UNEP

CBD

Convention on Biological Diversity

Distr.
GENERAL

UNEP/CBD/WG-ABS/8/2*
15 July 2009

ORIGINAL: ENGLISH

AD HOC OPEN-ENDED WORKING GROUP ON
ACCESS AND BENEFIT-SHARING
Eighth meeting
Montreal, 9-15 November 2009
Item 3.2 of the provisional agenda**

REPORT OF THE MEETING OF THE GROUP OF TECHNICAL AND LEGAL EXPERTS ON TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES IN THE CONTEXT OF THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING

INTRODUCTION

A. Background

1. In paragraph 11 of its decision IX/12, the Conference of the Parties to the Convention on Biological Diversity decided:

> "[…] to establish three distinct groups of technical and legal experts on: (i) compliance; (ii) concepts, terms, working definitions and sectoral approaches; and (iii) traditional knowledge associated with genetic resources. The terms of reference of the groups, including the criteria for the selection of experts, are laid out in annex II to the present decision;"

2. Section C of annex II to decision IX/12 reads:

> "1. A group of technical and legal experts on traditional knowledge associated with genetic resources is established to further examine the issue of traditional knowledge associated with genetic resources in order to assist the Working Group on Access and Benefit-sharing. The expert group shall provide legal and technical advice, including, where appropriate, options and/or scenarios. The expert group will address the following questions:
>
> (a) What is the relationship between access and use of genetic resources and associated traditional knowledge?
>
> (b) What practical impacts should the negotiations of the international regime take into account based on the range of community level procedures and customary systems of indigenous and local communities for regulating access to traditional knowledge associated with genetic resources at the community level?
>
> (c) Identify the range of community level procedures and determine to what extent customary laws of indigenous and local communities regulate access to genetic resources and

* Reissued to incorporate the correction circulated as document UNEP/CBD/WG-ABS/8/2/Corr.1.

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associated traditional knowledge at the community level and its relevance to the international regime;

(d) To what extent measures to ensure compliance with prior informed consent and mutually agreed terms under Article 15 also support the prior informed consent of indigenous and local communities for the use of their associated traditional knowledge?

(e) Identify elements and procedural aspects for the prior informed consent of holders of associated traditional knowledge when traditional knowledge associated with genetic resources is accessed also taking into account potential transboundary contexts of such associated traditional knowledge and identifying best practice examples;

(f) Is there a basis for prior informed consent for indigenous and local communities relative to traditional knowledge associated to genetic resources in international law? If so, how can it be reflected in the international regime?

(g) Assess options, considering the practical difficulties and distinct implementation challenges, for including traditional knowledge associated with genetic resources in a potential internationally recognized certificate issued by the competent domestic authority also by considering the possibility of a declaration on such certificate as to whether there is any associated traditional knowledge and who the relevant holders of traditional knowledge are;

(h) How to define traditional knowledge associated to genetic resources in the context of access and benefit-sharing?

2. The expert group shall be regionally balanced and composed of thirty experts nominated by Parties and fifteen observers, including seven observers from indigenous and local communities nominated by them, and remaining observers from, inter alia, international organizations and agreements, industry, research institutions/academia and non-governmental organizations.

3. Parties are also encouraged to nominate experts from indigenous and local communities where possible."

3. Accordingly, the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing met in Hyderabad, India, from 16 to 19 June 2009, in accordance with the above-mentioned decisions of the Conference of the Parties, with the financial and technical support of the Government of India. Financial support was provided by the host country and by the Governments of Austria, Sweden and Spain.

B. Attendance

4. In accordance with decision IX/12, annex II, 30 participants were selected among government-nominated experts from each geographic region, taking into account their expertise, the need to ensure fair and equitable geographic distribution, and gender balance. In addition, fifteen observers were selected from among representatives of indigenous and local communities, international organizations and agreements, industry, research institutions/academia and non-governmental organizations. The list of selected experts and observers was approved by the Bureau of the Conference of the Parties.

5. The meeting was attended by experts nominated by Argentina, Australia, Austria, Brazil, Canada, China, Costa Rica, Egypt, Georgia, Germany, Ghana, Guatemala, India, Indonesia, Malaysia, Mexico, Norway, Philippines, Republic of Moldova, Russian Federation, Saint Lucia, Serbia, Sweden, Tajikistan, Uzbekistan. The experts nominated by Cameroon, the Islamic Republic of Iran, Mali, South Africa and Zambia, who had been selected and invited to the meeting, were unable to participate.

6. Experts from the following organizations participated in the meeting as observers: Dena Kayeh Institute, the Indigenous Information Network, Parininihi ki Vaitotara, the Russian Association of Indigenous Peoples of the North (RAIPON), the Saami Council, the South West Aboriginal Land & Sea

Council, the Tebtebba Foundation, the International Chamber of Commerce (ICC), the World Intellectual Property Organization (WIPO), ECOROPA, Natural Justice (Lawyers for Communities and the Environment), the International Institute for Environment & Development, and the University of Delhi, India. An expert of the United Nations Secretariat of the Permanent Forum on Indigenous Issues (UNPFII) and the University of Technology, Australian Indigenous Education Jumbunna House of Learning were selected and invited to the meeting but were unable to participate.

7. In addition, the Co-Chairs of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, Mr. Timothy Hodges of Canada and Mr. Fernando Casas of Colombia, as well as a representative of the Bureau of the Conference of the Parties attended as *ex officio* observers. A representative of UNEP also attended the meeting.

ITEM 1. OPENING OF THE MEETING

8. The meeting was opened at 9.30 a.m. on Tuesday, 16 June 2009.

9. Mr. B. S. Parsheera, Special Secretary, Ministry of Environment Forests, in his opening remarks, welcomed all the experts on behalf of the Government of India. Giving a brief background of the meeting, Mr. Parsheera highlighted the measures taken by India relating to access and benefit-sharing pursuant to the Convention on Biological Diversity, including enactment of the Biological Diversity Act in 2002. Referring to some of the well-known instances of misappropriation of traditional knowledge from India, he emphasized the need for internationally accepted solutions to such misappropriation. He urged the delegates to deliberate in a frank and open manner the technical and legal issues relating to traditional knowledge in accordance with the mandate provided to this expert group by the Ninth Conference of the Parties to the Convention on Biological Diversity.

10. Mr. Jairam Ramesh, Minister of Environment & Forests, Government of India, in his presidential address, listed the priorities of the Government as conservation of biodiversity, its sustainable use, followed by access and benefit-sharing. Referring to the rich traditional knowledge of the country in both codified and oral forms, and the efforts being made to document the codified traditional knowledge in the form of Traditional Knowledge Digital Library (TKDL), he informed about the access agreement entered into with the European Patent Office on traditional knowledge in February 2009, that would defensively protect the traditional knowledge of the country from being patented. He said that environment and economic growth were not mutually exclusive and underlined the need for greater sensitivity to ecological issues. Expressing concern at the threat economic growth posed to the country's biodiversity, Mr. Ramesh said that GDP should henceforth be termed Green Domestic Product, and wanted it to record an annual growth of nine per cent. Pointing to the erratic monsoon pattern, the receding Himalayan glaciers, and decimation of forests, he referred to the intimate link between climate change and biodiversity.

