

Submissions from the Assembly of First Nations

In preparations for the first meeting of the Intergovernmental Committee, international organizations, indigenous and local community organizations and relevant stakeholders are kindly invited to provide views and or relevant information to the executive secretary in accordance with annex II to decision X/1:

The following are the Assembly of First Nations (AFN) preliminary views on this matter.

1) The Modalities of Operation of the Access and Benefit Sharing Clearing House

Article 14(4) of the Nagoya Protocol provides that

1. An Access and Benefit-sharing Clearing-House is hereby established as part of the clearing-house mechanism under Article 18, paragraph 3, of the Convention. It shall serve as a means for sharing of information related to access and benefit sharing. In particular, it shall provide access to information made available by each Party relevant to the implementation of this Protocol.

AFN perspective of this issue is that proper protection will be needed and that this article must be implemented in a manner that provides an opportunity for indigenous peoples to provide the information which most accurately reflects their genetic resources that they hold as well as their associated traditional knowledge.

2. Without prejudice to the protection of confidential information, each Party shall make available to the Access and Benefit-sharing Clearing-House any information required by this Protocol, as well as information required pursuant to the decisions taken by the Conference of the Parties serving as the meeting of the Parties to this Protocol. The information shall include:

(a) Legislative, administrative and policy measures on access and Benefit-sharing;

The AFN views are that legislation is required for inventors to apply for permits or clearance certificates from the indigenous focal point. No patents should be granted to the inventor unless they go through the indigenous focal point. These types of measures will have to be developed to reflect the rights to their genetic resources and their traditional knowledge should be applied consistent with any rights that indigenous peoples may obtain in the future in the development of other international and national processes. Additional information that should be provided by each Party include measures which already exist, including existing legal and policy measures, such as those that are flowing from their constitutional rights within their respective country as well as those measures that they are entitled to as a result of jurisprudence and those under international law such as the *Declaration on the Rights of Indigenous Peoples*.

(b) Information on the national focal point and competent national authority or authorities;

It is AFNs perspective that a key aspect of the national focal point should include procedures for obtaining the free and prior informed consent of indigenous peoples and their communities and that this should be carried out in a manner established by those particular communities. This principle should be applied before consideration of the terms mutually agreed upon. Reasonable time and capacity should be provided in indigenous communities to ensure that terms are mutually agreed upon.

Focal points should be determined by indigenous people's respective communities or region. Competent authorities must include those that indigenous peoples determine as required given their own governance and organizational structures.

(c) Permits or their equivalent issued at the time of access as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms.

This is a particularly important part of the clearing house in the view of AFN. The conditions of the permit should be on the free and informed consent of indigenous peoples and measures should be taken to ensure that the terms of the permit are understood by the members of the indigenous people and their communities. Mutually agreed terms will require a precondition or pre requisite including the capacity of indigenous communities and increased capacity to negotiate these terms. These terms will have to be developed in good faith. This permit should include the acknowledgement of the right of indigenous peoples to their genetic resources.

3. Additional information, if available and as appropriate, may include:

(a) Relevant competent authorities of indigenous and local communities, and Information as so decided;

(b) Model contractual clauses;

(c) Methods and tools developed to monitor genetic resources; and

(d) Codes of conduct and best practices.

4. The modalities of the operation of the Access and Benefit-sharing Clearing-House, including reports on its activities, shall be considered and decided upon by The Conference of the Parties serving as the meeting of the Parties to this Protocol at its first meeting, and kept under review thereafter.

The AFN views on this issue include the characteristics of the clearing house to be guided by the principles of transparency, accountability, and are to be administered through a process that is agreed upon by indigenous peoples and the involvement of indigenous peoples and local communities is recommended.

2) Measures to Assist in the Capacity Building, Capacity Development and Strengthening of Human Resources and Institutional Capacities in Developing Countries

The AFN view this issue of key importance for those who most need assistance. In expressing the following the AFN in no way diminishes the needs of developing countries where the need is the greatest. However, First Nations communities within a developed country are faced with fourth world conditions and in this regard parallels can be drawn pertaining to the capacity needs as it relates to the implementation of the Nagoya Protocol. First Nations communities should be provided with the necessary capacity and human resources as required to implement this Protocol.

