UNEP

CBD

Convention on Biological Diversity

Distr.
GENERAL

UNEP/CBD/COP/12/5/Add.1
25 June 2014

ORIGINAL: ENGLISH

CONFERENCE OF THE PARTIES TO THE
CONVENTION ON BIOLOGICAL
DIVERSITY
Twelfth meeting
Pyeongchang, Republic of Korea, 6-17 October 2014
Item 8 of the provisional agenda*

ANALYSIS ON THE IMPLICATIONS OF THE USE OF THE TERM "INDIGENOUS PEOPLES AND LOCAL COMMUNITIES" FOR THE CONVENTION AND ITS PROTOCOLS

I. INTRODUCTION

1. The United Nations Permanent Forum on Indigenous Issues, at its tenth session in 2011, called upon the Conference of the Parties to the Convention "to adopt the terminology "indigenous peoples and local communities" as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention almost 20 years ago" (recommendation 26).[1] In its recommendation, the Forum noted that the proposed change would be consistent with the terminology used in the Declaration on the Rights of Indigenous Peoples, which had been adopted by the United Nations General Assembly in its resolution 61/295 of 13 September 2007.

2. The Conference of the Parties at its eleventh meeting, held in October 2012, considered the recommendation of the Permanent Forum on Indigenous Issues and requested the Ad Hoc Open-ended Intersessional Working Group on Article 8(j) and Related Provisions to consider, at its next meeting, the matter and all its implications, taking into account submissions by Parties, other Governments, relevant stakeholders and indigenous and local communities, for further consideration by the Conference of the Parties at its twelfth meeting.

3. Having considered the matter at its eighth meeting, held from 7 to 11 October 2013, the Working Group affirmed that there is no intention to reopen or change the text of the Convention or its Protocols and noted that many Parties had expressed a willingness to use the term "indigenous peoples and local communities" in future decisions and documents under the Convention, while some Parties needed further information and analysis on the legal implications of the use of the term for the Convention and its Protocols in order to take a decision. In that context, the Working Group requested the Executive Secretary to prepare an analysis, including by obtaining advice from the United Nations Office of Legal

* UNEP/CBD/COP/12/1.

[1] See *Official Records of the Economic and Social Council 2011, Supplement No. 23* (E/2011/43-E/C.19/2011/14), para. 26.

Affairs, on the legal implications of the use of the term "indigenous peoples and local communities" for the Convention and its Protocols, and to make such advice available to the Conference of the Parties at least 90 days before its twelfth meeting.

4. Accordingly, this documents presents, in section II, analysis on the possible legal implications of the use of the term "indigenous peoples and local communities" instead of "indigenous and local communities" in future decisions and documentation under the Convention. Essentially, the analysis is based on or built around the legal opinion received from the United Nations Office of Legal Affairs in response to the questions submitted to it by the Secretariat in accordance with the recommendation of the eighth meeting of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions.[2]

5. Section III of this document submits some elements of a draft decision, including the relevant recommendation of the eighth meeting of the Working Group on Article 8(j), for the consideration of the Conference of the Parties.

6. In order to facilitate the consideration of this matter further, the compilation of submissions received by the Working Group on Article 8(j) at its eighth meeting has been updated to include the information received on 13 June 2014, regarding a joint statement by the Nordic Environment Ministers on Indigenous Peoples and the Convention on Biological Diversity,[3] and made available to the Conference of the Parties at its twelfth meeting as an information document (UNEP/CBD/COP/12/INF/1).[4] The Secretariat had also compiled views from the United Nations system including the Permanent Forum on Indigenous Issues, and conducted a survey of the use of the term "indigenous peoples" by agencies participating in the United Nations Inter-Agency Support Group on Indigenous Peoples' Issues (IASG). The result of the survey comprising responses from 16 agencies which has been presented in a table and included in the documentation for the eighth meeting of the Working Group on Article 8(j), has also been made available for the Conference of the Parties as an information document (UNEP/CBD/COP/12/INF/1/Add.1).

II. THE ADVICE OF THE OFFICE OF LEGAL AFFAIRS AND RELATED ANALYSIS

7. Following the request by the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions referred to in paragraph 4 above, the Executive Secretary formulated and forwarded the following questions to the Office of Legal Affairs for its legal advice:

Question 1

Article 8(j) of the Convention on Biological Diversity uses the terminology "indigenous and local communities". Would the use of the terminology "indigenous peoples and local communities" in future decisions of the Conference of the Parties and documents under the Convention alter the scope of the Convention? And/or would a change in terminology in future decisions of the Conference of the Parties have the same legal implications or effects as an amendment to Article 8(j) of the Convention or the relevant provisions of its Protocols?

