



## ICNP 3 HIGHLIGHTS: WEDNESDAY, 26 FEBRUARY 2014

Plenary addressed model contractual clauses, codes of conduct, guidelines and standards; and discussed CRPs on monitoring and reporting, and capacity building. The contact group on compliance met throughout the day and in the evening. An informal information session on the budget took place during lunchtime.

### MODEL CONTRACTUAL CLAUSES, CODES OF CONDUCT, GUIDELINES AND STANDARDS

Delegates heard presentations from panelists, followed by a question and answer session. Rodrigo Gonzales Videla, Argentina, described Argentina's efforts in regulating ABS, including the 2010 guidelines for import, export and registration of activities relating to genetic resources and benefit-sharing. China Williams, Royal Botanic Gardens, Kew, UK, said using model agreements and clauses introduces some predictability; however, monitoring compliance is also needed. She highlighted the challenge of remaining flexible based on experience with use, and the changing legal framework.

Geoff Burton, United Nations University Institute of Advanced Studies (UNU-IAS), referred delegates to the UNU-IAS survey of model clauses (UNEP/CBD/ICNP/3/INF/2) and outcomes of an informal meeting for the implementation of Articles 19 and 20, organized by Japan, the CBD Secretariat, and UNU-IAS (UNEP/CBD/ICNP/3/INF/3). He said the survey found that most permits involve non-commercial use, and that more clarity is needed about "change of intent" and "change of use." He noted the ABS Clearing-House and the WIPO databases should be mutually supportive.

AUSTRALIA asked about challenges for smaller institutions. Williams noted constraints on staff time and capacity for dealing with agreements. Executive Secretary Dias suggested networks can be helpful. CANADA asked if the models contained an "if/then" clause covering change of intent. Burton said many models stipulate that material is provided for non-commercial purposes and will require PIC and MAT, if commercialized. He noted inconsistency occurs in identifying the trigger point of commercialization, which may be a change of intent, change of action, or security of IPR, saying more work is needed on such transitions.

The BAHAMAS asked what constitutes commercial versus non-commercial use, and how TK is dealt with. Williams replied that "change of use" sometimes occurs when material is transferred, but intent also matters. Videla highlighted Argentina's efforts to consult with indigenous peoples, noting the challenge of building trust. Burton added that "commercialization" can mean producing a profit, or producing

an economic return (such as in the case of vaccines sold for non-profit purposes), arguing that providers of genetic material should still benefit in the latter case.

Responding to a question by the EU, Burton said that most codes and guidelines surveyed were developed by users. He noted an emerging gray area where guidelines are becoming *de facto* regulations. Dias encouraged considering existing models and relevant initiatives from ILCs.

TIMOR-LESTE asked about monitoring of MAT, and Burton advised that a feedback mechanism between the provider and user is needed, such as a statement of provenance together with materials.

CHINA asked how Kew Gardens are sharing benefits with local communities. Williams replied that they work through counterpart institutions, and that most benefits they share are non-monetary, including information sharing, technology transfer, training and capacity building. The THIRD WORLD NETWORK stressed that the work of researchers in most developed countries is subject to IPRs that apply when their outputs are commercialized, even many years later. Burton referred to Article 8(a) on taking into account change of intent and use.

The Secretariat then introduced the relevant document (UNEP/CBD/ICNP/3/10). CANADA supported the proposed recommendations, including that the COP/MOP take stock of the use of model contractual clauses and other voluntary instruments four years following entry into force. The EU, ARGENTINA and BRAZIL called for considering them at later COP/MOPs, noting that more practical experience is needed.

The EU highlighted the importance of such instruments for ensuring compliance of the non-commercial research sector, and said they should be developed by users themselves and stakeholders implementing them. SWITZERLAND said that such tools may add value if they are consistent with the Protocol, relevant instruments and national regulations, but could lead to cases of non-compliance if they are not up to date, consistent and flexible; and, with the AFRICAN UNION, noted they should be developed in close collaboration between users and providers.

The FAO reported on the process agreed upon by the CGRFA for the development of voluntary draft elements to facilitate domestic implementation of ABS for different sub-sectors of genetic resources for food and agriculture, taking into account relevant international ABS instruments; and the EU requested inserting reference to this process in the recommendations. The IIFB requested reference to the ongoing work of the Working Group on Article 8(j) on guidelines for tasks 7, 10 and 12 of the work programme on Article 8(j) (prior informed approval by ILCs for access to, benefit-sharing from, and reporting and prevention of unlawful appropriation of, TK). WIPO drew



attention to its development of relevant tools, particularly regarding IPR considerations, and provided an update on the IGC negotiations on intellectual property and genetic resources.

### MONITORING AND REPORTING

Delegates adopted a CRP, amending it to, *inter alia*, request the Secretariat to consolidate information contained in the interim national reports and published in the ABS Clearing-House for COP/MOP 3 consideration, as a contribution to the review of the effectiveness of the Protocol (Article 31).

### CAPACITY BUILDING

Delegates considered a CRP, including draft recommendations, a strategic framework on capacity building, and terms of reference for an informal advisory committee.