11. Dr. Y. S. Rajasekhar Reddy, Chief Minister of the State of Andhra Pradesh and chief guest of the function, formally released India's Fourth National Report to the Convention on Biological Diversity, and presented a copy to the representative of the Secretariat of the Convention on Biological Diversity. He highlighted the efforts made by the state of Andhra Pradesh in building biodiversity related institutions. In this regard, the Chief Minister announced a decision to hand over the state-run Environment Protection Training and Research Institute to the Government of India for converting it into a national institution. A proposal to set up a Centre of Excellence in Biodiversity Policy and Law, in this national institute, is also being actively considered by the Central Government. He wished the delegates success in their deliberations.

12. Shri P. Ramachandra Reddy, Minister for Forests, Environment and Science & Technology and Guest of Honor, released a film on invasive alien species entitled 'Deadly Neighbours, the World of Invasive Alien Species'. The film has been produced by the National Biodiversity Authority, Ministry of Environment & Forests, Government of India, on the occasion of the International Biodiversity Day, the theme for which this year is invasive alien species. Mr. Reddy also released Biodiversity News brought out by the Andhra Pradesh State Biodiversity Board.

13. In his opening remarks, Mr. Olivier Jalbert, Principal Officer, Secretariat of the Convention on Biological Diversity, speaking on behalf of the Executive Secretary of the Convention, Mr. Ahmed Djoghlaf, expressed his gratitude to the Government of India and to the State of Andhra Pradesh for hosting the meeting in such an inspiring setting and for the warm welcome and hospitality extended to the experts. India provided an ideal venue for this meeting as it boasts a vast, ancient and diversified culture. Life in India is a blend of tradition and modernity. India's initiative to host this meeting was once more a manifestation of Indian leadership on the issue of access to genetic resources and benefit-sharing. He recalled that India had been a founding member of the Group of Like-minded Megadiverse Countries (LLMC). This was not surprising since conservation of biological diversity and preservation of traditional knowledge was the cornerstone of Indian ethos and tradition. These concerns were engrained in its history, culture, religion and philosophy. They were also enshrined in its constitution, as well as national laws and policies.

14. Mr. Jalbert further expressed his appreciation to the Governments of Austria, Spain and Sweden who had provided financial support for the organization of the meeting. He recalled that this meeting had been mandated to examine a series of questions posed by the Conference of the Parties in decision IX/12 in connection with traditional knowledge associated with genetic resources. Participants had been selected on the basis of their personal expertise with due attention paid to regional balance and gender considerations. Their role consisted in providing expert and technical advice to the Ad Hoc Open-ended Working Group on Access and Benefit-sharing in connection with the questions submitted by the Conference of the Parties. In so doing, they would facilitate the negotiating process and help give shape to the International Regime.

15. The ABS Working Group Co-Chairs, Mr. Timothy Hodges and Mr. Fernando Casas also addressed the opening session. Mr. Hodges underscored India's international leadership on biodiversity issues, including in particular access and benefit-sharing, and praised the country's significant and exemplary efforts on access and benefit-sharing at the federal and state levels, including Andhra Pradesh. As India's domestic experience demonstrates, access and benefit-sharing is about seizing opportunity, identifying win-win situations and about building on diversity while concurrently working collaboratively in common purpose. While noting the many complex and vexing issues surrounding traditional knowledge associated with genetic resources, the Meeting of Technical and Legal Experts offered an important opportunity to provide input to the Ad Hoc Open-ended Working Group on Access and Benefit-sharing when it next meets. Co-Chair Hodges urged participants to bring their expertise to bear on the issues at hand and to avoid negotiating. By delivering on this charge, experts would play a significant role in the drive to a successful conclusion of the negotiations and historic adoption of the International Regime.

16. Mr. Casas emphasised that it was a great pleasure and privilege to be in India, a country with an ancient traditional knowledge and one of the most megadiverse countries in the world. He noted that the Co-Chairs were in attendance to observe, listen and learn. He further elaborated that incredible India had many lessons to teach and so many experiences to learn from, noting its rich and diverse colours, sounds, flavours, fragrances, landscapes, flora and fauna, and the people of India offering such an amazing blend of wisdom, knowledge, innovations and practices. This is precisely why the meeting was organized here in India, to benefit from its Spirit. He expressed high expectations, bearing in mind that this is part of the long road to Nagoya and part of a comprehensive effort, including many other meetings, studies, presentations, documents, and other work. In finishing he noted that access and benefit-sharing is about both resources and knowledge, and especially praised the long-term policy of India on purposely building a knowledge-based society, bridging its ancient traditions and its modern reality. We are here to learn from India's diversity, tolerance and caring for each other. He warmly thanked the Government of India, wished the experts good luck in their deliberations considering the great responsibilities to deliberate and provide solid advice to the access and benefit-sharing process.

ITEM 2. ORGANIZATIONAL MATTERS

2.1. Officers

17. At the opening session, on 16 June 2009, participants elected the expert nominated by Norway, Ms. Tone Solhaug, and the expert nominated by India, Mr. Vinod K. Gupta, as Co-chairs of the meeting.

2.2. Adoption of the agenda

18. The Group adopted the following agenda on the basis of the provisional agenda (UNEP/CBD/GTLE-ABS/3/1):

1. Opening of the meeting.
2. Organizational matters.
3. Traditional knowledge associated with genetic resources as it relates to the international regime on access and benefit-sharing.
4. Adoption of the report.
5. Closure of the meeting.

2.3. Organization of work

19. At its opening session, the Group decided to work initially in plenary with the possibility of breaking up in smaller working groups, as needed, during the following days. On the second and third days of the meeting, the Group broke into two contact groups.

ITEM 3. TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES IN THE CONTEXT OF THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING

20. In addressing the items laid down in the terms of references of the expert group, the Group had before it information and views provided by Parties, Governments, Indigenous and Local Communities, International Organizations and relevant Stakeholders in response to the invitation of the Conference of the Parties in paragraph 15 of Decision IX/12, as well as the following information documents: Study on Compliance in relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law (UNEP/CBD/ABS/GTLE/3/INF/1), the outcomes of the Vienna Workshop on Matters Related to Traditional Knowledge Associated with Genetic Resources and the International Access and Benefit-Sharing Regime (UNEP/CBD/ABS/GTLE/3/INF/2), the report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 17-19 January 2005 (UNEP/CBD/ABS/GTLE/3/INF/3), the report of the International Expert Group Meeting on the International Regime on Access and Benefit-Sharing and Indigenous Peoples' Human Rights of the Convention on Biological Diversity (UNEP/CBD/ABS/GTLE/3/INF/4) and the report of the Meeting of the Group of Legal and Technical Experts on Compliance in the Context of the International Regime on Access and Benefit-Sharing (UNEP/CBD/ABS/GTLE/3/INF/5).