Question 2

Would a change of terminology in decisions of the Conference of the Parties and documents under the CBD constitute a subsequent agreement on interpretation or application within the

[2] Recommendation 8/6, Report of the eighth meeting of the Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity (UNEP/CBD/COP/12/5).

[3] In their joint statement, the Nordic environment ministers expressed a strong desire that a decision be taken as soon as possible on a change in the terminology used when referring to indigenous peoples in the Convention on Biological Diversity.

[4] The document was initially issued as UNEP/CBD/WG8J/8/INF/10 and made available to the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions at its eighth meeting.

context of Article 31, paragraph 3 of the Vienna Convention on the Law of Treaties and therefore have legally binding effect?

Question 3

Is it possible, in decisions and documents under the Convention, to adopt a terminology that is different to the terminology used in the Convention text (e.g. Article 8(j), in this case) without this being a subsequent agreement on interpretation or application within the context of Article 31, paragraph 3 of the Vienna Convention on the Law of Treaties? If the answer to this question is 'yes', how could this be achieved?

8. The Office of Legal Affairs started its response to the above questions by recalling the scope of its responsibility and stated that it provides a legal opinion to treaty bodies on questions of international law usually upon a formal and written request from the intergovernmental organs of the treaty body and, therefore, its response to the questions was provided on an informal basis. Furthermore, the Office of Legal Affairs clarified from the outset that "the Parties to the Convention may take a different view to the responses" and, thus, its "response should not in any way be construed as the only or definitive view". The full copy of the response of the Office of Legal Affairs appears as an annex to this document.

9. In its response to question 1, the Office of Legal Affairs pointed out the existence of a specific amendment procedure to the Convention set out in Article 29. According to the Office of Legal Affairs, decisions of the Conference of the Parties that use the term "indigenous peoples and local communities" would not constitute an amendment to Article 8(j) unless the amendment procedures outlined in Article 29 were followed or unless it is by the unanimous agreement of the Parties.

10. A provision of a treaty may be altered by agreement of the parties in accordance with the procedure set out in the treaty itself or, pursuant to customary international law as specified in Articles 39 to 41 of the Vienna Convention on the Law of Treaties of 1969.[5] Article 29 of the Convention on Biological Diversity provides for a procedure on amendments to the Convention or its protocols. It specifies as to who can propose amendments to the Convention and its protocols, how amendments are to be adopted and how they enter into force. It therefore appears too remote to envisage that a decision alone by the Conference of the Parties to agree to change the wording in question, and where the procedure set out in Article 29 has not been followed or fulfilled, amounts to making amendment to the Convention.

11. As regards question 2, the Office of Legal Affairs noted, "as a preliminary matter" that Article 31 of the Vienna Convention reflects customary international law. It then goes on to indicate that the Parties can agree among themselves regarding the interpretation of the treaty; in this, the Office of Legal Affairs cited Article 31 (3) (a) of the Vienna Convention, which indicates that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", and Article 31 (3) (b) which indicates that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into account in interpreting a treaty. The response from the Office of Legal Affairs makes reference to the first report of the Special Rapporteur of the International Law Commission on subsequent agreements and subsequent practice in relation to treaty interpretation, which was considered by the Commission at its sixty-fifth session, held from 6 May to 7 June and from 8 July to August 2013 (see A/CN.4/660).

[5] United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf
See also section 4.4.1, page 22 of Treaty Handbook, prepared by the Treaty Section of the Office of Legal Affairs, which is available online at: https://treaties.un.org/doc/source/publications/THB/English.pdf , and paragraphs 248-255 of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, available at:
https://treaties.un.org/doc/source/publications/practice/summary_english.pdf

12. The report of the Special Rapporteur contained, inter alia, four draft conclusions relating to (a) the general rule and means of treaty interpretation; (b) subsequent agreements and subsequent practice as means of interpretation; and (c) the definition of subsequent agreement and subsequent practice as means of treaty interpretation. Following its deliberations, the Commission provisionally adopted the draft conclusions,[6] which the Office of Legal Affairs used for its analysis. According to the draft conclusion 2, "subsequent agreement and subsequent practice between the parties to a treaty are authentic means of interpretation which shall be taken into account in the interpretation of treaties", but are not the only "authentic means of interpretation". Subsequent agreement under Article 31 (3) (a) must be "reached" and "therefore presupposes a single common act by the parties by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions" while subsequent practice under Article 31 (3) (b), on the other hand, "encompasses all relevant forms of subsequent conduct by the parties to a treaty which contribute to the identification of an agreement or understanding of the parties regarding the interpretation of a treaty".

