

WORKING GROUP ON ARTICLE 8(J) HIGHLIGHTS: THURSDAY, 5 NOVEMBER

Delegates met in plenary in the afternoon, to discuss draft resolutions on *sui generis* systems, the ethical code and the work programme. The contact group on the international ABS regime addressed a Co-Chairs' text in the morning, and a conference room paper containing a revised Co-Chairs' text in the evening.

PLENARY

SUI GENERIS SYSTEMS: On the draft recommendation (UNEP/CBD/WG8J/6/CRP.2), MALAYSIA, supported by ARGENTINA, suggested that *sui generis* systems be developed taking into account customary law, practices and community protocols, with the involvement of traditional institutions. NEW ZEALAND supported reference to "knowledge holders," which was opposed by BRAZIL arguing that the aim of the provision is to seek the involvement of indigenous and local communities. NEW ZEALAND, supported by AUSTRALIA, proposed using language from Article 8(j), namely "holders of such knowledge, innovations and practices." Delegates eventually agreed that *sui generis* systems be developed "with the full and effective participation, approval and involvement of indigenous and local communities."

On the WIPO General Assembly decision to negotiate an instrument for the protection of genetic resources and traditional knowledge, ARGENTINA said that the Article 8(j) Working Group should "note" rather than "welcome" it. MALAYSIA proposed specifying that such decision should not prejudice CBD work on developing *sui generis* systems. BRAZIL, the EU, AUSTRALIA, CANADA and SWITZERLAND proposed quoting *verbatim* the WIPO decision section saying that WIPO work should not prejudice that pursued in other *fora*. Upon a proposal by BRAZIL and UGANDA, delegates eventually agreed quoting the decision *verbatim*, as well as noting progress at CBD on *sui generis* systems.

ETHICAL CODE: On the draft recommendation (UNEP/CBD/WG8J/6/CRP.3), IIFB suggested inviting the Global Environment Facility and international funding institutions to "build capacity and understanding" of the ethical code, instead of "providing assistance" to indigenous and local communities.

BRAZIL, supported by the AFRICAN GROUP, proposed deleting references to "knowledge holders" throughout the text. NEW ZEALAND opposed, explaining that not all community members have the authority to determine access and stressing the need to recognize the diversity of national circumstances.

The EU proposed that, in applying the ethical code, the need to correctly identify traditional knowledge holders "should be observed," suggesting dropping references to knowledge holders in the rest of the text. MALAYSIA, supported by the AFRICAN GROUP, proposed that, in applying the code of conduct, "it is for the indigenous and local communities to identify the holders of knowledge for all practical purposes," and NEW ZEALAND suggested adding "in accordance with customary law." BURKINA FASO, supported by the AFRICAN GROUP, CUBA and others, and opposed by CANADA, proposed removing brackets around "lands and waters traditionally occupied or used by indigenous and local communities." Parties could not reach agreement. Delegates were invited to address outstanding issues in informal consultations.

The EU further proposed taking into account in the preamble the International Covenant on Economic, Social and Cultural Rights and the International Convention for the Elimination of All Forms of Racial Discrimination. The EU proposed, and delegates agreed to, delete references throughout the text to "national law" and "national and international obligations." QUEBEC NATIVE WOMEN'S ASSOCIATION, supported by the EU, proposed "Tkariwaié:ri" (the right way) as a Mohawk title for the code.

WORK PROGRAMME: On the draft recommendation (UNEP/CBD/WG8J/6/CRP.5), delegates discussed whether to introduce reference to Article 10(d) on supporting local populations to develop and implement remedial action in degraded areas where biodiversity has been reduced. BRAZIL, supported by the AFRICAN GROUP and ARGENTINA, but opposed by the EU and NORWAY, proposed deleting it, cautioning against broadening the focus of the Working Group. With regards to indicators, BRAZIL, supported by the EU, opposed reference to land security, which remained bracketed. MALAWI opposed "testing" indicators, recommending instead to "implement" them. CANADA noted that indicators cannot be implemented. Delegates agreed to annex to the draft recommendation the terms of reference for developing guidelines to facilitate repatriation of information, with the understanding that this is the text prepared by the Secretariat and does not reflect parties' positions.

CONTACT GROUP ON ABS

In the morning, delegates reviewed a Co-Chairs' text, to identify key elements or issues to be added to the text. In the afternoon, they discussed a revised Co-Chair's text (UNEP/CBD/WG8J/6/CRP.4).

CO-CHAIRS' TEXT: Relationship between access and use of genetic resources and associated traditional knowledge:

One regional group proposed including reference to co-evolved and bio-cultural systems and, supported by a newly formed like-minded group, the inseparability of traditional knowledge and genetic resources. The like-minded group also proposed adding reference to: Article 8(j) as a stand-alone provision that protects all traditional knowledge of indigenous and local communities; traditional knowledge as providing the lead to the properties of a genetic resource; the need for the international ABS regime to embrace traditional knowledge; and *ex situ* access to traditional knowledge and genetic resources.

