "NCI wishes to promote the conservation of biological diversity, and recognizes the need to compensate source country organizations and peoples in the event of commercialization of a drug developed from an

organism collected within their country." Similarly, in late 1991 Merck agreed to provide Costa Rica with \$1 million and royalties on any commercialized products in return for access to its biodiversity.

The U.S. biotechnology and pharmaceutical industries have faithfully supported the decision not to sign, though the decision apparently took them by surprise. The Pharmaceutical Manufacturers Association, for example, did not even discuss the convention until one week after the U.S. administration said no.

The administration has argued that the convention would force companies to give up patented technologies and trade secrets. Yet, Article 16 states: "In the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights." Indeed, this statement was viewed by the negotiators as a major concession to U.S. concerns.

Industry in Europe—home of six of the top 10 pharmaceutical firms—has no problem at all with the biodiversity convention. Glaxo Pharmaceuticals' new policy is to share profits with countries in which rare plant products are discovered. And Britain's BioIndustry Association officially lauded the treaty for recognizing the importance of maintaining genetic diversity as a source for products in the future.

In short, there is every reason to believe that the U.S. biotechnology industry and American jobs—as well as the planet's rich natural endowment—will be best served by signing, not shunning, the Biodiversity Convention. Our president should take another look.

Mr. Reid, a vice president of World Resources Institute, a policy research center in Washington, D.C., is co-author of "Global Biodiversity Strategy" (WRI, 1992).

Counterpoint

By Walter V. Reid

new genes from those countries. Some 25% of all U.S. drugs are still derived from natural products, and recent advances in biotechnology have enhanced pharmaceutical companies' interest in screening plants and animals for new drugs. Taxol, derived from the Pacific yew tree, is the most promising cancer drug discovered in the past 15 years. Overall, more than 200 companies and research institutions world-wide are scouring the wealth of plant and animal species for new drugs.

The genetic resources at stake will disappear rapidly if countries have no economic incentive to conserve them. The Biodiversity Convention proposes a simple solution: Countries and companies should pay for the use of the resource. A chemical company wouldn't expect to obtain oil free of charge—shouldn't the biotechnology industry pay for its raw materials as well?

The U.S. said "no." And now there is good reason to think that barriers to the