13. Taking into account the views of the International Law Commission expressed in the draft conclusions referred to above, the United Nations Office of Legal Affairs provides the following response to the second question:

> "…a change of terminology in decisions of the Conference of the Parties that represent one or more single common acts of the Parties, could constitute a subsequent agreement regarding the interpretation of the Convention or the application of its provisions within the meaning of Article 31 (3) (a). As the Commission points out such decisions would not have legally binding effect unless it was clear that the Parties wished to reach a binding agreement on the interpretation of a treaty."

14. In its response to the Question 3 submitted to it by the Executive Secretary, the Office of Legal Affairs noted as follows:

> "…it is important to draw a distinction between decisions adopted by the Conference of the Parties under the Convention, which as explained above, are common acts by the Parties, on the one hand, and, on the other hand, Convention documents such as reports and proposals by the Secretariat or individual Parties that may be circulated amongst the Parties. In the case of the latter, the use of different terminology would not constitute an agreement within the context of Article 31. In the case of the former (COP decisions), in order for the Parties to ensure that the use of different terminology in a decision would not be construed as a "subsequent agreement", they should make clear in their decision that the use of different terminology was on an exceptional basis and without prejudice to the terminology used in the Convention and should not be taken into account for purposes of interpreting or applying the Convention."

15. According to the International Law Commission report, by a "subsequent agreement", parties must purport to clarify the meaning of a treaty or to indicate how the treaty is to be applied.[7] A possible future decision by the Conference of the Parties to use the wording, "indigenous peoples and local communities" in the documentation of future processes, instead of "indigenous and local communities", should contain an explicit affirmation of the intention of all Parties to the Convention to clarify the meaning of the term as used in Article 8(j) of the Convention in order to constitute a "subsequent agreement". However, the deliberations so far indicate otherwise. What is clearly stated, at least, by the Ad Hoc Open-ended Working Group on Article 8(j), is an affirmation that there was no intention to reopen or change the text of the Convention or its Protocols.

16. In concluding its response to the Question 2, the Office of Legal Affairs has, referring to the view of the International Law Commission, indicated that a decision by the Conference of the Parties to use terminology different from what is in the Convention and the Protocols may constitute a "subsequent

[6] For the report of the International Law Commission, see A/68/10.

[7] *Supra* 3, paragraph 76.

agreement" but would have no legally binding effect unless the Parties to the Convention take a clear step towards reaching a binding agreement in that regard. Further, in its response to the third question referred to above, the Office of Legal Affairs advises the Parties that, if their wish in the use of different terminology in a decision is not to reach a "subsequent agreement", their decision should make it clear that such use of different terminology is: (a) being done on an exceptional basis; (b) without prejudice to the terminology used in the Convention; and (c) not to be taken into account for purposes of interpreting or applying the Convention.

17. In concluding its response, the United Nations Office of Legal Affairs notes, once again, that the points it raised in its response were not meant to be an authoritative or definitive interpretation of the relevant provisions of the Vienna Convention and that other parties may take a different view.

III. SUGGESTED ELEMENTS OF A DRAFT DECISION

18. The Conference of the Parties may wish take into account the information and analysis in section II above. It may also wish to take into account the recommendation of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions at its eighth meeting (see UNEP/CBD/COP/12/5) and the submission of views compiled and made available as an information document (UNEP/CBD/COP/12/INF/1), and consider taking a decision along the following lines:

The Conference of the Parties,

Recalling paragraph 2 of decision XI/14 G, in which it requested the Ad Hoc Open-ended Intersessional Working Group on Article 8(j) and Related Provisions to consider the recommendations of the United Nations Permanent Forum on Indigenous Issues concerning the use of the term 'indigenous peoples and local communities' as contained in paragraphs 26 and 27 of the report of the Permanent Forum on its tenth session,[8] and all its implications for the Convention;

Noting recommendation 8/6 of the eighth meeting of the Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions, and the legal opinion that the Secretariat received from the United Nations Office of Legal Affairs as regards the use of the term "indigenous peoples and local communities" in future decisions of the Conference of the Parties and documents that would be prepared under processes of the Convention and its protocols;

Emphasizing that the subject matter of Article 8(j) and related provisions is traditional knowledge and customary use relevant to the conservation and sustainable use of biological diversity within the scope of the Convention, and that each Contracting Party is expected to implement these provisions as far as possible, as appropriate, and subject to national legislation;