3) Measures to Raise Awareness of the Importance of Genetic Resources and TK Associated with GRs, and Related Access and Benefit Sharing Issues

Paragraph 21 of the Nagoya Protocol provides

Each Party shall take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues. Such measures may include, inter alia:

(a) Promotion of this Protocol, including its objective;

The AFN believes that any measures taken should be with the involvement and direction from indigenous peoples and their communities. The AFN also believe that resources should be provided at the beginning of the implementation of this Protocol. Promotion of this Protocol should be through criminalization measures for theft and misuse of indigenous peoples traditional knowledge associated with the genetic resource. Any promotional materials should describe indigenous cultures and their relationship with genetic resources, including their spiritual beliefs of the genetic resources being used and the manner in which their traditional knowledge is controlled, managed, maintained and owned.

The promotion of this Protocol should also focus on those researchers who wish to carry out research activities and who plan to access the traditional knowledge and associated genetic resources of indigenous and local communities. The promotion of the protocol should also aim to inform the indigenous and local communities as much as possible and in the early stages of the implementation of the protocol.

(b) Organization of meetings of indigenous and local communities and relevant Stakeholders;

AFN proposes that in addition to meetings of indigenous and local communities as provided in this article that it is also essential to organize workshops with universities, with researches and with companies. These workshops would be led by ILCs with capacity assistance by the secretariat. The objectives of these workshops could include awareness of the language differences, indigenous philosophies and relationships that indigenous peoples and local communities have with the genetic resources and related traditional knowledge.

AFN further proposes that the sharing of best practices and innovations in national clearing house processes and for indigenous input regarding defensive mechanisms.

(c) Establishment and maintenance of a help desk for indigenous and local Communities and relevant stakeholders;

The AFN has concerns about how this help desk will actually be implemented especially when many of the indigenous communities are without the necessary resources or infrastructure to access the assistance of a help desk. It is recommended that these help desks are based in rural areas close to indigenous communities and administered by indigenous organizations if the necessary resources are provided to them.

(d) Information dissemination through a national clearing-house;

This information should be checked for accuracy, updated and translated in the all indigenous languages of the country in which the information is disseminated. This information should be updated on regular basis, should be geared to the users of the genetic resources and should involve information of indigenous peoples of the country, should include who to contact in the community involved, and should also include the governance systems and other decision making processes of indigenous communities. This information is to be provided by the indigenous community and capacity provided to ensure that the information reflects their cultural views and represents their approaches and processes. Information should also contain the facts of the researchers, the background of any research, and the goals and objectives of the research. The information should be to ensure transparency and accountability of the users. Reports on activities carried out by Parties and indigenous organizations and third parties such as universities, research agencies, and companies¹ should be disseminated.

4) Cooperative Procedures and Institutional Mechanisms to promote compliance with the Protocol and to address cases of non compliance, including procedures and mechanisms to offer advice or assistance

Paragraph 30 of the Nagoya Protocol states that

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate. They shall be separate from, and without prejudice to, the dispute settlement procedures and mechanisms under Article 27 of the Convention.

¹ AFN views this issue as an accountability and transparency issue whereby the research agencies, universities and companies have not disclosed their information and this is one of disclosure of information which is a cross cutting issue with other articles such as those under the compliance provisions. In particular the second manner is the way in which others see this provisions

A) Co-operative Procedures and Institutional Mechanisms to promote compliance with the protocol

The perspective of the AFN related to cooperative measures and institutional mechanisms should be implemented in conjunction with other related provisions including article 15 of the Protocol. The AFN would like to draw to the secretariat's attention to article 15 especially paragraph 1. This paragraph recognizes that:

Each Party shall take appropriate, effective and proportionate legislative, Administrative or policy measures to provide that genetic resources utilized Within its jurisdiction have been accessed in accordance with prior informed Consent and that mutually agreed terms have been established, as required by the Domestic access and benefit-sharing legislation or regulatory requirements of the Other Party.

