

WORKING GROUP ON ARTICLE 8(J)

HIGHLIGHTS:

TUESDAY, 16 OCTOBER

On Tuesday, delegates convened in two sub-working groups (SWG): SWG I addressed the composite report on traditional knowledge (TK) status and trends, an action plan for the retention of TK and an international regime on access and benefit-sharing (ABS); SWG II considered a *sui generis* system for TK protection and an ethical code of conduct to ensure the respect of the cultural and intellectual property of indigenous and local communities.

SUB-WORKING GROUP I

COMPOSITE REPORT: Discussions continued on phase II of the composite report on the status and trends of TK, with MEXICO calling for a timetable for capacity-building workshops on Article 8(j). CHINA supported developing guidelines for recording and documenting TK. COLOMBIA, ETHIOPIA, the PHILIPPINES and the FEDERATION OF THE SHUAR called for clarification on how indigenous peoples can retain control over their TK once it is documented.

On climate change, many underlined negative impacts on indigenous communities and TK, with GRENADA and TUVALU noting threats to SIDS, the NEPAL INDIGENOUS NATIONALITIES PRESERVATION ASSOCIATION stressing impacts on high-altitude areas, and the AFRICAN INDIGENOUS WOMEN'S ORGANIZATION emphasizing the vulnerability of indigenous women. The EU noted indigenous and local communities' contributions to mitigation. BANGLADESH and PAKISTAN supported mitigation activities, with the PHILIPPINES and EAST TIMOR calling for local approaches. NORWAY called for further collaboration with other bodies such as the Intergovernmental Panel on Climate Change. ETHIOPIA called for the identification and protection of TK holders.

On voluntary isolation, the INTERETHNIC ASSOCIATION OF DEVELOPMENT OF THE PERUVIAN RAINFOREST urged governments to take action to protect isolated communities and establish exclusive use areas. The EU noted that protected areas are just one of the ways to benefit such communities.

TK ACTION PLAN: SWG I Co-Chair Stewart introduced documents on the action plan for TK retention (UNEP/CBD/WG8J/5/3/Add.1 and INF/9). BRAZIL noted that TK databases require further discussion and stressed the importance of indigenous PIC. The EU proposed text relating

to, *inter alia*: TK retention measures when developing policies affecting indigenous and local communities; interactions between conservation, sustainable use and TK; and linking the Millennium Development Goals and TK. THAILAND called for national poverty reduction strategies to account for TK and biodiversity. CANADA proposed that indicators should address the 2010 target and that further research on sacred sites and protected areas be carried out. The AFRICAN GROUP, supported by many, highlighted translation difficulties due to the number of languages in the region and the need to incorporate languages into the education system. He further underlined the need to clarify the status of TK in the public domain. The INDIGENOUS YOUTH OF ARGENTINA pointed out difficulties for indigenous communities living in or near protected areas.

INTERNATIONAL ABS REGIME: SWG I Co-Chair Stewart introduced documents on an international regime on ABS (UNEP/CBD/WG8J/5/4/ and INF/10 and 13). The EU identified a tentative list of issues on which the ABS WG could benefit from input by indigenous and local communities, such as an internationally recognized certificate of compliance and, with the AFRICAN GROUP, noted that the international regime should include capacity building. BRAZIL, supported by INDIA and MEXICO, highlighted the link between TK and ABS and noted that: the use of TK should be based on PIC and mutually agreed terms (MAT), also requested by the AFRICAN GROUP; and that a *sui generis* regime should be developed by parties to complement the international ABS regime. The EU, opposed by BRAZIL, proposed establishing an *ad hoc* technical expert group on Article 8(j) to provide input to the ABS WG. AUSTRALIA, opposed by ARGENTINA, BRAZIL and MALAYSIA, tabled a proposal for non-binding guidelines for benefit-sharing to replace task 7 (guidelines to ensure equitable benefit-sharing with TK holders); task 10 (prevention of unlawful appropriation of TK); and task 12 (guidelines to implement Article 8(j)). NEW ZEALAND highlighted that any international regime will be implemented nationally and must be flexible to accommodate national differences. Noting that TK is a complex legal issue, CANADA underscored the merits of guidelines to complement the Bonn Guidelines.

CAMEROON, supported by MALAYSIA, ARGENTINA and ETHIOPIA, and opposed by AUSTRALIA, underscored the importance of a legally binding regime. KENYA, CHINA, BRAZIL, INDIA, CAMEROON, SOUTH AFRICA and MALAYSIA noted that the international regime should include,

inter alia: PIC, source of origin, indigenous rights, and *sui generis* systems. AUSTRALIA opposed disclosure of origin in patent applications.

The TULALIP TRIBES called for safeguards against false certificates. The FEDERATION OF THE SHUAR discussed the human dimension of bioprospecting. The AFRICAN GROUP, MALAYSIA and the LATIN AMERICAN INDIGENOUS CAUCUS underscored the inextricable link between TK and genetic resources. ARGENTINA argued that the CBD is weakened by the lack of an enforcement mechanism. The PHILIPPINES, supported by the INDIGENOUS PEOPLES COUNCIL ON BIOCOLONIALISM, recommended that the Article 8(j) WG provide the ABS WG with specific language relating to Article 8(j) by 30 November, 2007.