1. *Decides:*

(a) To use the term "indigenous peoples and local communities" in future decisions and secondary documents under the Convention;

(b) That the use of the term "indigenous peoples and local communities" in future decisions and secondary documents is without prejudice to the terminology used in Article 8(j) of the Convention and should not be taken into account for purposes of interpreting or applying the Convention;

2. *Notes* that the decision in paragraph 1 above is not intended to clarify the meaning of the term "indigenous and local communities" as used in Article 8(j) of the Convention and the relevant provisions of its protocols and, therefore, shall not constitute a subsequent agreement among Parties to the Convention on Biological Diversity;

[8] See *Official Records of the Economic and Social Council, 2011, Supplement No. 23* (E/2011/43-E/C.19/2011/14).

3. *Also notes* the recommendations arising from the eleventh[9] and twelfth[10] sessions of the Permanent Forum on Indigenous Issues, and *requests* the Executive Secretary to continue to inform the United Nations Permanent Forum on Indigenous Issues on developments of mutual interest.

Annex

Legal opinion of the Office of Legal affairs on the legal implications of adopting the term "indigenous peoples and local communities" in decisions of the Conference of the Parties to the Convention on Biological Diversity and documents

[9] Ibid., *2012, Supplement No. 23* (E/2012/43-E/C.19/2012/13).

[10] Ibid., *2013, Supplement No. 23* (E/2013/43-E/C.19/2013/25).

United Nations Nations Unies
HEADQUARTERS • SIEGE NEW YORK, NY 10017
TEL.: 1 (212) 963.1234 • FAX: 1 (212) 963.4879

REFERENCE: 2013-OLC-001098

28 February 2014

Dear Mr. Souza Dias,

I wish to refer to your letter dated 12 November 2013 to the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel by which you have asked for our legal opinion on the consequences of adopting the term "indigenous peoples and local communities" in decisions of the Conference of the Parties to the Convention on Biological Diversity, instead of the term "indigenous and local communities" which is used in Article 8 (j) of the Convention. You indicate that the Ad Hoc Open-ended Inter-sessional Working Group on Article 8 (j) and Related Provisions ("the Working Group") which was established by the Conference of the Parties ("the COP") in 1998 has considered this matter in its meeting held in October 2013 and has requested you to obtain our advice on this question.

You recall that the Permanent Forum on Indigenous Issues, a subsidiary organ of ECOSOC, had recommended to the Parties to the Biological Diversity Convention "to adopt the terminology 'indigenous peoples and local communities' as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention [on Biological Diversity] almost 20 years ago" (E/2013/43-E/C.19/2010/15, paragraph 112).

In the light of this recommendation the Working Group has requested the Executive Secretary of the Biological Diversity Convention to obtain advice from our Office on the legal implications of the use of the term "indigenous peoples and local communities" for the Convention and its Protocols.

Mr. Braulio Ferreira de Souza Dias
Executive Secretary
Secretariat of the Convention on Biological Diversity
Montreal

I wish to recall that the primary responsibility of the Office of Legal Affairs is to provide formal legal opinions to United Nations offices funds or programmes and to United Nations intergovernmental organs at the formal request of those organs. We can provide legal opinions to Treaty Bodies on questions of international law but that is usually pursuant to a formal and written request from the inter-governmental organs of the Treaty Body concerned. Therefore, we are responding to your questions on an informal basis.

I am also aware that Parties to the Convention may take a different view to the responses we provide. As such, our response should not in any way be construed as the only or definitive view and I would appreciate your conveying this understanding to the Working Group. Subject to that understanding I would like to respond as follows.

Article 8 (j) of the Biological Diversity Convention requires that each party "as far as possible and as appropriate…[s]ubject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity" (emphasis added).

In this context, your first question is formulated as follows:

> "Article 8 (j) of the Convention on Biological Diversity uses the terminology 'indigenous and local communities'. Would the use of the terminology 'indigenous peoples and local communities' in future decisions of the Conference of the Parties and documents under the Convention alter the scope of the Convention? And/or would a change in terminology in future decisions of the Conference of the Parties have the same legal implications or effects as an amendment to Article 8 (j) of the Convention or the relevant provisions of its Protocols?"

We wish to point out that there is a specific amendment procedure to the Convention set out in Article 29. Decisions of the COP that use the term "indigenous peoples and local communities" would not constitute an amendment to Article 8 (j) unless the amendment procedures outlined in Article 29 were followed or unless it is by the unanimous agreement of the Parties. As to whether it would have the "same legal implications or effects as an amendment to Article 8(j) of the Convention or the relevant provisions of its Protocols" this question is considered in our answers to questions 2 and 3 set out below.