CANADA, opposed by the LMMC and the AFRICAN GROUP, proposed deleting a reference to the development of a global programme to assist in the implementation of the strategic framework and contribute to the implementation of the Strategic Plan. The text was bracketed pending informal consultations.

On establishing an informal advisory committee, SWITZERLAND, supported by CANADA, proposed that the committee be *ad hoc*, and provide advice to COP/MOP 2. The LMMC, the AFRICAN GROUP and ARGENTINA preferred to extend its mandate beyond COP/MOP 2, calling for retaining text on the committee providing advice on matters related to the implementation of the strategic framework. The EU disagreed, saying this could be read as establishing a subsidiary body, and the text was bracketed pending informal consultations.

COLOMBIA suggested replacing mention of the ABS Capacity Development Initiative in the preamble with a general mention of ABS activities “such as those led by the CBD Secretariat.” After discussion, Namibia for the AFRICAN GROUP asked to refer to the ABS Capacity Development Initiative “*inter alia*,” noting that the African Group has received substantial support from that initiative.

The EU requested: reference to the private sector among those providing resources for, and information on, capacity-building initiatives; and encouraging developing country parties to incorporate capacity-building needs and priorities into their national biodiversity strategies and action plans. Delegates agreed to text on ensuring that information on capacity-building needs can be accessed from all platforms under the Convention.

On the development of tools to assist parties and ILCs assess their capacity-building needs, ARGENTINA, MALAYSIA and SOUTH AFRICA preferred requesting the Secretariat to undertake this role, while the EU preferred text on ‘encouraging the development of tools,’ expressing concern about staff capacity and funding needs. ANTIGUA AND BARBUDA proposed, and delegates agreed, to ask the Secretariat to compile information on existing tools and report to COP/MOP 2 on the need for new tools.

Delegates also considered the draft strategic framework, including appendices on measures requiring capacity building to implement the Protocol and practical capacity-building activities. In a key area on capacity for development and implementation of domestic ABS measures, the AFRICAN GROUP proposed including an item on developing procedures for granting or refusing PIC. CANADA suggested that developing minimum requirements for MAT to secure fair and equitable benefit-sharing from TK utilization should be “as appropriate.”

The AFRICAN GROUP proposed that capacity regarding developing mechanisms to monitor the utilization of genetic resources, should extend to tracking them, including though the designation of checkpoints after they have left the jurisdiction of the provider country. The issue remained outstanding, pending consultations.

### COMPLIANCE

The compliance contact group was co-chaired by Jimena Nieto (Colombia) and Kaspar Sollberger (Switzerland). Participants discussed including ILC representatives in a

proposed 15-member compliance committee, with many agreeing that each region may nominate an ILC representative as one of three members. Others expressed concern about limiting the number of ILC representatives as committee members, or about the proposal to limit them to observers. The text remained bracketed.

Participants then debated at length whether committee members should serve “in their personal capacity”, “as representatives of parties” or “in the best interest of the Protocol.” One participant suggested, and many supported, the use of the formulation under the Biosafety Protocol whereby members work “objectively and in a personal capacity.” Delegates eventually agreed that committee members serve “in the best interest of the Protocol and in their individual expert capacity.”

Participants agreed that committee members would serve four-year terms, and not more than two consecutive terms. They also agreed on holding meetings, subject to the availability of funding.

Delegates then discussed the term of the rotating Chair of the committee, eventually deciding that it will be agreed in the committee’s rules of procedure. On the committee’s decision-making, participants discussed whether two-thirds of members should constitute a quorum, and whether the committee, having exhausted efforts to reach consensus, should decide by two-thirds or three-quarters majority of members present and voting, leaving options in brackets.

In the afternoon, participants discussed and eventually agreed that the compliance committee meetings be open, but when the committee is dealing with individual cases of parties whose compliance is under consideration, the meetings be closed to the public, unless the concerned party agrees otherwise. Delegates also debated whether only committee members would be allowed to participate in the deliberations of the committee, eventually deciding to leave the question to future deliberations on the committee’s rules of procedure.

Delegates then considered the functions of the committee. On the type of information that the committee should consider, some participants pointed to the need to specify that the committee will consider information submitted to it, and others preferred a broader formulation to allow it to consider information from the Clearing-House and other sources, particularly when national reports have not been submitted. One participant proposed not to pre-empt discussion of triggers, addressed in a later section of the draft. Discussions continued in the evening.

### IN THE CORRIDORS

The view of skiers executing expert telemark turns, visible through the tall glass windows of the Alpensia Convention Centre, provided a welcome relief to delegates engaged in a balancing act of their own in the compliance contact group on Wednesday. Working through heavily bracketed text, delegates proceeded at snail pace on key aspects, including the make-up of a future compliance committee. Those hoping for innovative procedures also to accommodate the needs of ILCs were somewhat disappointed to witness participants generally choosing well-trodden options to preserve parties’ comfort zone.

Meanwhile, in plenary, delegates completed a first reading of draft recommendations on monitoring and reporting, and capacity building. Many expressed satisfaction at the pace of proceedings and commended the panel presentations on model clauses and other voluntary instruments. However, difficulty over establishment of a global programme and an advisory committee to assist in implementation of the strategic framework on capacity building served as a reminder that many bridges still need to be built through challenging sections, jokes about “slippery slopes” notwithstanding.