This particular paragraph should be implemented in a manner that ensures that any access to genetic resources and its utilization should be conducted with the free and prior informed consent of the indigenous peoples where such access and utilization of genetic resources are found on indigenous territories.

It is AFN views and perspective that mutually agreed terms should be clear and translated in good faith. Good faith for First Nations means that there is a clear understanding between the users and providers of the traditional knowledge associated with genetic resources. In addition there should be accuracy of the terms agreed upon, that these terms were understood and clearly presented and that First Nation communities were granted the time required to understand these terms and that their free and prior informed consent was obtained.

The AFN is of the view that article 30 is to be implemented taking into account the various domestic existing arrangements that may contribute to the compliance with the protocol and that these arrangements not only include domestic administrative and policy measures but also include any existing indigenous community protocols and other recognized indigenous measures that create the building of compliance measures such as customary laws. Therefore any cooperative procedures and institutional measures to promote compliance will have to foremost, include elements that comply with these community protocols and customary laws. In addition these procedures and mechanisms to promote compliance when accessing traditional knowledge associated with genetic resources.

The AFN suggests that existing systems and arrangements of how for example traditional knowledge is accessed and the sharing of benefits are carried out within indigenous communities are conducted and should be given careful and further thought. For example, the Natura case in Brazil may be of some assistance. Traditional knowledge is used by Natura in the discovery of new ingredients and development of harvesting strategies for genetic resources. The company accesses traditional knowledge through collaborations with ethnobotanists or ethno pharmacologists. The company has entered

into an arrangement with the Iratapuru community. Natura began working in Iratapuru in 1999 to source Brazil nuts. Natura worked with the community for three years to support the process of acquiring FSC certification and contacted an international community, Cognis to purchase nuts from the community, process them into oil, and sell the oil to Natura. In 2005, natura set up a press within the village to add more value there. The community undertakes a first extractive of the oil, which it then sells to Cognis. Natura provides a percentage of sales to the Iratapuru community.

Parties should work on legal remedies for Indigenous peoples including stiff mandatory minimum prison sentences for persons who steal, misuse and misappropriate indigenous knowledge. Stiff civil remedies may also be developed.

B) Non Compliance

In this regard AFN is of the view that criminal sanctions may be necessary and civil remedies need to be made available for any misappropriation or misuse of First Nations traditional knowledge and associated genetic resources.

The AFN perspective on this issue is also part of the capacity building necessary for First Nations communities to address issues of non compliance. This capacity to address non compliance could then reflect community approaches of resolving non compliance and in manner that the community as a whole sees fit and in ways which reflect their values and beliefs.

The issue of non compliance which occur for example between users and holders of traditional knowledge and associated genetic resources can be addressed through existing indigenous approaches to conflict resolution and based on their own community protocols and customary laws.

The misuse, misappropriation and misrepresentation of indigenous traditional knowledge results in ongoing harm to indigenous cultures as this type of misuse and misrepresentation portrays indigenous culture in ways that are inaccurate, is misrepresented, misinterpreted and therefore the indigenous cultural expressions goes unprotected from further misuse, and misappropriation. These negative and possible derogatory processes create other harms to indigenous cultural expressions resulting in further loss of control of their respective culture.

c) Procedures and Mechanisms to offer Advice or Assistance

Capacity in the indigenous community is essential when addressing the issue of non compliance. This capacity may be focused on the tools to know when non compliance is occurring. This in itself may not be so easily demonstrated and so knowledge of the existing arrangements and partnerships including MOUs may need to be widely available in their own language as well as an understanding of how these arrangements work especially the accuracy of the terms and conditions of existing arrangements and when

breaches occur. Such a step will increase the capacity of indigenous and local communities to address issues of non compliance.

The advice and assistance should be presented to the users of the genetic resources and associated traditional knowledge by the indigenous peoples and their community before compliance becomes an issue.