

WORKING GROUP ON ARTICLE 8(J) HIGHLIGHTS: TUESDAY, 3 NOVEMBER

Delegates met in plenary in the morning, to exchange views on the international ABS regime and discuss the Article 8(j) work programme, and again briefly in the afternoon. The contact group on the ethical code of conduct met throughout the day, while a newly established contact group on the work programme convened in the afternoon.

PLENARY

INTERNATIONAL ABS REGIME: On the international ABS regime (UNEP/CBD/WG-ABS/8/2 and UNEP/CBD/WG-ABS/7/3), the EU, supported by CANADA, proposed that the Working Group provide detailed and focused views on the outcome of the technical expert groups on traditional knowledge and compliance. MALAYSIA suggested that the Article 8(j) Working Group produce a consensus outcome on the questions put to the expert groups. BRAZIL expressed the need to look beyond the expert groups' reports, highlighting other crucial issues related to ABS and traditional knowledge that should be addressed.

NORWAY favored addressing the participation of indigenous people and local communities in the international regime. The LEAGUE FOR PASTORAL PEOPLE AND ENDOGENOUS LIVESTOCK DEVELOPMENT argued that the international regime must fully recognize livestock keepers' rights. THAILAND underscored the possible contribution of the ethical code and *sui generis* systems to the international regime. AUSTRALIA suggested that the Article 8(j) Working Group provide guidance on *sui generis* systems unrelated to intellectual property.

IIFB supported the expert group's conclusion about the existence of a strong basis for the requirement of prior informed consent (PIC) of indigenous and local communities under international law. ARGENTINA recommended that the international regime include measures on PIC, with the AFRICAN GROUP adding that PIC should be free of coercion. JORDAN requested consideration of the rights of indigenous and local communities to benefit-sharing, and GUATEMALA consideration of all international instruments on indigenous rights. The QUEBEC NATIVE WOMEN'S ASSOCIATION stressed indigenous land rights and gender issues. ALGERIA considered the protection and promotion of traditional knowledge and indigenous and local communities' rights as a cornerstone of the international regime. IFLC stressed that

traditional knowledge is collective, inter-generational and inalienable and that PIC should be obtained according to customary laws.

WG Co-Chair Breier established a contact group on the international regime, to be convened on Wednesday, co-chaired by Damaso Luna (Mexico) and indigenous representative Merle Alexander, noting that the contact group is to focus on the expert groups' reports, but with the possibility to address other issues.

WORK PROGRAMME: On the multi-year work programme (UNEP/CBD/WG8J/6/2), the LATIN AMERICAN CAUCUS OF THE IIFB pointed to lack of progress on the majority of tasks set out in the current work programme, calling for work on existing outstanding tasks and, supported by ARGENTINA, opposing substitutions with new tasks. The TULALIP TRIBES, supported by MALAYSIA, proposed adding emerging issues, such as climate change. CANADA observed that the work programme is too long, and the focus on Article 8(j) too narrow and disconnected from the broader CBD framework, and favored a focus on conservation and sustainable use, especially on Article 10(c) (customary use). The IIFB lamented limited country reporting on traditional knowledge, and proposed indigenous participation in national reporting or review mechanisms for indigenous and local communities to be facilitated by the Secretariat. NORWAY welcomed the proposed indigenous and local community-specific indicators.

WG Co-Chair Breier established a contact group on the work programme to be convened in the afternoon, co-chaired by Tone Solhaug (Norway) and indigenous representative Gunn-Britt Retter.

ETHICAL CODE: Ethical Code Contact Group Co-Chair Chung reported on progress in the contact group, noting persisting disagreement on certain elements, as well as the need to continue deliberations.

CONTACT GROUP ON ETHICAL CODE

The contact group removed the majority of brackets and consolidated options for the draft elements of the ethical code. Two delegations opposed language on "lands and waters traditionally occupied by indigenous and local communities" throughout the draft elements. Delegates also discussed whether to include the reference to "traditional knowledge holders" throughout the text, without reaching agreement. Delegates decided to delete explicit references to "research activities" throughout the text.

On rationale, delegates agreed to indicate that the code addressees will not be limited to parties and governments. On intellectual property rights over traditional knowledge, delegates

discussed whether this should be discussed under WIPO or the CBD; delegates could not reach agreement whether knowledge holders should be allowed to retain existing rights, including the determination of intellectual property rights, over traditional knowledge. On collective and individual ownership, delegates could not agree to a reference to “customary law and community protocols,” but agreed to respecting the rights of “indigenous and local communities to safeguard collectively” their heritage. Delegates further agreed on text on benefit-sharing “taking into account relevant community-level procedures.” On transparency, delegates agreed that indigenous and local communities should be “adequately informed in advance” of proposed activities involving their traditional knowledge, but disagreed as to whether to refer to their PIC or “approval and involvement.”

