

WORKING GROUP ON ARTICLE 8(J)

HIGHLIGHTS:

THURSDAY, 26 JANUARY 2006

On Thursday, delegates convened in two Sub-Working Groups (SWGs). SWG-I considered and approved draft recommendations on the composite report, the programme of work on Article 8(j), *sui generis* systems for the protection of traditional knowledge (TK), and access and benefit-sharing (ABS). SWG-II considered and approved draft recommendations on the ethical code of conduct, recommendations of the UN Permanent Forum on Indigenous Issues (UNPFII), participatory mechanisms, and, based on the outcome of a contact group, genetic use restriction technologies (GURTs).

SUB-WORKING GROUP I

COMPOSITE REPORT: SWG-I Co-Chair Bodegård introduced a revised draft recommendation. Delegates discussed a paragraph on registers, recommending that: registers should be only one approach to TK protection; their establishment should be voluntary; they should be established with the prior informed consent (PIC) of indigenous and local communities; and their ownership and control be vested with these communities, subject to national legislation.

Discussion focused on the reference to community ownership and control. The INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY (IIFB), with NORWAY and ETHIOPIA, opposed subjecting it to national legislation, and suggested either deleting the clause or inserting a reference to consistency with international and human rights obligations. Delegates agreed to delete the reference and approved the recommendation with this and other minor amendments.

SUI GENERIS SYSTEMS: In the morning, SWG-I Co-Chair Bodegård introduced a revised draft recommendation. Delegates discussed at length whether the development of *sui generis* forms of TK protection should only be “non IPR-based,” as suggested by AUSTRALIA, in line with the mandate of the Article 8(j) WG. NEW ZEALAND, SWITZERLAND and CANADA supported Australia, while BRAZIL, COLOMBIA and MEXICO noted the preliminary stage of discussions and preferred leaving both “IPR-based and non IPR-based” options open for consideration. Co-Chair Bodegård proposed recalling Decision VII/16H (mandate of Article 8(j) on *sui generis* systems) in the preamble. BRAZIL and ETHIOPIA supported the proposal, while AUSTRALIA and NEW ZEALAND preferred clarifying that the mandate only includes “non IPR-based” systems.

Concerned that PIC may set back progress in policy development, NEW ZEALAND and CANADA, opposed by IIFB and GUATEMALA, proposed deleting references to PIC on national and local models for TK protection and for the international framework.

On the international *sui generis* framework, AUSTRALIA, COLOMBIA and CANADA proposed referring only to the development of elements identified in the Annex to Decision VII/16H. CANADA recommended that the Article 8(j) WG focus on thorough examination of existing customary laws before proceeding to the development of elements of an international system.

In the afternoon, following informal consultations, Co-Chair Bodegård proposed and delegates agreed to: preambular language recalling Decision VII/16H, in particular paragraphs 6(a) referring to non-IPR based *sui generis* forms of TK protection, and 6(b) on developing elements for a *sui generis* system listed in the Annex; and maintaining references to PIC “subject to Article 8(j).” SWG-I approved the draft recommendation as amended.

PROGRAMME OF WORK: Co-Chair Bodegård introduced a draft recommendation on implementation and in-depth review of the programme of work on Article 8(j), and integration into the Convention’s thematic programmes.

Delegates discussed a recommendation for COP-8 to initiate work on tasks related to traditional cultural practices for conservation and sustainable use, with many opposing AUSTRALIA and NEW ZEALAND’s requests for deletion. Following a suggestion by Co-Chair Bodegård, they agreed that the Article 8(j) WG, at its next meeting, should address as a priority the timeframe for initiating work on the remaining tasks of the work programme.

The recommendation was approved with this and other amendments.

INTERNATIONAL ABS REGIME: Discussion on the ABS regime commenced in the afternoon, on the basis of a GRULAC proposal tabled in the morning. The proposal included a recommendation to the COP requesting the Article 8(j) WG to: invite parties and indigenous and local communities to provide their views on TK-related elements of the regime; request ways and means to facilitate indigenous participation in the ABS WG; and urge parties to include indigenous representatives in national delegations to the Article 8(j) and ABS WGs.

On the recommendation to the COP, delegates agreed to a suggestion by the EU to recommend that COP-8 take action directly rather than refer tasks to the Article 8(j) WG.

Supported by AFRICA and SAINT LUCIA, the EU proposed requesting the Article 8(j) WG, rather than parties, to provide views on TK-related elements of the regime. INDIA, with CANADA, proposed that views on TK-related elements be made available to the ABS WG. Following consultations, delegates agreed to request the Article 8(j) WG to provide its views on the TK-related elements of the regime, and request the Executive Secretary to make them available to the ABS WG. The IIFB recalled that the Article 8(j) WG not only provides views but can also make recommendations.

The EU also proposed: extending the mandate of the Advisory Group to contribute to work on the ABS regime; and developing participatory mechanisms within the ABS WG, including participation of indigenous representatives in contact groups. NEW ZEALAND, CHINA, CANADA and AUSTRALIA opposed extending the Advisory Group's mandate, noting it was established to address the composite report. NORWAY, with SAINT LUCIA and IIFB, preferred creating a new advisory group, with MEXICO noting it would duplicate the work of the ABS WG. Following discussion, the EU proposed giving the COP the option to extend the mandate or create a new advisory group. On participatory mechanisms, NEW ZEALAND, CHINA and CANADA suggested they be addressed in the ABS WG. CANADA said indigenous participation is best enhanced at the domestic level, by improving indigenous participation in delegations.