21. During the four days of the meeting, the experts proceeded to an in-depth examination of the issues of traditional knowledge associated with genetic resources in the context of the international regime on access and benefit-sharing, based on the eight questions posed by the Conference of the Parties.

22. Specifically, on 16 June, the Group considered questions (a) and (h) of its agenda in plenary. On 17 June, the Group broke into two contact groups: Contact Group I, chaired by Ms. Lucy Mulenkei with Mr. Andreas Drews as Rapporteur, considered questions (b) and (c). Contact Group II, chaired by Mr. Merle Alexander with Mr. John von Doussa as Rapporteur, considered questions (d) and (f). The outcome of contact group discussions was later discussed in plenary.

23. On 18 June, the Group met in plenary to review a summary record of discussions on questions (a) and (h). The same contact groups (with the exception that the Rapporteur of Working Group II was Ms.

Jennifer Tauli-Corpus) later met to examine questions (e) and (g). The outcome of contact group discussions was later discussed in plenary.

24. On 19 June, the Group discussed in plenary the advice to be provided on each of the questions on the basis of the discussions during the previous days. The outcome of deliberations is annexed to the present report.

ITEM 4. ADOPTION OF THE REPORT

25. The present report was adopted at the final session of the meeting, on 19 June 2009.

ITEM 5. CLOSURE OF THE MEETING

26. Experts expressed their appreciation to the Government of India for hosting the meeting.

27. Following the customary exchange of courtesies, the meeting was closed at 8 p.m. on Friday, 19 June 2009.

Annex

OUTCOME OF THE MEETING OF THE GROUP OF TECHNICAL AND LEGAL EXPERTS ON TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES IN THE CONTEXT OF THE INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING

1. The Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources met to provide legal and technical advice, including, where appropriate, options and/or scenarios, regarding the questions identified for its consideration in decision IX/12, annex II, section C, paragraph 1.

2. After careful consideration of the relationship between the various questions, and discussions with and agreement of the experts, the Co-Chairs decided to cluster the eight questions as follows: (a) and (h), (c) and (b); (d) and (f), and (e) and (g).

3. The following reflects the outcome of discussions in that order.

(a) What is the relationship between access and use of genetic resources and associated traditional knowledge?

Relationship between access to genetic resources and associated traditional knowledge

4. For the purposes of the discussion, traditional knowledge (TK) is interpreted within the context of Article 8(j) and Article 15, as knowledge, innovations and practices associated with genetic resources. Furthermore the traditional knowledge in question is that which is held by indigenous and local communities. Some experts emphasized that there are many types of traditional knowledge[1].

5. Although in most cases genetic resources seem to have associated traditional knowledge, it was also recognized that not all genetic resources have associated traditional knowledge[2].

6. Some molecules/properties/active ingredients of genetic resources may be identified in genetic materials without the support of traditional knowledge and others with the support of traditional knowledge. One expert noted that modern science increasingly relies on screening of biological resources to identify active properties and in such instances does not make use of traditional knowledge.

7. Hence not all uses of genetic resources are based on traditional knowledge, however it was also pointed out that there are many cases where traditional knowledge is used sometimes either directly or indirectly and not acknowledged.

8. In situations where traditional knowledge is associated to genetic resources however, it was highlighted by many experts that traditional knowledge and genetic resources are inseparable[3].

9. Experts further clarified that there are two types of traditional knowledge, one that is highly specific and that which is of a more general nature, related to the encompassing ecosystem and is the result of co-evolution.

10. In discussing the relationship between traditional knowledge and genetic resources, the history of co-evolution (of biological and cultural systems) reinforces the inseparability of traditional knowledge and genetic resources. Furthermore, co-evolution suggests that there is traditional knowledge which is highly specific, and traditional knowledge which is of a more general nature as the result of co-evolved, bio-cultural systems. Research shows that human ecosystem management and traditional knowledge promotes biological diversity and thus genetic diversity.

11. In order to determine what will be covered under the scope of the International Regime, the key question is what is “associated traditional knowledge”.

[1] For instance both India and China have established five categories of traditional knowledge.

[2] Para. 37 of the Bonn Guidelines.

[3] See text of submissions.

12. It was suggested by many experts that associated traditional knowledge refers to traditional knowledge which is specific or general in its relationship to genetic resources.

13. It was also suggested by a number of experts that traditional knowledge often provides the lead to genetic resources with potential properties, even if the traditional knowledge does not match the end product. Thus it should nevertheless be covered by the International Regime. Although the traditional knowledge used for the final product may not match the body of traditional knowledge, traditional knowledge adds value to genetic resources by providing a massive increase of efficiency in identifying genetic resources with potential properties. Traditional knowledge can therefore be considered as an indicator of the potential properties of a genetic resource. At the same time, it was noted by some that traditional knowledge does not always provide useful leads to genetic resources.

14. In essence, traditional knowledge that sparks the process or provides the lead to the properties of a genetic resource although it may not be reflected in the end product remains associated to that product. However, one expert emphasized that traditional knowledge does not always provide a lead to genetic resources.

15. Another point raised is the fact that there is not always a relationship between the owners of genetic resources accessed and the holders of traditional knowledge. In some instances, genetic resources may be owned by the government or a private landowner or indigenous and local communities and the traditional knowledge held by indigenous and local communities. It was noted that the relationship between access and use may vary depending on the nature of State sovereignty.

16. Although Article 8(j) and Article 15 are separate articles, both are recognized as a basis of the International Regime. Use of traditional knowledge may trigger benefit-sharing because of the association of traditional knowledge and genetic resources.

17. Some experts highlighted the distinction between commercial use and non-commercial use, such as taxonomy, and considered that research may imply access but not necessarily use, but from the point of view of indigenous and local communities, this distinction is not necessarily relevant. Others noted that research can also lead to commercial use, and indeed, in recent times, most research is driven by commercial viability.

18. It was also noted that Article 8(j) is a stand-alone provision that was not subservient to Article 15 but in fact they are mutually supportive and the development of the International Regime should support Article 8(j) in respecting, protecting and promoting traditional knowledge. It was noted that Article 15 speaks to the sovereignty of States over their genetic resources whereas Article 8(j) recognizes holders of traditional knowledge. It was further emphasized that Article 8(j) as a stand alone provision protects all traditional knowledge of indigenous and local communities, within the mandate of the Convention on Biological Diversity, including traditional knowledge associated with genetic resources. Furthermore associated traditional knowledge does not necessarily have to be associated with genetic resources, as it can also include the use of traditional knowledge associated with biological resources.

19. It was highlighted that biological resources is an umbrella term used by some countries and communities in addressing access and benefit-sharing in order to encompass not only genetic resources, but also biochemical properties, organic extracts and others.

20. In conclusion, experts agreed that even though further work is needed to determine the exact relationship between genetic resources and associated traditional knowledge, given that most traditional knowledge is intrinsically linked to a genetic resource, the International Regime should also embrace traditional knowledge.

How should traditional knowledge be addressed in the International Regime?