Delegates could not agree on making reference to the precautionary approach. On specific considerations related to sacred sites and traditionally occupied lands and waters, parties agreed to delete language on the inseparability of traditional knowledge, cultures, lands and waters, but disagreed as to whether parties should recognize traditional land tenure. On specific considerations on access to traditional resources, parties included an express reference to traditional resource rights as “collective in nature” and added that access of indigenous and local communities to traditional resources is crucial for the sustainable use of biodiversity and cultural survival. A sentence on removal of indigenous and local communities by force or coercion was deleted.

On traditional guardianship/custodianship, delegates could not agree on the role of cultural diversity in the preservation of biodiversity. On peaceful relations, delegates agreed to refer to “conflicts caused by” biodiversity-related activities. Regarding subsidiarity and decision-making, delegates agreed that all decisions regarding biodiversity-related activities should be taken at the appropriate level.

On confidentiality, delegates agreed to just refer to information and not resources, and to clarify that such information should not be disclosed for any purpose other than that consented to without the consent of the knowledge holder. Delegates retained some references to “inter-cultural respect” and “full and effective participation/participatory approach.” On reciprocity, delegates agreed on including promotion of technology transfer.

On draft recommendations, delegates agreed to “consider” rather than “endorse” the elements, and to entitle them “The Montreal Code of Ethical Conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant for the conservation and sustainable use of biological diversity.”

CONTACT GROUP ON WORK PROGRAMME

On the in-depth review of the work programme (UNEP/CBD/WG8J/6/2/Add.6), several delegates favored focusing on conservation and sustainable use. One party noted that WIPO provides the most appropriate forum for addressing intellectual property-related discussions on traditional knowledge and proposed reconceptualizing the Article 8(j) Working Group into a result-oriented think-tank. Other delegates cautioned that WIPO focuses solely on intellectual property, stressing the need to adopt a broader action plan for the protection of traditional knowledge under the CBD.

Some delegates cautioned that certain tasks in the work programme may become redundant after the adoption of the international ABS regime, with one proposing to review tasks related to ABS at COP-10. On repatriation of information and traditional knowledge, one delegate, opposed by others, considered preparing guidelines premature, favoring a

compilation of best practices. Another delegate suggested joint work on traditional knowledge with the UN Framework Convention on Climate Change and the UN International Strategy for Disaster Reduction, focusing on the ecosystem-based approach and including participation of indigenous and local communities. One party suggested linking climate change with capacity building and tasks related to Article 10(d) (remedial action).

On progress in implementing Article 8(j) (UNEP/CBD/WG8J/6/2), delegates prioritized protected areas and climate change for an in-depth dialogue on thematic areas and cross-cutting issues under the Working Group. One delegate proposed holding meetings back to back with SBSTTA or the Working Group on Review of Implementation. Others noted that ABS should be included as one of the thematic cross-cutting issues for the proposed in-depth dialogue, supporting continued back-to-back meetings with the ABS Working Group.

On Article 10(c) (UNEP/CBD/WG8J/6/2/Add.1), some parties welcomed convening an expert group, while others proposed an international workshop to allow for broader participation. Another considered it premature to convene an expert group. The issue of whether to add a target related to Article 10(c) to be included in the revised post-2010 framework was also discussed without reaching agreement.

Delegates could not decide on whether to adopt draft terms of reference to develop guidelines to facilitate the repatriation of information, including cultural property, to facilitate the recovery of traditional knowledge (UNEP/CBD/WG8J/6/2/Add.2), with some favoring instead a compilation of views on best practices or establishing a consultative process on this issue. Informal consultations were held in the evening in this respect.

On guidelines for recording and documenting traditional knowledge (UNEP/CBD/WG8J/6/2/Add.3), some delegates cautioned against WIPO’s work prejudicing other forms of protection, with one proposing a reference to the CBD “leadership role” on traditional knowledge related to biodiversity. Several delegates underlined the importance of PIC to recording and documenting traditional knowledge. One party proposed deleting references to “repatriation.” On indicators (UNEP/CBD/WG8J/6/2/Add. 4/Rev.1), delegates supported an indicator on status and trends of land-use change and land security in traditional territories of indigenous and local communities. On UNPFII recommendations (UNEP/CBD/WG8J/6/2/Add.5), one delegation opposed referring to UN Declaration on the Rights of Indigenous Peoples as “relevant international standard.”

IN THE CORRIDORS

As negotiations on the ethical code continued, feeding hope that such a voluntary instrument could be adopted by COP-10, some delegates mused about the extent to which the code would be implemented. One delegate pointed to the comparable fate of the much-quoted but rarely implemented Akwé: Kon Guidelines that were adopted following long debates about PIC and “lands and waters traditionally occupied or used by indigenous and local communities.” While these issues remain sticking points in the current discussion on the ethical code, many delegates remarked that overall the tone of the debate has changed, with the vast majority of countries no longer questioning these references. Other delegates expressed hope that elements of the ethical code will be used in future legally binding instruments, possibly even in the traditional knowledge elements of the international ABS regime.