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AD HOC OPEN-ENDED INTER-SESSIONAL WORKING GROUP ON ARTICLE 8(J) AND RELATED PROVISIONS OF THE CONVENTION ON BIOLOGICAL DIVERSITY

Sixth meeting
Montreal, 2-6 November 2009

REPORT OF THE VIENNA WORKSHOP ON MATTERS RELATED TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES AND THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING

Note by the Executive Secretary

1. The Executive Secretary is pleased to circulate herewith, for the information of participants in the sixth meeting of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions, an information document containing the outcomes of the Vienna Workshop on Matters Related to Traditional Knowledge with Genetic Resources and the International ABS Regime, hosted by the Austrian Ministry of Agriculture, Forestry, Environment and Water Management, which took place in Vienna from 15 to 17 December 2008.
2. The document is being circulated in the form and language in which it was received by the Secretariat.

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Vienna Workshop on Matters related to Traditional Knowledge associated with Genetic Resources and the International ABS Regime

Vienna, 15 - 17 December 2008

Proceedings

As called for in *CBD COP Decision IX/12* the Austrian Ministry of Agriculture, Forestry, Environment and Water Management hosted an informal workshop on matters relating to traditional knowledge and access and benefit-sharing under the Convention on Biological Diversity in order to facilitate preparation for the elaboration and negotiation of the international ABS regime.

The workshop took place in Vienna from 15 – 17 December 2008 and was attended by 25 participants. In order to facilitate open discussions, it was agreed that the meeting was held under the Chatham House Rule, so that participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed. All participants attended in his/her personal capacity.

In the course of the three days and guided by three fictional ABS scenarios designed to match real-life procedures, participants discussed matters that are of concern to indigenous peoples and local communities in relation to traditional knowledge and the international ABS regime, how these could be addressed in practice and identified issues that will require further discussion.

The summary of main points of the discussion is annexed to these proceedings. They are intended to provide an informal input to the access and benefit-sharing process under the Convention on Biological Diversity and are available for free distribution, future use and reference.

Annex

Summary of main points of the discussion

Fundamental Overarching Issues

- Effective implementation depends on the recognition of all rights over genetic resources and associated traditional knowledge. The UN Declaration on the Rights of Indigenous Peoples should provide an overarching framework for ABS, and requires implementation at the national level to support the international ABS regime;
- Recognizing the sovereign rights of States over their natural resources, States are required to take measures for creating conditions to facilitate access to genetic resources and for fair and equitable benefit-sharing. For these measures, governments are obliged to respect and fulfill the human rights of their peoples, and need to promote their active engagement and participation in implementing ABS requirements, including equitable benefit-sharing;
- In the ABS context, a differentiation is required between what has to be done at the international level and what has to be done at the national level. Homework is necessary by both, governments and indigenous peoples/local communities, to establish effective governance and implementation structures, since quality of governance will affect the implementation of the international ABS regime;
- The international ABS regime needs to be supported by local and national structures, that recognize self-determination and indigenous governance procedures;
- The rights of indigenous peoples and local communities need to be recognized in domestic legal systems, and this recognition will also enable effective protection vis-à-vis foreign jurisdictions;
- Indigenous peoples and local communities should be involved in the development and implementation of ABS policies at the domestic level;
- In the ongoing ABS process, a further discussion is required on the relationship of indigenous peoples and local communities and rights to their genetic resources. This should include notions of shared, overlapping and/or partial rights and interests in genetic resources.

The International Regime

1. Objective

- The third objective of the Convention must be focused on supporting the other two objectives of the CBD (conservation and sustainable use of biodiversity) and recognize all rights over genetic resources and associated traditional knowledge.

2. Scope

- Indigenous peoples/local communities are not only holders of traditional knowledge but also own genetic resources. ABS should therefore apply to genetic resources and associated traditional knowledge. If separated this would cause particular challenges with respect to effective practical implementation;
- ABS as one of the three objectives in the Convention should contribute to implementing Article 8(j) (benefit-sharing requirements on the use and promotion of the use of traditional knowledge, innovations and practices).

3. Main components/Negotiation procedures for ABS arrangements

3.1 Fair and equitable benefit-sharing¹

- Clear identification of the knowledge holder(s) and owners of genetic resources is fundamental for effective ABS arrangements;
- Parties will need to define national competent authorities and locate and recognize local competent authorities established and defined by indigenous peoples and local communities themselves;
- Indigenous peoples/local communities will need to define and establish local competent authorities in cases where they do not exist and determine community level procedures for access and benefit-sharing;
- Indigenous peoples/local community defined local competent authorities should be responsible for FPIC and MAT at the community level and identification of recipients and knowledge holders for effective benefit sharing;
- Indigenous peoples/local communities should be directly involved in the identification of benefits;

¹ References to essential components for further elaboration: A.1.9), A.1.10), A.2.6)

- Benefit-sharing should not only be in monetary terms, but also in non-monetary terms (e.g. involvement in research activities, development of inter-generational research capacity, infrastructure development, and the wider strategic inter-generational capacity development needs of indigenous peoples and local communities).

