



RELATIONSHIP BETWEEN THE CBD WORKING GROUP ON ACCESS AND BENEFIT SHARING AND WIPO

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Co-Sponsored by WIPO, Indigenous people's Council on Biocolonialism, Center for International Environmental Law

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CBD Working Group on Access and Benefit-Sharing
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I. FORMAL RELATIONSHIP BETWEEN THE ABS WORKING GROUP AND WIPO

I.1 First Mandate of the ABS Working Group

Both the WTO and WIPO formed a significant part of the awareness of the mandate of the working group, a pattern which has continued.

WIPO

Article 11 of the Decision establishing the work group asks that the group take into account work on intellectual property by WIPO. Article 15(d) explicitly invites WIPO to analyze issues of intellectual property rights as they relate to access to genetic resources and benefit-sharing, including the provision of information on the origin of genetic resources, if known, when submitting applications for intellectual property rights, including patents.

The Decision is also communicated to the secretariats of both the WTO and WIPO.

What is clear is that from the beginning, the ABS Working Group was concerned about developments in the WIPO to ensure that they not undermine the CBD but was also, in some respects, somewhat deferential regarding intellectual property issues.

I.2 Second mandate of the Working Group

At the 2004 Conference of the Parties, the ABS working group was explicitly mandated to negotiate an international regime on ABS. (COP [decision VII/19](#))².

WIPO

WIPO was formally requested to take part in the CBD in the second mandate when it was invited to "to examine, and where appropriate address, taking into account the need to ensure that this work is supportive of and does not run counter to the objectives of the Convention on Biological Diversity, issues

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² <http://www.cbd.int/decisions/?dec=VII/19>

regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications, including, *inter alia*:

- (a) Options for model provisions on proposed disclosure requirements;
- (b) Practical options for intellectual property rights application procedures with regard to the triggers of disclosure requirements;
- (c) Options for incentive measures for applicants;
- (d) Identification of the implications for the functioning of disclosure requirements in various World Intellectual Property Organization-administered treaties;
- (e) Intellectual property-related issues raised by proposed international certificate of origin/source/legal provenance;

and regularly provide reports to the Convention on Biological Diversity on its work, in particular on actions or steps proposed to address the above issues, in order for the Convention on Biological Diversity to provide additional information to the World Intellectual Property Organization for its consideration in the spirit of mutual supportiveness;”³

The Decision also notes the “Technical Study on Disclosure Requirements Concerning Genetic Resources and Traditional Knowledge prepared by World Intellectual Property Organization at the request of the Conference of the Parties in decision VI/24 C”. WIPO had delivered this to the COP 7, in a process which caused some difficulties among member states at WIPO, many of whom complained of insufficient consultation and prejudging of issues that were still under discussion at WIPO.

II. WIPO IN CBD DISCUSSIONS

The third meeting of the ABS working group, the first under the second mandate, took place in February 2005 in Thailand.⁴ At the time several countries (e.g. Korea) emphasized that the regime should be in line with international rules at WIPO and the TRIPS Agreement, based on the presumption that these rules should trump the fundamental sustainable development goals of the CBD.

The meeting also reflected serious disagreement about the relationship of the negotiations to WIPO. Several countries cautioned against importing concepts wholesale from WIPO and also noted that the lack of progress on similar issues in these venues was a problem for the pace of agreement in the CBD. Some e.g. the US, argued that the working group should be cautious about duplicating work already being done at WIPO.⁵ Others, such as Brazil, argued for consideration of the amendment on Disclosure of Origin to the TRIPS Agreement proposed by Brazil and its partners in the TRIPS Council.⁶ They also argued, however, that processes at WIPO and the WTO were insufficiently broad to cover the full spectrum of concerns on Access and Benefit Sharing.⁷

The second meeting under the Second mandate was held 30 January to 3 February in Granada, Spain, immediately following the Working group on Article 8j. A certain level of urgency was felt as the meeting was to report to the Conference of the Parties in March 2008.

³ COP [decision VII/19](#), Article E:8

⁴ For a detailed summary of the meeting see Earth Negotiations Bulletin Volume 9, No. 311 (21 February 2005), <http://www.iisd.ca/download/pdf/enb09311e.pdf>

⁵ Earth Negotiations Bulletin Volume 9, No. 308 (16 February 2005), p2

⁶ Earth Negotiations Bulletin Volume 9, No. 308 (16 February 2005), p2

⁷ Earth Negotiations Bulletin Volume 9, No. 309(17 February 2005), p1

Japan, Australia, the EU, New Zealand and Switzerland continued to oppose any reference to mandatory disclosure of origin arguing, essentially, that it ran counter to existing international IP agreements. The EU, Switzerland, Norway and Canada, also emphasized that the issue should be left to WIPO.⁸ These same countries also emphasized the need for ‘further study’ of the issues of certificate of origin.

