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AD HOC OPEN-ENDED WORKING GROUP ON
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COMPILATION OF SUBMISSIONS PROVIDED BY PARTIES, GOVERNMENTS, INDIGENOUS AND LOCAL COMMUNITIES AND STAKEHOLDERS ON CONCRETE OPTIONS ON SUBSTANTIVE ITEMS ON THE AGENDA OF THE FIFTH AND SIXTH MEETINGS OF THE AD HOC OPEN-ENDED WORKING GROUP ON ACCESS AND BENEFIT-SHARING

Note by the Executive Secretary

Addendum

SUBMISSION FROM CANADA

1. The Secretariat is circulating herewith, as an addendum to the original compilation of submissions on concrete options on substantive items on the agenda of the fifth and sixth meetings of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing (UNEP/CBD/WG-ABS/6/INF/3), a non-paper from the Government of Canada on access and benefit sharing for genetic resources - contracts and private international law.

2. The contribution has been reproduced in the form and language in which it was received by the Secretariat.

* UNEP/CBD/WG-ABS/6/1.

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NON-PAPER ON ACCESS AND BENEFIT SHARING FOR GENETIC RESOURCES - CONTRACTS AND PRIVATE INTERNATIONAL LAW

Introduction

1. The use of contracts and the role of private international law in compliance and enforcement are ideas that can effectively advance provisions under the Convention on Biological Diversity for access and benefit sharing of genetic resources. Contracts necessitate the consent of the provider and the user, as well as elaborating the mutually agreed terms upon which access to genetic resources will be allowed, subject to national access laws, and how the benefits derived there from are to be shared.

2. Contract terms are fashioned by the parties themselves, creating the flexibility required for the diverse range of both users and providers of genetic resources. Contracts are also instruments that can be legally enforced, and can provide for a variety of dispute resolution options and remedies, including internationally. Contracts are successfully used and enforced in all major legal systems around the world.

3. Governments can fashion the contractual atmosphere for bioprospecting in ways they deem necessary for fairness and efficient national and international enforcement, through their domestic legislation and internationally developed model contract terms. Issues related to bargaining power disparity and access to justice need to be addressed through capacity building programmes and possible domestic legislation.

A. Contracts for Access and Benefit Sharing

Domestic Legislation

4. General contract law, enhanced by domestic legislation in certain sectors where needed, allows parties and governments more flexibility than a formal regulatory regime.

5. The role of domestic legislation in enhancing the environment for contracts involving genetic resources can be important in order to achieve the access and development goals sought by governments. This is especially true where existing domestic contract laws in general, which fill in gaps not specifically included in any contract, are considered insufficient in certain sectors.

6. Internationally developed examples of draft domestic legislation to deal with specific issues could be drawn upon by a Party to enhance the use of domestic legislation on such contracts. A prescribed, recommended contract form, with model key clauses or a checklist, could also be used. This is well known practice with respect to international commercial transactions

Access

7. A government can enact domestic legislation or regulations mandating that access to, and the removal of, genetic resources from its jurisdiction requires a contract with the owner, or with the authority which has control over the land in question.

8. Access to and removal of genetic resources without a contract would be tantamount to trespass and theft, which are criminal offences in many jurisdictions, as well as a basis for civil action for conversion. Where a contract is required under national access laws, removal without a contract would also constitute a violation of those laws.

Mutually Agreed Terms

9. By definition, a contract ensures that both parties have freely agreed to the subject of the contract and to its terms. Parties cannot be held to a contract made involuntarily or where there has been no agreement as to terms. This ensures mutually agreed terms for users and providers.

Benefit Sharing Across Different Sectors

10. Contracts allow for a wide range of benefit sharing options, from strictly monetary to non-monetary information sharing or capacity building benefits. In the case of access and benefit sharing contracts, each user and provider can ensure that the contract meets their specific needs, ensuring meaningful access for the user, and benefits which are fair from the perspective of both parties.

11. Users and providers, whether countries or individuals, indigenous peoples or local communities, all have different interests which would be difficult to address through other proposed regime models. Further, a government can require, through its domestic legislation, mandatory terms of consideration fashioned to their domestic circumstances and needs, as is often done in the case of consumer contracts.

12. If the terms of a contract are found to be manifestly unfair, national legal systems have mechanisms to invalidate the contract or provide for relief.

Fairness in Contracting

13. General contract theory assumes that parties enter into agreements with relatively equal bargaining power. In the case of indigenous peoples, the general public, or even the scientific community, this may often not be the situation. Capacity building for indigenous peoples in particular is therefore critical to the proper establishment of fair contracts for access and use of genetic resources. This could include training in negotiation and the use and meaning of possible model contract terms, and the provision of consultants where required.

Respect for the Rights of Indigenous Peoples

14. To further ensure that its indigenous peoples can take full advantage of a contract offer for the use of genetic resources on their traditional lands should they wish to do so, a government could require through its domestic legislation the protection of the interests of the providers. For example, the receipt of independent legal advice for all parties to the contract could be made mandatory under a county's domestic legislation, so that the parties are fully aware of all their legal rights before entering into any agreement.

Dispute Resolution and International Dispute Resolution

15. Most contracts have standard terms for the resolution of disputes that arise during the life of the contract. These terms can include the use of mediation or binding arbitration. Where the parties are from different jurisdictions and plan to rely on traditional civil courts, they typically will also include the specific jurisdiction in which disputes under the contract are to be heard and whose law will apply. These types of provisions help create legal certainty for both parties on what form dispute resolution is to take, and under the laws of which national jurisdiction it will take place.