21. Some were of the opinion that traditional knowledge should be reflected across the International Regime, others were rather of the opinion that a special chapter should be devoted to traditional knowledge. It was pointed out that the development of a chapter on traditional knowledge which did not

take into account the relationship between indigenous and local communities and genetic resources would not be desirable.

22. Some suggested that the International Regime should contain specific language that speaks to the rights of indigenous and local communities over their traditional knowledge and associated genetic resources. Some experts felt that if the International Regime is legally binding concerning genetic resources, it should also be legally binding concerning associated traditional knowledge and in particular in its requirement for respective prior informed consent of Governments for genetic resources and prior informed consent of indigenous peoples and local communities concerning traditional knowledge.

23. However, one expert stated the belief, that article 8(j) was designed to give States maximum flexibility and pointed out that under the Convention on Biological Diversity there was no legally binding obligation on States regarding traditional knowledge.

24. The development, adoption and implementation of the International Regime should not restrict the exchange of genetic resources and traditional knowledge among indigenous and local communities for traditional purposes.

25. A list of issues to be considered by negotiators includes:

a. Issues related to scope, such as traditional knowledge related to biological resources and demand for raw materials or extracts due to the demand created by associated traditional knowledge[4].

b. Some Parties do not require prior informed consent for access to genetic resources. Under these circumstances, there is a need to consider how to deal with access to associated traditional knowledge if genetic resources do not require the prior informed consent of the State in order to ensure that benefits will be shared with indigenous and local communities as holders of the traditional knowledge accessed.

c. There is a need to consider situations where genetic resources are found in one country and traditional knowledge related to these genetic resources is found in another (see paragraph 85).

d. There is also a need to address not only traditional knowledge associated with genetic resources that is accessed *in situ* but also traditional knowledge and genetic resources accessed *ex situ*, including in databases, or libraries and the potential sharing of benefits

e. Some traditional knowledge recorded in databases can be used as a lead for drug discovery[5]. Some were of the opinion that these situations and the sharing of benefits for traditional knowledge associated with genetic resources accessed under these circumstances should be addressed by the International Regime. Some felt that traditional knowledge in the public domain should not be subject to benefit-sharing. Whereas others felt that such traditional knowledge would come under national control and that the State should determine beneficiaries.

Other matters

26. One expert noted that in some regions/countries there may be little traditional knowledge left in indigenous or local communities. In some cases traditional knowledge and genetic resources were attributed to scientific institutions. In such cases, it was suggested that national regulations should reflect the possibility for national governments to preserve this traditional knowledge and have a right over traditional knowledge and more specifically for governments or communities to be able to reclaim and restore traditional knowledge through repatriation. Another expert stated an opinion that article 8(j) was designed to provide national governments with maximum flexibility and therefore this report should focus on what should be done internationally, rather than nationally.

[4] Some experts highlighted the Hoodia case-study as a relevant example.

[5] A relevant example is the use of traditional Chinese medicine for identification and development of useful compounds.

(h) How to define traditional knowledge associated with genetic resources in the context of access and benefit-sharing?

27. It was noted that article 15 speaks to the sovereignty of States over their genetic resources whereas Article 8(j) recognizes holders of traditional knowledge, and this could be a helpful starting point for the discussions.

28. The experts agreed that a common understanding of traditional knowledge associated with genetic resources would assist the expert group in its work. Opinions varied almost equally among the experts on the value and practicability of the expert group developing a precise or working definition, or simply enumerating a list of indicative characteristics of traditional knowledge associated with genetic resources that could provide a working understanding of what was meant and could be passed on to the Ad Hoc Open-ended Working Group on Access and Benefit-sharing (Working Group on ABS).

29. A number of experts advocated the value of developing a definition. It was noted that WIPO had been developing a broader definition of traditional knowledge over a number of years. While no consensus had been reached to date, a working definition is included in the WIPO draft provisions for the protection of traditional knowledge and that has proved helpful for the discussions.

30. An expert noted that one written submission to the expert group provided draft operational text for a definition adapted from the WIPO definition. Other experts agreed it would be worthwhile to try to define what was meant by traditional knowledge associated with genetic resources even if it was not perfect. The point was made that a definition would be made more valuable if it was simple and easy to understand, while addressing the subject holistically within a particular social or cultural context. One expert noted that any definition would also need to address misappropriation of traditional knowledge associated with genetic resources.

31. A number of other experts highlighted the wide range of contexts within which any definition would need to be applied. It was important to maintain flexibility for self definition particularly at domestic level. The length of negotiations within WIPO pointed toward the possible impracticability of developing a definition. They advocated the value of enumerating an indicative list of common characteristics of traditional knowledge associated with genetic resources and these could be useful to the negotiations of the Working Group on ABS and provide a possible basis for a subsequent definition if deemed necessary.

32. The Convention's provisions in Article 8(j) and the preamble were a useful starting point, including the understanding that the short-hand term "traditional knowledge" associated with genetic resources, applied to "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles", to ensure discussions were consistent with Article 8(j).

33. Some common characteristics of traditional knowledge associated with genetic resources suggested included:

(a) A link to a particular culture or people – knowledge is created in a cultural context;

(b) A long period of development, often through an oral tradition, by unspecified creators;

(c) A dynamic and evolving nature;

(d) Existence in codified or uncodified (oral) forms;

(e) Passed on from generation to generation – intergenerational in nature;

(f) Local in nature and often imbedded in local languages;

(g) Unique manner of creation – (innovations and practices);

(h) It maybe difficult to identify original creators.

(c) Identify the range of community level procedures and determine to what extent customary laws of indigenous and local communities regulate access to genetic resources and associated traditional knowledge at the community level and its relevance to the international regime

34. Experts agreed that there exists a wide diversity of community level procedures, which address access to natural, biological and genetic resources. It was generally agreed, with the exception of one expert, that indigenous peoples and local communities hold rights to traditional knowledge associated with genetic resources and that their agreement should be obtained before such knowledge is accessed. As mentioned, such decisions as well as terms for granting access will often be guided by the indigenous peoples or local communities customary laws and community level procedures. Consequently, when indigenous peoples and local communities have customary laws and community level procedures pertaining to traditional knowledge, these laws and procedures are relevant to the International Regime. Procedures for prior informed consent and mutually agreed terms, when they have not been established, can draw on existing practices. In many cases there are collective decision-making procedures at community level.

35. When indigenous and local communities have well defined structures and have established indigenous authorities, national regulations can directly rely on these. The Norwegian legislation, for example, provides for the involvement of the Saami Parliament in access and benefit-sharing cases. If access to traditional knowledge associated with genetic resources is sought, the authority to determine access to traditional knowledge rests with the Saami Parliament. In cases where such structures do not exist, their establishment in general would be desirable. It was suggested that community protocols (as proposed by the African Group in its operational text for the International Regime and which has been included in the annex to the Paris report under measures to ensure compliance with customary law and local systems of protection) may provide a useful approach.