WIPO reported on a technical paper that it was preparing in response to the CBD request and updated the group on some its work on traditional knowledge.

At the third meeting under the mandate, held in Montreal October 2007, the ABS Working Group continued work based on directions from COP 8 in Curitiba, to complete its deliberations by COP 10 and that this meeting and the subsequent one would constitute a single session. It immediately preceded the Working Group on Article 8j.

The issue of disclosure was raised under compliance mechanisms, and New Zealand, Australia, Canada, Japan and the US stated that the CBD was not the right venue for discussing the issue and that it should be addressed at WIPO.⁹ It should be noted that these same countries have stated in those venues that disclosure of origin was not needed and did not need to be addressed and are thus opposed to any such requirements being developed at WIPO.

Discussion also took place on traditional knowledge, with the EU, Japan and Canada arguing that IP aspects of traditional knowledge should be addressed at WIPO and not the CBD.¹⁰ It is again interesting to note that Japan has repeatedly stated in WIPO that it sees no need for any protection of traditional knowledge while both the EU and Japan have been part of the group of industrialized countries calling for further delays while studies be carried out.

The WIPO secretariat reported on activities that had been undertaken on traditional knowledge although this reflected little progress from previous reporting. An interesting comment on all references to WIPO and the WTO came from Argentina which noted that many statements from delegates showed significant misunderstanding at the ABS meeting about what it is that was being done at WIPO and the WTO.¹¹

For the difficult issues such as protection of traditional knowledge and disclosure of origin, the industrialized countries seem to favor a forum shifting approach that prioritizes WIPO over the WTO and the CBD. This may be based on a sense that, at WIPO, they have been successful in sidelining the issues into a committee with a narrow, but exclusive mandate where they can ensure that there is no progress on these issues. That assessment may however, have to be revisited given the recent successes in achieving a development agenda at WIPO and in increasing awareness of the stances industrialized countries have taken in other fora regarding the WIPO process. The increasing success of placing the disclosure of origin issue on the agenda of the WTO may also have contributed to fewer and fewer mentions of the WTO by industrialized countries, while developing countries such as Brazil have increasingly raised the issues of the Article 29bis amendment in the ABS context and tried to have the proposal included, at least as an information document. Proposals by Brazil and others to this effect have been opposed by Switzerland, the EU, and Australia.¹²

III. HOW HAS WIPO PARTICIPATED IN AND VIEWED THE CBD ABS WORKING GROUP?

WIPO has participated as observers in the deliberations of the ABS Working Group. However, it has generally kept a low profile within the CBD and has also been beneficiaries of the forum shifting by states of issues from the CBD.

⁸ Earth Negotiations Bulletin Volume 9, No. 342 (2 February 2006), p2

⁹ Earth Negotiations Bulletin Volume 9, No. 390 (10 October 2007), p2

¹⁰ Earth Negotiations Bulletin Volume 9, No. 391 (11 October 2007), p2

¹¹ Earth Negotiations Bulletin Volume 9, No. 390 (10 October 2007), p2

¹² Earth Negotiations Bulletin Volume 9, No. 310 (18 February 2005), p2

WIPO has a memorandum of understanding (MoU) with the Secretariat of the CBD¹³, signed in 2002, that guides the program of collaboration and work between the two organizations. Unlike the response to the CBD request which involved all stakeholders, this MoU was essentially written by the Secretariat and simply placed for approval to the closed meeting of the WIPO Coordination Committee. The MoU has limited procedural and substantive breadth. Procedurally, it provides for participation and inputs into studies carried out by each organization. It pledges mutual support on projects such as compilation of databases of disclosed traditional knowledge. The primary tool is information sharing on activities. As part of the MoU, WIPO has consistently, if not in much depth, participated in ABS meetings. A repeated element of WIPO's statements at the CBD has been that it ensures that its activities are mutually supportive with the CBD, although there is no examination of how specific proposals in areas such as the IGC or the Standing Committee on Patents might fit into the approach.

The primary area in WIPO for discussion of disclosure of origin and traditional knowledge is the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The committee has framework documents on traditional knowledge and folklore but discussions reflect some of the same arguments about whether an instrument for the protection of traditional knowledge is needed and a disagreement about whether the extensive existing documents should serve as the basis for negotiations. Genetic resources have been largely left aside in the committee as it has proven difficult and divisive and some states view the process at the WTO as a better venue.