3.2 Access to genetic resources²

- Clear identification of the knowledge holder(s) and owners of genetic resources is fundamental for effective ABS arrangements;
- Vital elements of ABS arrangements include scope, utilization, recognition of protocols/customary laws and indigenous compliance processes, intellectual property and licensing arrangements, dispute settlement, limitations in time, and benefit-sharing arrangements;
- When ABS arrangements are based on contracts, elements such as those listed above should be included in the contracts, to increase certainty for the parties to the contract;
- Development of contracts through active engagement of all parties/stakeholders concerned, acknowledging community-level procedures;
- Parties will need to define national competent authorities and locate and recognize local competent authorities established and defined by indigenous peoples and local communities themselves;
- Indigenous peoples/local communities will need to define and establish defined local competent authorities in cases where they do not exist and determine community level procedures for access and benefit-sharing;
- Defined local competent authorities should be responsible for FPIC and MAT at the community level and identification of recipients and knowledge holders for effective benefit sharing.

3.3 Compliance³

- Indigenous peoples and local communities to make use of and contribute to the development and improvement of traditional and modern technologies for ABS implementation, e.g. digital mapping, data and information exchange, establishment of electronic material transfer agreements/licensing;

² References to essential components for further elaboration: B.1.1)

³ References to essential components for further elaboration: C.1.1)(a), C.1.2)(a), C.2.1.(a) – (e), C.2.2)(c), C.2.3.(b), C.2.4)

- Leadership of, and involvement by, indigenous peoples/local communities in the design and management of research activities;
- Intellectual property rights policies need to take account of rights and interests of indigenous peoples/local communities and may include the development of 'commons' licensing models to provide choice and enhanced use of intellectual property classification and coding schemes for monitoring compliance;
- Peer reviews, guidelines for good practice (e.g. OECD/DAC) for funding agencies;
- Compliance with indigenous peoples'/local community defined competent local authorities, and recognition of customary laws/community-level procedures should be a requirement and reflected in domestic law;
- Establish policies or mechanisms for legal recourse at domestic level in cases of conflicts of law;
- Elaboration of conflict of laws procedures among international/national and customary laws at domestic level.

3.4 Traditional knowledge associated with genetic resources⁴

3.4.1 Approach to a definition of traditional knowledge

- Potential usefulness of a definition of traditional knowledge:
 - No definition of traditional knowledge in the Convention and only two references to traditional knowledge in the text itself;⁵
 - "knowledge, innovations, and practices of indigenous peoples and local communities embodying traditional lifestyles" is a broader concept, as it also refers to *new* knowledge;
 - Other fora are also concerned with definitions of traditional knowledge, e.g. WIPO where it is a narrower concept;
 - There is a need to be precise about the specific context and scope of the international regime under the umbrella of the CBD;
- Example of a possible working definition:

„For the purposes of the International Regime, traditional knowledge means the knowledge, innovations, and practices of indigenous [peoples] and local communities [embodying traditional lifestyles] associated with [, or potentially associated with,] genetic resources subject to this Regime."

⁴ References to essential components for further elaboration: D.1.1) – 8), D.2.1)

⁵ Art. 8(j) and Art. 17.2 concerning exchange of information

- Elements for further discussion:
 - Reference to “peoples” reflects new dynamics after the adoption of the CBD and the UN Declaration on the Rights of Indigenous Peoples;
 - Who are the knowledge holders? “...embodying traditional lifestyles...” is too narrow and no longer reflects current status of discussions on the definition of “indigenous peoples” in other fora. The results of work on the definition of knowledge holders in these fora should be recognized and a final definition could be incorporated by the CBD;
 - Reference to “or potentially associated with” reflects discussion on the fact that genetic resources are not a stable category over time, and that while genetic resources are held by another entity, specific traditional knowledge could potentially increase its value.

3.4.2 Free Prior Informed Consent (FPIC)

- Obtaining the free prior informed consent from indigenous peoples and local communities for accessing their traditional knowledge is essential for effective ABS implementation;
- FPIC from indigenous peoples/local communities differs from the concept laid down in the Convention of Prior Informed Consent which is to be obtained from the Party to the Convention, i.e. the state. In cases where a Party requires PIC for access to its genetic resources, these two procedures need to be mutually supportive;
- In practice, FPIC should be regarded as a procedure that is intrinsically intertwined with obtaining MAT, since MAT is essential to protect community interests;
- “Free” relates to the fact that access to traditional knowledge should not be engineered or coerced when consent is sought;
- The FPIC Procedure requires:
 - identification of knowledge holders/owners, taking into account situations where genetic resources extend across multiple communities;
 - national and local institution building for allowing for long-term and reciprocal relationships for effective enforcement of PIC and MAT;
 - participation, active engagement of indigenous peoples/local communities in ABS procedures and arrangements at all levels, to make PIC meaningful;
 - demand-driven process, to meet the needs of indigenous peoples/local communities (e.g. non-monetary benefit-sharing);
 - community-level procedures for obtaining consent, and, where applicable, for benefit-sharing.

- Implementation to be supported by:
 - code of ethics, Akwe:Kon Guidelines;
 - disclosure requirement, incl. enhanced use of existing coding and classification schemes for intellectual property;
 - capacity development and training of indigenous peoples/local communities, e.g. legal training, development and use of technologies, effective participation in research.

3.5 Capacity⁶

- Development of capacity and infrastructure, supported by financial means, directed towards:
 - indigenous peoples/local communities and governments;
 - defined local authorities and national competent authorities;
 - science/research community;
 - private sector.
- Development of capacity and infrastructure for:
 - development of toolkits and checklists could support ABS arrangements;
 - strengthening local institutions and establishment of local organizations, including through benefits directed towards institution building for communities, so that knowledge can be maintained within the communities;
 - increasing awareness of the potential use of modern technologies, and assessment of the potential risks and benefits associated with particular technologies.

⁶ References to essential components for further elaboration: E.1.1)(b)-(c), E.1.1)(e), E.1.4)