36. It was recognized that community level procedures are in constant evolution and may not be well known to non-members. Therefore, although customary laws and practices may not provide specific procedures for access to genetic resources at this time, these may evolve in response to the development of the International Regime and national legislation. It was also stressed that due to the diversity of community level procedures there is no one-size-fits-all approach to address access to genetic resources and associated traditional knowledge at the community level.

37. Common themes relating to customary law and community level procedures were identified during the discussion, including but not limited to the following:

- Generally indigenous and local communities conceive genetic resources more broadly. They have a more holistic approach and refer generally to natural or biological resources. The concept of genetic resources has only started to be considered more recently.
- Indigenous and local communities also perceive traditional knowledge and genetic resources/biological resources in a holistic manner. Traditional knowledge is hence generally considered as cohesive and integral to genetic resources.
- Traditional knowledge is collective in nature.

38. When discussing the first point, it was highlighted that although the terminology of genetic resources may not be used by indigenous and local communities, they do have specific knowledge related to the properties of biological resources. It was suggested that capacity-building is needed at the community level to raise awareness on genetic resources and access and benefit-sharing and that the International Regime should address this.

39. When discussing the concept of genetic resources, it was pointed out that this concept is a developing concept in law and that a number of countries were still grappling with it. A number of different approaches have been adopted at the regional and national levels to deal with the ownership of genetic resources. For example, while in some cases genetic resources are the ownership of the State, in others they may be the property of the land owner.

40. With respect to traditional knowledge, it was generally suggested, except by one expert, that the International Regime needs to address the issue of the ownership of traditional knowledge which is already documented in databases and scientific publications.

41. Given the nature of traditional knowledge, innovations and practices, which are collective and intergenerational, it was highlighted that any conflict with other systems relating to the same issues need to be addressed by the International Regime.

(b) What practical measures should the negotiations of an international regime take into account based on the range of community level procedures and customary systems of indigenous and local communities for regulating access to traditional knowledge associated with genetic resources at the community level?

42. The International Regime should provide basic principles to ensure respect for customary laws and community level procedures. These principles could include procedures or mechanisms upon which access and benefit-sharing can be addressed. In this respect, the role of competent national authorities in providing clear rules for access and benefit-sharing was highlighted. Competent national authorities and focal points for access and benefit-sharing would have the responsibility to inform applicants on access granting procedures and rights of indigenous and local communities. They should also direct applicants to relevant indigenous authorities when access to traditional knowledge associated with genetic resources was concerned. These indigenous authorities could ensure respect for customary laws and procedures. It was hence submitted that providing for prior informed consent by the relevant indigenous or local community authority contributes to respect for customary laws and community level procedures. With such an approach, the user need not necessarily be aware of the actual content of the customary law, enhancing efficiency and legal certainty. It was mentioned that the task of identifying relevant indigenous authorities could be difficult in countries with many different indigenous and local communities.

43. Capacity-building at the community level would be required to address this challenge in order to develop clear procedures for access to traditional knowledge associated with genetic resources, such as community protocols.

44. In this respect, it was suggested that mechanisms were needed at the national level for national governments to empower indigenous peoples and local communities to make decisions that are informed and clearly understood. Indigenous and local communities also need to have the ability to engage on their own terms and therefore would need to be involved in the development of these mechanisms.

45. In the situation where national laws do not take into account indigenous and local communities, the question was raised, as to how the International Regime could address this situation in order to ensure the prior informed consent of indigenous peoples and local communities when their associated traditional knowledge is accessed and that they receive benefits arising from the utilization of such knowledge. It was suggested that the International Regime should call on state legislation to recognize rights of indigenous peoples and local communities.

46. Attention was drawn to the fact that so far only a few countries have established Competent National Authorities and that the lack of information regarding access procedures is preventing potential users from engaging in bioprospecting activities.

47. It was suggested that a matrix could be developed at the national level to assist in clarifying the various levels of authority for obtaining access to genetic resources and associated traditional knowledge.

48. It was noted that there may be different levels of law relevant to the development of the International Regime incorporating international, regional, national, sub-national and customary laws and the relationship between and obligations arising from these different levels of laws may need to be clarified in the International Regime.

49. The issue of transboundary traditional knowledge, as well as the migration of indigenous and local communities across borders and from one country to another, were also considered. Examples were provided of regional approaches that address the issue of common resources found in neighboring

countries, such as the Nordic Council of Ministers and the proposed draft ASEAN Framework agreement on Access and Benefit-Sharing. It was recognized that a regional approach may be a helpful approach to deal with many of these transboundary issues.

50. In order to address situations of conflicts arising from transboundary traditional knowledge, it was suggested that an international and/or regional mediation or alternative dispute resolution mechanism could be established by the International Regime exclusively or among others to address issues regarding the authority to grant prior informed consent.

51. It was suggested that the International Regime could establish a legal aid body, such as an ombudsperson, that includes representatives of indigenous and local communities that could assist in addressing imbalances in legal capacity between providers and users of genetic resources and associated traditional knowledge in order to create a level playing field. This authority could be empowered to take action on behalf of indigenous and local communities and provide evidence of customary law and practices, as and where appropriate.

52. It was also suggested that the International Regime should address the situation of traditional knowledge found in the public domain. In this respect, it was stated that intellectual property rights can not be granted on traditional knowledge found in the public domain. Some suggested that traditional knowledge found in the public domain remains the property of indigenous and local communities and therefore should require prior informed consent before being used. The distinction between public availability and the public domain was stressed. One expert suggested that such traditional knowledge should not be classified for purposes of prior informed consent and mutually agreed terms under the International Regime.

(d) To what extent measures to ensure compliance with prior informed consent and mutually agreed terms under Article 15 also support the prior informed consent of indigenous and local communities for the use of their traditional knowledge?

53. The experts approached the answer to this question in two stages.

54. In the first stage they considered the interpretation of Article 15 read in conjunction with other provisions of the Convention on Biological Diversity, in particular Article 8(j), and discussed to what extent these provisions support the prior informed consent of indigenous peoples and local communities before traditional knowledge associated with genetic resources is accessed.

55. It was noted that Article 15.1 and 15.5 stipulate that access to genetic resources is subject to the prior informed consent of the Contracting Party, unless otherwise determined by that Party. The experts further noted that these provisions do not directly apply to access to traditional knowledge associated with genetic resources. However, the experts concluded that there is a link between Articles 15 and 8(j), as evidenced for example by the reference to environmentally sound uses and the furtherance of the objectives of the Convention on Biological Diversity in Article 15.2.

56. The experts considered the interpretation which should be given to article 8(j). For the reasons given in the answer to question (f), they concluded, with the exception of one expert, that article 8(j) provides a basis for a requirement that prior informed consent be obtained. National laws would therefore prescribe compliance conditions for the granting of access to genetic resources with associated traditional knowledge which ensure that prior informed consent is properly and appropriately obtained from indigenous peoples and local communities.