SUB-WORKING GROUP II

SUI GENERIS SYSTEMS FOR TK PROTECTION: SWG II Co-Chair Breier invited comments on draft guidelines for *sui generis* systems for TK protection (UNEP/CBD/WG8J/5/6 and INF/16). Many called for the swift development of an international framework for *sui generis* TK protection, with COLOMBIA proposing that the Executive Secretary prepare draft guidelines based on information already received. Noting the inadequacy of IPRs for TK protection and measures against misappropriation in user countries, INDIA, TANZANIA, KENYA and the KUNA PEOPLE supported developing international standards, opposed by AUSTRALIA, CANADA, NEW ZEALAND and the EU; the latter preferring the development of a list of priority elements.

CANADA suggested that ABS 6 consider guidelines for national ABS arrangements on TK to complement the Bonn Guidelines and, with NEW ZEALAND, proposed that COP 9 establish a technical expert group to develop these guidelines. ARGENTINA, BRAZIL and the PHILIPPINES opposed.

The EU, the PHILIPPINES and TANZANIA noted that *sui generis* systems should fully respect the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). CANADA said WIPO should develop the IPR elements of *sui generis* systems, opposed by the INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY (IIFB), who insisted that the Article 8(j) WG is the leading body on *sui generis* systems.

The AFRICAN GROUP, COLOMBIA and the CANADIAN INDIGENOUS BIODIVERSITY NETWORK (CIBN) suggested references to capacity building and to funding for the development of *sui generis* systems. ARGENTINA, opposed by MALAYSIA and CANADA, cautioned that *sui generis* systems might be inconsistent with the WTO TRIPS agreement. MALAYSIA encouraged delegates to make WTO provisions consistent with the CBD rather than argue that IPRs undermine CBD implementation.

BRAZIL proposed specifying that *sui generis* systems should be based on relevant customary law and guarantee indigenous PIC and MAT. AUSTRALIA, opposed by the IIFB and IWBN, preferred reference to "prior involvement," rather than indigenous PIC and, with MEXICO, requested specifying that *sui generis* systems be based on customary law only when not in conflict with national or international law. The CIBN, opposed by CANADA, said these should not be made subject to national law and proposed developing conflict of law norms.

SWG II Co-Chair Breier established a Friends of the Chair Group to prepare a proposal on the procedure for developing guidelines on *sui generis* systems. A revised draft recommendation will be prepared for further consideration.

ETHICAL CODE OF CONDUCT: SWG II Co-Chair Retter introduced documents on an ethical code of conduct to ensure the respect of the cultural and intellectual heritage of indigenous

and local communities (UNEP/CBD/WG8J/5/7 and INF/15). The AFRICAN GROUP welcomed draft elements on capacity building. NORWAY said the code should complement the ABS regime. BRAZIL, TANZANIA, the EU, ARGENTINA and CIBN proposed preambular references to UNDRIP.

BRAZIL requested referring to "ethical" principles throughout the text. Noting that many of the draft elements are unacceptable, NEW ZEALAND and AUSTRALIA suggested preparing a concise list of principles and a description of the code's focus and intent. CANADA, opposed by the CIBN and others, requested rewording or deleting references throughout the text, which he said inferred indigenous rights to lands, resources, and restitution, or recognized indigenous customary law, on grounds that these are not recognized by the CBD. MEXICO suggested including references to access by indigenous and local communities to land they have traditionally occupied.

Nature and Scope: NEW ZEALAND, opposed by the CIBN, proposed limiting the code's application to the research community, the extractive industry and developers, when interacting with indigenous communities. BRAZIL, TANZANIA, COLOMBIA and the CIBN, said it should also apply to governments, research funding agencies, public and private research organizations, and others. NEW ZEALAND and CANADA stated the code should not encourage activities inconsistent with national legislation. The CIBN suggested the code should not dilute states' obligations under human rights law. CANADA, opposed by the IWBN, suggested deleting a paragraph on encouraging parties' cooperation in the code's implementation.

General Principles: The EU suggested replacing the heading "acknowledgement of collective responsibilities" with "protection of rights;" and NEW ZEALAND instead proposed "respect for existing settlements." The EU, TANZANIA, ARGENTINA and the CIBN asked to include free indigenous PIC in paragraphs on full disclosure and respect. NEW ZEALAND and CANADA also requested deletion of references to the protection of the relationships between indigenous communities and their environment, and the precautionary approach, noting that these were not clear.

Specific Considerations: NEW ZEALAND proposed separating references on the recognition of sacred and culturally significant sites from those recognizing lands and waters traditionally occupied by indigenous and local communities. BRAZIL, opposed by CANADA, requested referencing ILO Convention 169 (Indigenous and Tribal People's Convention) in paragraphs on repatriation and participation.

Methods: NEW ZEALAND questioned the section's purpose, noting that it outlined principles rather than methods. The EU proposed adding secrets and sacred knowledge to a reference on inter-cultural respect. BRAZIL, opposed by NEW ZEALAND, suggested deletion of references to research and research relationships. A revised recommendation will be prepared.

IN THE CORRIDORS

As negotiations continued in the sub-working groups, some delegates commented that the Article 8(j) Working Group was getting caught up in a dynamic similar to the ABS Working Group last week. There negotiations foundered on the seeming impasse between those focusing on national implementation and others keen to negotiate a binding international instrument. Some delegates noted that the debate had already been revisited and it was time to "move on" and engage with the more focussed mandate of the Article 8(j) WG. Another delegate joked that the debate on whether climate change was within the remit of the Convention, was outside the remit of this working group.