16. Contracts often include terms for the use of internationally accepted procedures, such as the Rules of Arbitration of the International Chamber of Commerce, or the use of international institutions such as the International Court of Arbitration. These terms significantly enhance the efficiency of implementing any resolution for parties internationally. Arbitration awards determined under a binding arbitration

clause in a contract can be enforced in foreign jurisdictions under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

17. Internationally developed examples of model contract terms to improve the efficiency of dispute resolution in contracts can be established for wider use. For example, under the International Treaty on Plant Genetic Resources for Food and Agriculture, facilitated access to plant genetic resources is provided by the use of a standard material transfer agreement (SMTA). Under Article 8.4 of the SMTA, dispute resolution is provided for through a series of steps from negotiation to arbitration. If the dispute reaches the arbitration stage, the dispute will be settled using the Rules of Arbitration of the International Chamber of Commerce.

Judicial Remedies for Breach of Contract

18. Apart from mediation or arbitration, if a valid contract has been made and in some way breached, judicial systems have developed a range of remedies, from strictly monetary damages to orders forcing the specific performance of the contract. The available remedies vary depending on the circumstances of the contract and what the injured party feels is required to rectify the situation.

19. Model contract terms developed internationally on matters such as benefit sharing, information disclosure or dispute resolution would facilitate the enforcement of these terms in foreign jurisdictions.

Needs of business

20. A valid contract provides certainty to the user of any genetic resource, using a legal avenue already well established in the world of commercial transactions. Contracts provide the rules for how matters will evolve and be handled between the parties.

Needs of the academic community

21. Contracts, each one being a unique agreement between parties, can be fashioned in any way necessary to ensure that a diverse range of users of genetic resources have a diverse range of contractual terms to choose from. For example, the academic community can include, as consideration, terms for information sharing and capacity building, as opposed to monetary compensation available in commercial use contracts.

Implementation

22. Contractual models and standards for access and benefit sharing are easier and less costly for governments to implement, as many of the basic contract laws and institutions required, e.g. domestic courts or international arbitration tribunals, already exist. Greater time and resources would be required to establish formal new regimes for access and benefit sharing for genetic resources.

23. Capacity building for evolving legal systems or institutions is already a well established avenue of development assistance. Modules for legislative drafting or contract enforcement regarding access and benefit sharing for genetic resources can be created using existing or enhanced development programmes.

B. Private International Law and Enforcement of judgements regarding Access and Use of Genetic resources

Foreign Judgements

24. If a Court has ordered damages for a contract breach, or restitution or compensation where a user has accessed genetic material without a valid contract, the order may be enforced in another jurisdiction pursuant to the rules of private international law known as conflicts.

26. The enforcement of foreign judgments is sometimes regulated by a bilateral or a multilateral treaty. If no bilateral or multilateral treaty exists, the courts of many states will accept jurisdiction to hear cases for the enforcement of foreign judgments if:

- the defendant or relevant assets are physically located within their jurisdiction;
- the foreign court properly accepted jurisdiction over the defendant;
- the proceedings in the foreign court met generally accepted measures of natural justice, for example, the defendant was properly served with notice of the proceedings and given a reasonable opportunity to be heard;
- the proceedings were not tainted by fraud;
- the judgment does not offend the public policy of the enforcing state; and
- the judgment does not violate sovereign immunity.

27. In Canada, courts have moved toward the principle of greater legal reciprocity in civil actions, as flows of wealth, people and products across borders are now commonplace. The clear trend in Canadian courts is to recognise and enforce foreign judgments.

C. Private International Law and Illegal Access

28. Entering lands and taking genetic resources, without the consent of the owner, are in many cases acts of trespass and theft, which could be dealt with under the criminal laws or national access laws of the domestic regime from which the genetic resource has been taken. Such acts can also form the basis of a civil case for damages resulting from the trespass or theft.

29. If the trespassing party has moved to a foreign jurisdiction, civil damage awards granted by domestic courts in favour of the party wronged, in this case the land owner/provider of the genetic resources, can generally be enforced in that foreign jurisdiction pursuant to the rules outlined in paragraph 26 above, and if:

- the sum is for a definite amount;
- there is a “real and substantial connection” between the jurisdiction making the award, and the subject matter of the case, and
- the sum is not the result of the penal or revenue laws of the jurisdiction making the award, i.e. not a fine or a tax.

Conclusion

30. Contracts can provide both the necessary protections to ensure appropriate access and equitable benefit sharing provisions for the use of genetic resources, as well as the necessary flexibility given the diverse range of users and providers. They provide legal certainty for both parties, and can utilise already well established rules and procedures available in each state. They can also work in tandem with national access and benefit sharing laws.

31. Contracts can be enforced in the appropriate jurisdiction chosen by the parties, and disputes can be resolved by mutually agreed and established mechanisms. This can include existing international rules and institutions, making implementation and enforcement, both domestic and international, much easier. Court judgements in cases of contract or contract breaches may be enforced in foreign jurisdictions under the existing principles of private international law.

32. Private international law rules can also be used to provide access to remedies in cases where genetic resources have been accessed illegally or without a valid contract in place.