57. The International Regime could require that national law builds upon the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization (Bonn Guidelines). Essential to the access regime established by domestic law is the creation of a Competent National Authority (CNA) and a national access point. At minimum, a CNA is needed to promote certainty over the domestic process governing prior informed consent of indigenous peoples and

local communities when access to associated traditional knowledge is sought. In this regard, the CNA will be guided by the customary laws, community procedures or community protocols where they exist.[6]

58. The Bonn Guidelines recommend that prior informed consent should be obtained from indigenous and local communities where traditional knowledge associated with genetic resources is to be accessed.

59. In the second stage, the experts considered what kinds of compliance measures could be prescribed for ensuring the prior informed consent of indigenous peoples and local communities for the use of their traditional knowledge. National law should not arbitrarily prescribe the process for obtaining prior informed consent. The process should be a flexible one recognising that customary laws and local practices will vary between different groups and locations. No one size will fit all.

60. National laws should provide for respecting customary laws and community protocols – whether codified or not - to regulate the process to obtain prior informed consent, and for best practice codes of conduct to be observed by applicants for access. Protocols and codes of conduct should fully reflect the rights/decisions of indigenous peoples and local communities concerned.

61. A CNA would significantly contribute to promote compliance and to ensure that prior informed consent of indigenous peoples and local communities was freely and properly given.

62. Compliance measures that also support the prior informed consent of indigenous peoples and local communities for the use of their associated traditional knowledge could include:

(a) Capacity-building, awareness-raising and information-sharing within indigenous and local communities;

(b) Codes of conduct and best practice codes of users;

(c) Sectoral model clauses for material transfer agreements to promote equity between the negotiating positions of the parties;

(d) Minimum standards for access and benefit-sharing agreements (as recommended in paragraph 69 (a)-(h) of the study on compliance in relation to customary law of indigenous and local communities (UNEP/CBD/ABS/GTLE/3/INF/1); and

(e) Disclosure requirements concerning the origin or source of genetic resources and associated traditional knowledge to which access is granted.

63. One expert drew attention to the impact of free trade agreements, such as the Central American Free Trade Agreement (CAFTA), to impose obligations on the Parties to the Convention on Biological Diversity which would be inconsistent with the disclosure requirements of a certificate of origin. Other experts agreed on the relevance of this issue.

64. One expert expressed the view that disclosure requirements may be ineffective in promoting compliance and may also decrease potential benefit-sharing.

65. To enhance legal certainty, clarity and transparency, the International Regime could suggest the inclusion of clear provisions for obtaining prior informed consent of indigenous peoples and local communities when accessing traditional knowledge associated with genetic resources in national access and benefit-sharing frameworks. In this regard, a procedure for simplified access for research with non-commercial purposes must be considered.[7]

[6] See paragraph 72 below.

[7] See paragraph 17 above.

(f) Is there a basis for prior informed consent for indigenous and local communities relative to traditional knowledge associated to genetic resources in international law? If so, how can it be reflected in the international regime?

66. One expert did not agree with the following paragraphs.

67. The experts discussed the value of existing international instruments and processes particularly within the human rights area with respect to indigenous peoples in providing a source of law with varying degree of applicability to establish a basis for prior informed consent of indigenous peoples and local communities for traditional knowledge associated with genetic resources. International instruments that provide a basis for prior informed consent of indigenous peoples and local communities relative to associated traditional knowledge include:

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- International Labour Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (1989)
- Food and Agriculture Organization International Treaty on Plant Genetic Resources for Food and Agriculture (2001)
- Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization (2002)
- Declaration on the Rights of Indigenous Peoples (2007)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)

68. These instruments demonstrate a progressive trend towards international law mandating a requirement for the prior informed consent of indigenous peoples and local communities for traditional knowledge associated with genetic resources, there is hence a clear trend that provides a basis in international law for the International Regime to require prior informed consent. Moreover, a growing body of individual State and regional practice requires prior informed consent of indigenous peoples and local communities in relation to traditional knowledge associated with genetic resources. It was also noted that there is a growing practice in developed countries for commercial users to seek prior informed consent from indigenous peoples and local communities as a matter of best practice.

69. The Convention on Biological Diversity entered into force in 1993. The understanding of the Convention can evolve over time. The interpretation of the Convention by the Conference of the Parties through its decisions must be guided by the developments in international law and processes particularly with regard to prior informed consent. Within the discussions on Article 8(j) in the Working Group on the subject, and the current negotiations of the International Regime, the need for the knowledge holder's prior informed consent has been recognized in relation to traditional knowledge associated with genetic resources.

70. It was noted that the provisions of the Convention on Biological Diversity, and the discussions within the International Regime negotiations were not limited to the prior informed consent of indigenous peoples as Article 8(j) recognizes traditional knowledge associated with genetic resources can be held by local communities.

71. It was concluded that there is a clear basis in international law for prior informed consent of indigenous peoples and local communities when traditional knowledge associated with genetic resources is accessed and this should be considered in the International Regime.

(e) Identify elements and procedural aspects for the prior informed consent of holders of associated traditional knowledge when traditional knowledge associated with genetic resources is accessed also taking into account potential transboundary contexts of such associated traditional knowledge and identifying best practice examples

72. Following their mandate, the experts elaborated on existing examples and best practices related to prior informed consent of associated traditional knowledge and addressed transboundary issues. A section on transboundary issues follows the initial section dealing with prior informed consent.

73. The experts identified the following as desirable elements for the prior informed consent of holders of associated traditional knowledge:

(a) Competent national authority

(b) Competent authority at the level of indigenous and local communities with a statutory authorization/mandate as competent authorities of indigenous and local communities. It was pointed out that there is a need for legal recognition of indigenous and local communities competent authorities and recognition of customary law. Without such recognition there is an inherent risk that customary law is being replaced by local government regulations.

(c) Elements of process including:

(i) Written application

(ii) Wide notification of applications sought

(iii) Applications to be widely accessible

(iv) Legitimate process

(v) Adequate timing and deadlines

(vi) Specification of use with clause to address change of use and transfer to third parties

(d) Prior informed consent granted on the basis of mutually agreed terms

(e) Consultation process with indigenous and local communities

(f) Procedures consistent with customary practices

74. It was mentioned that the Bonn Guidelines provide useful elements and procedural aspects for prior informed consent, such as competent national authorities, appropriate timing of procedures and deadlines, stating the specificity of use, mechanisms for stakeholder consultations and a process for prior informed consent.

75. The following examples of best practices in seeking prior informed consent of indigenous peoples and local communities were provided:

76. In Australia, the Land Council for the South West of Australia, a non-governmental organization representing some tens of thousands of people and with a statutory role assigned by the national government, assists applicants in obtaining prior informed consent and mutually agreed terms on a variety of matters. Basic principles used by the organization in reaching prior informed consent include firstly, the provision of information that is comprehensive, understandable and clearly outlines the intentions of the proponent as well as the potential of the project, secondly, agreement to an appropriate time frame in order for a considered decision to be reached and thirdly, legitimate decision making processes. Legitimacy of process is critical, and in this case includes the cultural appropriateness of decision making processes in addition to fairness, freedom from coercion and transparency.