Four parties argued that under the CBD there is no legally binding obligation on states regarding traditional knowledge. Another party underscored that the whole CBD is legally binding. One party stressed that there is not always a relationship between the owners of the accessed genetic resources and traditional knowledge holders, and that the relationship between access and use may vary depending on the nature of state sovereignty.

Customary law and community-level procedures: Several delegates proposed that national regulations directly rely on indigenous and local communities' defined structures and established authorities. The like-minded group opposed the idea that "principles" could include procedures or mechanisms to ensure respect for customary laws in the international ABS regime. Another party highlighted the importance of customary laws and community protocols, and stressed the need to include mechanisms for identifying competent indigenous and local authorities.

A party expressed concern at increasing the length of the Co-Chairs' text. The like-minded group stressed that key issues, such as the need to provide benefit-sharing when traditional knowledge provides the lead to the properties of genetic resources, and the inseparability of genetic resources and traditional knowledge, should not be lost.

A regional group and others strongly supported the inclusion of capacity-building for community-level mechanisms for ABS and empowerment of indigenous peoples and local communities, with one party stressing capacity-building needs of government agencies.

PIC: One regional group requested a reference to the Bonn Guidelines. Another regional group asked to refer to compliance measures that also support community PIC and, with several others, to competent national authorities to ensure that community PIC is freely given. Indigenous representatives requested reference to compliance with PIC and MAT rather than consultation requirements, and that national laws should respect customary laws and community-level procedures. Another party requested reference to disclosure requirements concerning the origin or source of genetic resources and associated traditional knowledge. Indigenous representatives requested using the term "free" PIC throughout the document as set out in the UNDRIP. A regional group warned that this would introduce a separate concept and require a new definition, since the concept used under the CBD is PIC.

A regional group requested reference to an internationally recognized certificate to be issued by the competent national authority, with a party adding a reference to community authorities' role in securing PIC. A party requested reference to the distinction between traditional knowledge "in the public domain" and "publicly available" traditional knowledge, adding that any use should trigger benefit-sharing. One party preferred referring to PIC of traditional knowledge holders,

whereas another stressed that traditional knowledge is held by communities. Three parties and one indigenous representative called for an article in the ABS regime on definitions, to clarify the meaning of "publicly available" traditional knowledge.

Compliance: A regional group supported the Co-Chairs' text on compliance in its entirety, while one party proposed underlying the variety of customary laws and the possibility for national laws to incorporate them at different levels.

REVISED CO-CHAIRS' TEXT: Regarding the chapeau citing the COP 9 mandate for the Article 8(j) Working Group to review the expert reports on traditional knowledge and compliance, and provide detailed and focused input for consideration by the ABS Working Group, one party requested to specify that views were "identified by a majority of parties." Several delegates opposed, with one noting that many proposals had been supported by all parties, others by an overwhelming majority and some by all but one party. Another proposed to refer to "a range of" detailed and focused views. A regional organization proposed to include reference to the methodology used by the contact group, and parties agreed to state in the chapeau that parties and observers were invited to submit elements and concepts in the expert groups' reports that they considered particularly important, focusing on elements and concepts that in their view received the broadest support from the expert group. A footnote also clarified that the elements and the specific wording of paragraphs were not negotiated.

On the operative text, a regional group noted that a reference to "biological resources" as "an umbrella term" should be included. Parties agreed to keep a reference to the Action Plan on Capacity-building for ABS and the terms of reference for the ABS Working Group adopted at COP 7 as a basis, "among others," for the negotiation of the international regime, after inserting a footnote clarifying that this was not part of the expert groups' report. A party suggested that the international regime call on national legislation to recognize the right of indigenous and local communities "to PIC and benefit-sharing when their knowledge is accessed and utilized."

IN THE CORRIDORS

As the sun set on the penultimate day of WG 6, delegates busy discussing ABS started off by wondering whether the outcome should reflect "everybody's views," "almost everybody's views" or "all but one's views." Once they agreed on this, they reached quickly agreement on content, surprising WG Co-Chair Nicola, who had to schedule the final plenary earlier than expected the next day.

On the ethical code, participants were expected to informally find common ground on outstanding issues, in particular the question of "knowledge holders." Most remained skeptical, though, that agreement could eventually be reached on "traditionally occupied" lands and waters – a symptomatic case of all-but-one issue. In a similar vein, a like-minded Asia-Pacific group was formed among all-but-one countries in the region with similar views on the traditional knowledge element of ABS.

ENB SUMMARY AND ANALYSIS: The Earth Negotiations Bulletin summary and analysis of the Working Group on Article 8(j) will be available on Monday, 9 November 2009 online at: <http://www.iisd.ca/biodiv/wg8j-6/>.