The divide with respect to traditional knowledge is largely between industrialized countries who do not see a need for any instrument (especially the US and Japan), and developing countries that seek a binding instrument. Industrialized countries have spent much of the period of the committee calling for further studies to determine the necessity and scope of any action on traditional knowledge and folklore.

After the "Technical Study on Disclosure Requirements Concerning Genetic Resources and Traditional Knowledge prepared by World Intellectual Property Organization which was an input the decision establishing the second ABS mandate, WIPO decided to respond to the invitation stated in the decision to examine the inter-relation between genetic resources. It produced a response according to a consultative and participatory procedure that was hard fought for by developing countries and their civil society partners. The key elements were that it should reflect the state of discussions in its own bodies and the objectives and needs of the CBD, rather than imposing the WIPO secretariat's own views on the organization.¹⁴ The final document¹⁵ transmitted to the CBD Conference of the Parties in 2005 was broad in scope and a thorough examination of the state of the art at WIPO, having followed a process over almost two years. The document did not necessarily provide guidance to the CBD other than to make them aware of how difficult and fraught with tensions such discussions at WIPO were. It was transmitted with the understanding that:

"The [Study] has been prepared to contribute to international discussion and analysis of this general issue, and to help clarify some of the legal and policy matters it raises. It has not been prepared to advocate any particular approach nor to expound a definitive interpretation of any treaty. It is to be regarded as a technical input to facilitate policy discussion and analysis in the CBD and in other fora, and it should not be considered a formal paper expressing a policy position on the part of WIPO, its Secretariat or its Member States."¹⁶

¹³ WIPO Document WO/CC/48/2 http://www.wipo.int/documents/en/document/govbody/wo_gb_cc/pdf/cc48_2.pdf

¹⁴ For a full analysis of the debate, process and comments on it see [CBD Request to WIPO on the Interrelation of Access to Genetic Resources and Disclosure Requirements: Establishing an adequate framework for a WIPO Response \(South Centre/CIEL\) \(Fall 2004\)](#) and [CBD Request to WIPO on the Interrelation of Access to Genetic Resources and Disclosure Requirements: Observations from the Center for International Environmental Law \(CIEL\) on the First Draft of the WIPO Examination of the Issues](#) (April 2005)

¹⁵ In Annex to WIPO document WO/GA/32/8

¹⁶ WIPO Document WO/GA/32/8, para 6

In general, WIPO delegates from developing countries have been happy to see principles and aims of the CBD brought into the WIPO process but have been extremely cautious about the transfer of WIPO principles and approaches into the CBD. This reflects the historical mistrust of the Secretariat which has been seen as largely captured by industry interests. However, the Secretariat's strong support of indigenous group's participation in WIPO's IGC and their capacity building work with them may present a somewhat different view of the role that the WIPO Secretariat may play in the CBD process. Nevertheless, until there is greater transparency and trust between the Secretariat and developing country member states, further participation by WIPO in the CBD e.g. capacity building on IP related aspects of the CBD during CBD meetings, may not be viewed positively. In addition, industrialized countries have been content to keep the WIPO and CBD processes separate and continuing to argue that IP-related CBD issues should be sequestered in WIPO's IGC where they have had a successful time delaying progress.

IV. SHOULD THE CBD SEEK TO STRENGTHEN ASSOCIATIONS WITH WIPO?

The simple answer to that question is that WIPO is too important to be left alone to address issues of such importance to the CBD. However, the key issues is the direction of the flow of influence and activity.

With respect to WIPO, it is likely that the flow has largely been in the wrong direction. Rather than WIPO making inputs into the CBD deliberations, it should be the CBD making greater inputs and interventions into WIPO deliberations, especially with the aim of ensuring that all of WIPO's future actions, norm-setting remain within and are mutually supportive of the goals of the CBD. To this end, there is a task to be done of educating and raising awareness amongst WIPO delegates and indigenous participants of the standards and norms at the CBD, the mandate of the ABS Working Group, and the obligations of actors at WIPO regarding CBD and other environmental norms. Especially on disclosure of origin and protection of traditional knowledge, it is time that CBD delegates and the CBD Secretariat stopped deferring to the WIPO Secretariat. These issues are as new to WIPO as they are to the CBD, and the CBD has the advantage of having all the relevant stakeholders at the table, not just a select group of patent lawyers, business interests and general purpose UN delegates and patent offices. It is a legitimate forum for discussion of these issues and has a legal right to ensure that subsequent treaties conform with its standards on issues related to conservation and sustainable use of biological resources, including intellectual property related discussions.