77. In New Zealand, similar processes as in Australia have been established. Tribal organizations act as competent indigenous authorities. Transboundary issues among tribes are dealt with among the

indigenous and local communities themselves. Protocols have been formulated on how to engage with each other to address the issues especially regarding the sharing of benefits generated from traditional knowledge.

78. In cases where associated traditional knowledge is accessed *ex situ,* benefit-sharing arrangements should be negotiated. Regarding access to gene banks and resulting benefit-sharing, it was highlighted by a number of experts that prior informed consent should be applied if associated traditional knowledge is accessed, subject to national legislation, and that benefit-sharing should apply. The International Regime could suggest that gene banks record such information where and as appropriate. Examples of best practice included the Chinese gene-banks. It was noted that in China, gene-banks identified villages where genetic resources and associated traditional knowledge were accessed.

79. With reference to the opposition of many indigenous and local communities, particularly in Latin America, to the compulsory documentation of associated traditional knowledge in databases or registers, there was broad agreement that adequate safeguards and protective mechanisms were needed regarding the use of associated traditional knowledge accessed through such databases or registers.

80. Recognizing that many countries have not yet established competent national authorities as well as appropriate prior informed consent procedures for the full inclusion of indigenous and local communities, there was broad agreement that the International Regime could provide incentives or even require Parties to establish such institutions and to develop relevant procedures. Some experts suggested that building a tandem of prior informed consent and mutually agreed terms at the level of indigenous and local communities and providing legitimacy at both levels should be an obligation under the Regime.

81. It was also highlighted that the International Regime must safeguard against "ABS shopping" to obtain access to genetic resources and associated traditional knowledge from providers which have unduly lax provisions or requirements, by providing clear guidelines on how to ensure the notification of access applications sought, the publication of applications, transparency, timing and deadlines and by using the Clearing-House Mechanism under the Convention on Biological Diversity.

82. It was suggested that at the national level, the establishment of authorities and procedures should build on existing structures of local governance and constitutional requirements where they exist. One expert further suggested that established prior informed consent procedures for the approval of, for example, natural resource extraction activities on land inhabited by indigenous and local communities could in some cases be adapted to accommodate access and use of genetic resources and associated traditional knowledge.

83. There was broad agreement that dispute settlement through alternative dispute resolution mechanisms, as well as appropriate compliance mechanisms could be defined by the International Regime.

84. It was suggested to explore how the CITES mechanisms could be used to deal with associated traditional knowledge to ensure benefit-sharing with traditional knowledge holders.

85. There was general agreement that legal certainty and consultative mechanisms were both desirable. However, conflicts could arise regarding the timing of procedures and deadlines as well as confidentiality. On the one hand, sufficient time is necessary for legitimate prior informed consent processes to be carried out and on the other hand, potential users, such as scientists and the business community, require speedy procedures. In addition, the information requirements requested under prior informed consent and mutually agreed terms may conflict with the need for confidentiality.

Transboundary issues

86. In situations where associated traditional knowledge is shared between indigenous and local communities, spread across national boundaries or indigenous and local communities with different values, customary norms, laws and understandings, countries should encourage and support the development of community protocols that will provide potential users of such associated traditional knowledge with clear and transparent rules for acquiring prior informed consent.

87. In transboundary situations, to the extent possible, the prior informed consent procedures of both countries should be required from all entitled communities. The same applies to benefit-sharing. Dispute resolution mechanisms, if established, should be used in case of conflict. Benefit-sharing trust funds may be appropriate if common traditional knowledge is accessed and used.

88. In the transboundary context, there is a need to differentiate between national (indigenous and local communities within one State) and regional (between States) situations. In cases where genetic resources are spread across a broad international scale, transboundary issues need to be addressed at the international level. Concern was raised as to how prior informed consent should be addressed in cases where many countries and indigenous and local communities are involved.

89. In cases of shared associated traditional knowledge, applicants should be directed towards established competent indigenous and local community authorities in order to avoid a race to the bottom, i.e. lowest costs. It was highlighted that such authorities, even for intercommunity decision making, do exist in many cases.

90. It was highlighted that indigenous authorities and procedures do not seem to exist to address prior informed consent and mutually agreed terms for access to *ex situ* transboundary traditional knowledge.

91. It was suggested that it may be helpful to address access and benefit-sharing separately. The proposed draft ASEAN Framework Agreement on Access and Benefit-Sharing for example provides for a notification mechanism regarding access in one country and benefits shared with indigenous and local communities in other countries through a common fund.

92. When traditional knowledge is found in more than one community and prior informed consent and mutually agreed terms are negotiated with only one or few of these communities, it was suggested that trust funds could be established for the sharing of benefits with the other communities who did not take part in prior informed consent and mutually agreed terms.

93. One example of indigenous competent authorities operating across borders is the San Councils in the Southern African States which have developed procedures for interaction to address the shared traditional knowledge of the San communities. In order to ensure sharing of benefits among the San communities in the different countries, a common trust fund has been set up.

94. It was noted that a notification process is essential for state established competent authorities (e.g.: as established under proposed draft ASEAN Framework Agreement on Access and Benefit-sharing) as well as for competent authorities established by indigenous and local communities (e.g. such as the San Councils in Southern Africa).

95. The need for an ombudsperson under the International Regime for mediation of transboundary conflict was highlighted.

(g) Assess options, considering the practical difficulties and distinct implementation challenges, for including traditional knowledge associated with genetic resources in a potential internationally recognized certificate issued by the competent domestic authority also by considering the possibility of a declaration on such certificate as to whether there is any associated traditional knowledge and who the relevant holders of traditional knowledge are;

96. In answering this question, the experts acknowledged the usefulness of the report of the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Source/Legal Provenance which met in Lima from 22 to 25 January 2007 (UNEP/CBD/WG-ABS/5/7). A series of sub-questions were identified as a means to analyse the question:

(a) Should there be certificates?

(b) Are these certificates of compliance/origin/provenance?

(c) Who would issue the certificates?

(d) For whom is the certificate issued?

(e) What would be the content of a certificate?

97. The group also discussed some of the practical difficulties and distinct implementation challenges in relation to an internationally recognised certificate.

Should there be certificates?

98. Some experts raised the basic question as to whether it is necessary to have certificates in the first place. An extensive discussion ensued on this fundamental question. The experts generally agreed that certificates could be useful as evidence that prior informed consent from indigenous peoples and local communities had been achieved in relation to traditional knowledge associated with genetic resources.

99. A number of opinions were expressed that a certificate would be a necessary, concrete and credible tool within the access and benefit-sharing toolkit. Some experts noted that a certificate would provide assurance that misappropriation did not occur, while emphasising that good faith is a fundamental attribute of granting prior informed consent.

