

WORKING GROUP ON ARTICLE 8(J) HIGHLIGHTS: WEDNESDAY, 4 NOVEMBER

Delegates met in plenary in the afternoon. The contact group on the international ABS regime met throughout the day, while the contact group on the work programme convened in the afternoon and evening.

PLENARY

Delegates heard reports from the contact groups, with Ethical Code Contact Group Co-Chair Chung noting that references to PIC and “traditionally occupied lands and waters” remained in brackets. WG Co-Chair Breier invited delegates to undertake informal consultations on these issues, taking into account that some bracketed text had already been agreed by the COP.

MECHANISMS FOR PARTICIPATION: Delegates discussed a draft recommendation on mechanisms for participation (UNEP/CBD/WG8J/6/CRP.1). Delegates agreed to encourage capacity-building efforts “in anticipation of the adoption of an international regime on ABS and post-2010 implementation.”

On development of mechanisms for participation, CANADA proposed inviting not only parties and the Secretariat, but also relevant stakeholders to develop electronic and traditional means of community education and public-awareness materials. CANADA also proposed clarifying that proposed Article 8(j) national contact points could support the CBD national focal points, facilitate communication with indigenous and local communities and promote effective development and implementation of the Article 8(j) work programme. GUATEMALA emphasized that electronic and other means of communication should use indigenous languages.

On participation of indigenous and local communities in CBD work, CANADA proposed recommending parties make efforts to include indigenous and local organizations who are mandated by their respective communities to represent them in CBD processes and provide them with opportunities to effectively participate.

CONTACT GROUP ON ABS

TRADITIONAL KNOWLEDGE: ABS Contact Group Co-Chair Alexander proposed discussing each of the questions addressed by the expert group on traditional knowledge.

Relationship between access and use of genetic resources and associated traditional knowledge: One party suggested that traditional knowledge should be dealt with separately in the international regime and not be included in the elements on ABS. Certain delegates argued that the international ABS regime needs to reflect the integral connectedness of genetic resources and traditional knowledge. Another party stressed the need for

a direct connection between genetic resources and traditional knowledge for associated traditional knowledge to be covered. One party highlighted the expert group’s conclusion about lack of binding obligations on States regarding traditional knowledge. Another party stressed that traditional knowledge should be integrated throughout the regime. One delegate stressed that use of traditional knowledge associated with genetic resources triggers the right to benefit-sharing.

An indigenous representative stressed the difference between awareness-raising workshops and national consultation and PIC requirements. A regional group called for a two-tiered approach to PIC, where national PIC is provided by the competent national authority subject to PIC of indigenous and local communities to be provided by a competent local authority. Some highlighted the need to coordinate national PIC with the PIC of indigenous and local communities. Several stressed the role of competent national authorities in promoting compliance with PIC.

One party pointed to consensus on not restricting exchange of genetic resources between indigenous and local communities for traditional purposes, and for the international regime to focus on benefit-sharing from the use of genetic resources and associated traditional knowledge. A participant pointed to the expert group’s recognition of indigenous peoples as property right holders of traditional knowledge.

Some delegates stressed that traditional knowledge in the public domain should also be part of the international ABS regime. A regional group argued that the international regime should cover also non-documented traditional knowledge. One party endorsed the expert group’s conclusions on: avoiding the distinction between commercial and non-commercial use; providing benefit-sharing for *ex situ* access to traditional knowledge; and, supported by others, the distinction between public domain and public availability of traditional knowledge with reference to the applicability of benefit-sharing obligations.

Definition of traditional knowledge associated with genetic resources in the ABS context: One delegate suggested a definition that includes indigenous and local communities’ knowledge innovations and practices that embody lifestyles relevant for the conservation and use of biological resources and that are not in the public domain.

Another delegate called attention to the WIPO working definition of traditional knowledge, arguing that a new definition within the international ABS regime may not be necessary. Another party noted that WIPO has been unsuccessful in finding a definition, while several delegates supported drawing a definition from the common characteristics of traditional knowledge, as proposed by the expert group.

Community-level procedures and customary laws: Many delegates supported the view that the international ABS regime should provide basic principles to ensure respect for customary laws and community-level procedures. A regional group supported recognition of defined community-level structures and authorities and the development of community protocols, as well as the creation of an ombudsperson to take action on behalf of indigenous and local communities.

A few stressed the need to allow for flexibility in the international regime due to the wide diversity of community-level procedures and national regulations, especially approaches to ownership of genetic resources. Some parties supported recognizing the diversity and evolving nature of community-level procedures regarding access to biological resources, with one party also supporting recognition of communities' rights to traditional knowledge associated with genetic resources and PIC. Several delegates requested inclusion of a PIC standard in relation to national decision-making processes.