Your second question is formulated as follows:

> "Would a change of terminology in decisions of the Conference of the Parties and documents under the CBD constitute a **subsequent agreement** on interpretation or application within the context of Article 31, paragraph 3 of the

Vienna Convention on the Law of Treaties and therefore have legally binding effect?"

As a preliminary matter, it is noted that, Article 31 of the Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention") reflects customary international law (e.g. *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, ICJ Reports 2009,* p. 237, para. 47).

Hence, references to Article 31 in the analysis should be read in that context.

Article 31 (3) (a) of the Vienna Convention provides that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" should be taken into account in interpreting a treaty.

Article 31 (3) (b) further provides that, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into account in interpreting a treaty.

In this connection, we would like to draw your attention to the Report of the International Law Commission for its 65th session (A/68/10) ("Commission"), which contains the "text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-fifth session." ("Draft Conclusions")

The Commission in draft Conclusion 1, paragraph 5 stated that "the interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated respectively, in articles 31 and 32."

In draft Conclusion 2, the Commission stated that, "subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31."

In defining the term "subsequent agreement" the Commission stated that it is "an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of a treaty or the application of its provisions." (draft Conclusion 4, paragraph 1).

The Commission in its commentary on draft Conclusion 2 pointed out that subsequent agreements and subsequent practice are not the only "authentic means of interpretation" and that "analyzing the ordinary means of the text of a treaty" is also such a means. In addition, while both subsequent agreement and practice were "authentic means of interpretation" this did not **however imply that these means necessarily possess a conclusive or legally binding effect** pointing to the chapeau of Article 31 (3) which states that subsequent agreements and subsequent practice shall only be "taken into account" in the interpretation of a treaty.

That said, Parties could, if they so wished reach a binding agreement on the interpretation of a treaty, although it would have to be clear that the Parties considered the interpretation to be binding upon them.

In seeking to define subsequent agreement and subsequent practice the Commission in its commentary on draft Conclusion 4 pointed out that the Vienna Convention did not envisage any particular formal requirements for agreements and practice under Article 31 (3) (a) and (b). As to the difference between these two concepts, the Commission expressed the view that a subsequent agreement must be "reached" and therefore presupposes a single common act by the parties by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions. Subsequent practice under Article 31 (3) (b) on the other hand, encompasses all relevant forms of subsequent conduct by the parties to a treaty which contribute to the identification of an agreement or understanding of the parties regarding the interpretation of a treaty.

Consequently, in answer to your second question and bearing in mind the views of the Commission, a change of terminology in decisions of the Conference of the Parties that represent one or more single common acts of the Parties, could constitute a subsequent agreement regarding the interpretation of the Convention or the application of its provisions within the meaning of Article 31 (3) (a). As the Commission points out such decisions would not have legally binding effect unless it was clear that the Parties wished to reach a binding agreement on the interpretation of a treaty.

Your third question is formulated as follows:

> "Is it possible, in decisions and documents under the Convention, to adopt terminology that is different to terminology used in the Convention text (e.g. Article 8(j) in this case) without this being a subsequent agreement on interpretation or application within the context of Article 31, paragraph 3 of the Vienna Convention on the Law of Treaties? If the answer to this question is 'yes', how could this be achieved?"

In answer to your third question it is important to draw a distinction between decisions adopted by the Conference of the Parties under the Convention, which as explained above, are common acts by the Parties, on the one hand, and, on the other hand, Convention documents such as reports and proposals by the Secretariat or individual Parties that may be circulated amongst the Parties. In the case of the latter, the use of different terminology would not constitute an agreement within the context of Article 31. In the case of the former, in order for the Parties to ensure that the use of different terminology in a decision would not be construed as a "subsequent agreement", they should make clear in their decision that the use of different terminology was on an exceptional basis and without prejudice to the terminology used in the Convention and should not be taken into account for purposes of interpreting or applying the Convention.

Finally and as explained above, I would like to note that the points mentioned above do not purport to be an authoritative or definitive interpretation of the relevant provisions of both Vienna Conventions and that other parties may take a different view. Furthermore, the points we raise may be subject to adjustments depending on the specific circumstances of each case.

I hope the responses above would provide some guidance to your questions.

Yours sincerely,

Stephen Mathias
Assistant Secretary-General for Legal Affairs