100. Reluctance was expressed by some regarding the possible administrative complexity of issuing a certificate in relation to traditional knowledge associated with genetic resources. It was agreed that any certificate would need to be simple, straightforward, efficient, and workable. The Lima Expert Group report and its recommendations were referenced in this regard. It was further noted that it should be possible to create an efficient system, as long as the certificate itself is easy to verify. Furthermore, having as simple a document as possible would be consistent with article 8(j), give flexibility to States, and minimize the administrative burden. One expert added that once the right of holders of traditional knowledge to provide prior informed consent is established, it should be straightforward to devise a certificate system. The expert further added that a definition of misappropriation in the International Regime would clarify what rights should be complied with before a certificate is granted.

101. There was also some discussion regarding the issuance of different types of certificates for different uses (i.e., academic, scientific research and commercial uses). The comprehensiveness or complexity of the certificate could depend on the use proposed.

Are these certificates of compliance/origin/provenance?

102. The general opinion of the group was that it does not matter what the certificate would eventually be called, as long as it contains certain essential information. Essential components of a certificate would include whether or not there is traditional knowledge associated with genetic resources involved, who the traditional knowledge holders are, and whether or not the user has complied with indigenous customary law, community protocols and other consent or decision-making processes. Customary law per se would not need to be reflected in a certificate.

103. The experts recalled the Lima Expert Group Meeting report which "found it practical to refer to the certificate as a certificate of compliance with national law, in accordance with the Convention" (paragraph 7). One expert expressed a view that a certificate of origin indicating country, as well as the region or indigenous peoples' territory from which the traditional knowledge associated with the genetic resources originated could be preferable.

Who would issue the certificate?

104. The experts noted early in the discussion that question (g) assumes a competent domestic authority would issue a certificate. The law establishing a country's access and benefit-sharing framework would identify who acts as the domestic competent authority.

105. Some experts stated there would necessarily be a role for including a competent local authority in the process since there is a trend within many countries toward devolving authority to local levels. The main requirement however was foreseen to be assigning a due diligence responsibility to the competent domestic authority to ensure that prior informed consent had been obtained from the relevant indigenous peoples or local communities in relation to traditional knowledge associated with genetic resources.

106. In effect the competent domestic authority could be envisioned to act as a kind of clearing house, with the responsibility to verify compliance with the requirements of national law, indigenous or customary law, as well as the International Regime. A further comment made noted the competent domestic authority could have a meaningful role facilitating the development of community protocols that, among other things, could identify the indigenous or local community authority that has the power to give consent.

For whom is the certificate issued?

107. It was generally acknowledged that certificates could have multiple possible objectives and uses. This would necessarily mean that there would be multiple users of certificates.

108. A discussion ensued on the role of the intellectual property system, particularly the patent system and patent offices. Some strong concerns were expressed by some experts regarding the applicability of the intellectual property system as a means to protect traditional knowledge.

109. The work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/IGC) was noted and its general conclusion that *sui generis* solutions may be required to truly and substantively protect traditional knowledge. That is, the WIPO/IGC has developed *sui generis* draft provisions for the protection of traditional knowledge in light of the increasing recognition that existing intellectual property tools are not fully adequate in protecting traditional knowledge.

What could be the content of a certificate?

110. It was agreed that certificates could also include information on whether or not traditional knowledge associated with genetic resources has been accessed and whether prior informed consent and mutually agreed terms obligations have been fulfilled, taking into account what is stated in paragraph 101 of this report and para 21 (d) of the report of the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Source/Legal Provenance.

111. There was general agreement that the content of a certificate in relation to traditional knowledge associated with genetic resource must be simple and not overly detailed.

112. The group discussed the utility of a certificate including a declaration as a substantive component. The declaration would include an affirmative statement by the prospective user that the prior informed consent of an indigenous peoples or local community had been obtained in the process to gain access. A number of experts commented that a declaration could be a useful, straightforward and constructive tool to ensure full disclosure had been provided by the prospective user.

113. There was some reference to the repercussion of non-disclosure, as well as the voiding of the certificate if the declaration proved to be false. In addition it was noted that the disclosed content of a certificate would need to be sensitive to the sacred, secret and confidential nature of some traditional knowledge. However, one expert noted that this kind of traditional knowledge is not covered by the provisions of the Convention on Biological Diversity as Article 8(j) refers to traditional knowledge that may have a wider application.

114. A wide-ranging discussion regarded the complexities of identifying definitively all applicable indigenous and local communities given that joint or shared legal title to associated traditional knowledge is not common.

115. In relation to the rights of indigenous peoples to their traditional knowledge, one expert requested that the report reflect that it could not be unanimously agreed that indigenous peoples have an indigenous right to their traditional knowledge and that there were varying legal interpretations in national and international law.

Practical difficulties and implementation challenges

116. In its discussions the experts acknowledged there could be practical difficulties and distinct implementation challenges in relation to an internationally recognised certificate.

117. An important issue included identifying who could legitimately provide prior informed consent at indigenous or local community level, particularly where there are different holders of traditional knowledge associated with genetic resources. Another important issue touched on the likelihood that domestic legal frameworks in different countries could differ significantly.

118. The group also noted other situations that could pose practical difficulties and implementation challenges where traditional knowledge associated with genetic resources was shared by multiple communities, found in a transboundary context or found in *ex-situ* conditions.

119. It was noted that traditional knowledge that is shared does not usually belong to only one community/people/country and in the context of a certificate system this will likely present some challenges for a domestic competent authority in determining who the relevant traditional knowledge holder would be. One expert explained that traditional knowledge associated with genetic resources shared by multiple communities should not necessarily preclude any of the individual communities at issue from providing prior informed consent and entering into agreements, provided any agreement would not limit the subsequent ability of any of the other communities from entering into similar agreements.

120. In the discussion on *ex-situ* sources, some experts noted that traditional knowledge associated with genetic resources in the public domain does not necessarily have the prior informed consent of the relevant indigenous peoples or local communities from which it was sourced. It was proposed by some that use should trigger some benefit-sharing.

121. It was further noted that two categories could be discerned: those where ownership is definable and those where it is not. If the holders are known they should be entitled to benefit-sharing based on principles of equity. If a holder is unknown or not identifiable, one option could be for the State to act as a trustee on behalf of its citizenry to claim benefits.

122. Furthermore, the experts recognized a critical distinction between traditional knowledge associated with genetic resources being in the “public domain” versus being “publically available”. It was pointed out that the term public domain, which is used to indicate free availability, has been taken out of context and applied to traditional knowledge associated with genetic resources that is publicly available. The common understanding of publicly available does not mean available for free. The common understanding of public availability could mean that there is a condition to impose mutually agreed terms such as paying for access. Traditional knowledge has often been judged to be in the public domain and hence freely available once it has been accessed and removed from its particular cultural context and disseminated. But it cannot be assumed that traditional knowledge associated with genetic resources that has been made available publicly does not belong to somebody. Within the concept of public availability, prior informed consent from a traditional knowledge holder that is identifiable, could still be required, as well as provisions of benefit-sharing made applicable including when a change in use is discernible from any earlier prior informed consent provided. When a holder is not identifiable, beneficiaries could still be decided for example by the State. The experts also felt that the phrase public domain in the context of traditional knowledge needs to be more correctly re-phrased as publicly available. One expert did not agree with this distinction.