Delegates then approved the recommendation as amended, with the understanding that informal consultations on the EU proposals regarding the Advisory Group and participatory mechanisms would continue during the night.

SUB-WORKING GROUP II

ETHICAL CODE OF CONDUCT: SWG-II Co-Chair Abete-Reema introduced, and delegates approved, the draft recommendation finalized by the contact group on the ethical code of conduct, with NORWAY highlighting that it sets up a process leading to the code's adoption by COP-9.

RECOMMENDATIONS OF THE UNPFII: Co-Chair Abete-Reema introduced a draft recommendation, which was approved without amendment.

PARTICIPATORY MECHANISMS: The Secretariat introduced a revised draft recommendation, noting two unresolved issues: the establishment of an advisory group; and the determination of geographical regions to balance participation. NEW ZEALAND proposed deleting references to the advisory group as its establishment had not been approved by SWG-I, and requested that a limited number of pilot projects be subject to available resources. In response, GRENADA proposed deleting the reference to "a limited number of" projects. CANADA agreed to use the seven UNPFII geo-cultural regions. The draft recommendation was approved including all the proposed amendments.

GENETIC USE RESTRICTION TECHNOLOGIES: In the morning, the SWG-II Co-Chairs presented a revised draft recommendation on GURTs. AUSTRALIA and NEW ZEALAND proposed to: delete a reference to the precautionary approach; "note," rather than "reaffirm," COP Decision V/5 section III (GURTs); include a reference to both positive and negative impacts of GURTs; and add a reference to case-by-case risk assessments in further research and studies. Uganda, speaking for AFRICA, the EU, the PHILIPPINES and NORWAY opposed the changes. The PHILIPPINES, supported by many, suggested requesting WIPO to prepare a report on all GURT patents issued and pending worldwide.

EGYPT, supported by others, requested a reference to TK, innovation and practices, seed exchange and breeding, and spiritual practices, and opposed a reference to increased productivity. The FEDERATION OF GERMAN SCIENTISTS opposed the case-by-case risk assessments arguing they fail to take into account socioeconomic impacts, while the PUBLIC RESEARCH AND REGULATION INITIATIVE supported it.

AFRICA, with NORWAY, IIFB and ETC GROUP, requested deleting a reference to promoting technology transfer on GURTs. The INTERNATIONAL SEED FEDERATION noted that technology transfer is a goal of the CBD and national governments should decide which technology to use. The ETC GROUP, supported by PAKISTAN, asked to delete references to the private sector, and called on delegates to strengthen COP Decision V/5 by recognizing the potential negative impacts of GURTs on indigenous peoples and smallholder farmers. The RED DE COOPERACION AMAZONICA suggested referring to negative impacts of GURTs on local communities.

The IIFB called on parties to grant a continuous coordination mandate and advisory functions to the Article 8(j) WG in future consideration of GURTs. A contact group, co-chaired by Brazil and Austria, was established.

At lunchtime, the contact group convened to finalize the draft recommendation. Participants discussed references to: the precautionary approach; positive or negative impacts of GURTs, deciding to refer instead to their socioeconomic impacts; and involvement of other international organizations in studies on patents and ethical and spiritual consequences of GURTs. Among other issues, they agreed to retain references to potential impacts on farmers' rights, local crop varieties, food security and indigenous biological diversity, and to "reaffirm" COP Decision V/5.

In the afternoon, AUSTRIA reported to SWG-II on the compromise reached in the contact group, and a last-minute agreement to include a reference to "case-by-case risk assessment" with respect to different categories of GURTs. In turn, AUSTRALIA agreed to retain references to the precautionary approach. WG-II delegates approved the revised document as amended.

IN THE CORRIDORS

With the weekend approaching, participants were relieved to see the early approval of recommendations on the code of conduct, *sui generis* systems and participatory mechanisms, leaving ABS and GURTs last on the table. On GURTs, discussions were reminiscent of those at previous CBD meetings, with a number of delegates wondering about the reasons for reopening issues already resolved by the COP, COP/MOP and SBSTTA. Some participants experienced a feeling of being in a merry-go-round, whereas NGOs who had traveled to Granada hoping for a stronger stance on GURTs left disappointed.

Meanwhile, participants were intrigued by a rumor that a "Granada Declaration" was in the works, containing proposals for indigenous representatives to form a drafting group during the ABS WG meeting in the coming week. Some speculated that a declaration could send a strong message to the ABS WG on the need for greater inclusiveness of indigenous representatives, while others insisted that under the CBD one WG cannot direct another on how to conduct its work. However, the latest reports indicate that the much talked about declaration has vanished into thin air.

ENB SUMMARY AND ANALYSIS: The *Earth Negotiations Bulletin* summary and analysis of the Working Group on Article 8(j) will be available on Monday, 30 January 2006, in Granada, at the fourth meeting of the Working Group on Access and Benefit-Sharing, and online at <http://www.iisd.ca/biodiv/wg8j-4>.