Parties stressed that the legal concept of genetic resources is still developing. Some parties and indigenous representatives highlighted the need to address ownership of documented traditional knowledge, noting that indigenous and local communities should retain it. A participant highlighted that public availability of traditional knowledge in databases does not imply free access.

Several supported community-level capacity building to develop procedures for access to traditional knowledge, with one noting the need for using local languages and dialects. Others supported capacity-building provisions based on the CBD Action Plan on Capacity Building on ABS. Developing and certain developed country delegates called for respect for customary laws and community protocols.

A party highlighted the role of competent national authorities to inform applicants about ABS procedures, and supported developing a matrix to clarify the various levels of authority for obtaining access to genetic resource and traditional knowledge. Another party underscored the lack of information regarding access procedures is preventing potential users from engaging in bioprospecting activities.

PIC: Some parties agreed that the international regime could require national laws to build upon the Bonn Guidelines. Stressing the need for flexibility in national regulation, a regional organization stressed that even a community PIC requirement under the international regime could not override national regulations with different standards. Noting that CBD Article 15 only refers to state PIC, one party stated that there should be an equally mandatory obligation regarding community PIC as set out in previous COP decisions and the Bonn Guidelines. A regional group and others considered Article 8(j) as the basis for a requirement that PIC be obtained from indigenous and local communities when their traditional knowledge is accessed. Another party argued that access should be based on MAT and opposed any reference to community PIC because it is not referred to in Article 8(j).

Several parties, a regional group and indigenous representatives argued there was a clear basis in international law for PIC of indigenous and local communities, which should be reflected in the international regime. Indigenous representatives and several parties supported international human rights instruments and the Bonn Guidelines as the basis for PIC. One party pointed to emerging international customary law on indigenous PIC as reflected in many national ABS regulations. Another party opposed any requirement for PIC and MAT related to traditional knowledge under the international regime. A party opposed forwarding any "majority consensus" on this issue from this meeting to the ABS Working Group, suggesting instead highlighting diverging views. Several parties supported the need

for benefit-sharing arrangements for *ex situ* access to traditional knowledge, as well as the expert group's list of desirable elements for PIC.

Transboundary traditional knowledge: Some parties suggested differentiating national from regional situations. Several parties supported: developing community protocols for PIC on transboundary traditional knowledge; establishing trust funds for benefit-sharing from transboundary traditional knowledge; and creating an ombudsman under the international regime for mediation of transboundary conflicts.

Certificate: One party highlighted WIPO's work on traditional knowledge. Others, including a regional group, favored certificates to provide evidence of PIC and evidence of lack of misappropriation, in particular a certificate of compliance with national laws. Parties also stressed implementation challenges associated with certificates of origin where traditional knowledge is shared by multiple communities.

COMPLIANCE: Delegates discussed how compliance measures could take account of customary laws of indigenous and local communities. Many delegates agreed that customary laws should be taken into account. Several parties and indigenous representatives requested that the international regime address the rights of indigenous and local communities, including their rights to genetic resources and associated traditional knowledge. Another party agreed that respect of the rights of indigenous and local communities constitute the basis for PIC and MAT.

An indigenous representative did not agree that databases or registries that respect community PIC can be helpful to promote compliance. A party explained that databases are meant to be a defensive mechanism to ensure that relevant information is disclosed when making a patent claim.

CONTACT GROUP ON WORK PROGRAMME

Delegates discussed a Co-Chairs' text. On progress reports, delegates agreed that the next meeting of the Working Group will be held back to back "with the appropriate subsidiary or *ad hoc* body or other CBD meeting." On in-depth review, delegates could not agree whether to initiate work on certain priority tasks, with a delegate arguing that this should be revisited upon completion of the negotiation of the international ABS regime and another arguing that the COP mandated to undertake these tasks regardless of the status of that negotiation.

On the revised agenda for the Working Group, many stressed that benefit-sharing modalities should be the priority for future meetings, with others suggesting protected areas and climate change. Delegates decided to delete detailed proposals on an in-depth dialogue on climate change. On indicators, reference to "land security" remained bracketed.

IN THE CORRIDORS

As the first exchange of views on the traditional knowledge element of the international ABS regime was completed, some expressed concern that an opportunity to engage in substantive discussions of opposing views was missed, and with that the chance for community representatives to effectively exert moral pressure to have their concerns taken into account in future ABS negotiations. Others felt that the contact group approach had been very constructive, avoiding unnecessary confrontations that are beyond the scope of Article 8(j) Working Group and thus paving the way to potential agreement on key elements. Everybody expects the debate to become considerably more animated once the Co-Chairs table draft recommendations on ABS on Thursday.