



## WORKING GROUP ON ARTICLE 8(J) HIGHLIGHTS: TUESDAY, 8 OCTOBER 2013

Delegates to the Article 8(j) Working Group met in plenary in the morning to continue discussion of *sui generis* systems, and consider recommendations from the UN Permanent Forum on Indigenous Issues (UNPFII), including the matter of terminology related to “indigenous peoples and local communities” and its implications for the CBD. A contact group on repatriation of traditional knowledge, co-chaired by Valeria Gonzalez Posse (Argentina) and Gam Shimray (IIFB), met in the afternoon.

### PLENARY

**SUI GENERIS SYSTEMS:** The MARITIME ABORIGINAL PEOPLES COUNCIL stressed that protection of traditional knowledge is in the Working Group’s mandate, cautioning against a transfer of this task to WIPO. Noting negotiations under the IGC are still ongoing and not sufficient in and of themselves to cover all aspects of *sui generis* systems of traditional knowledge, BRAZIL underscored the Working Group’s mandate on protection and preservation of traditional knowledge, and, supported by BOLIVIA, the need to go beyond intellectual property rights (IPRs).

PERU called for respecting previous COP decisions regarding *sui generis* systems. SOUTH AFRICA noted potential overlap with work under task 12. INDONESIA underscored that the Working Group’s discussions on *sui generis* systems should be related to other fora, including the IGC, and emphasized *sui generis* systems’ importance in recognizing traditional knowledge as collective property and the need to prevent misappropriation by third parties for commercial purposes. She suggested a careful approach when addressing transboundary traditional knowledge.

The IIFB lamented lack of funds to convene a technical expert group with ILC participation for the preparation of a report on *sui generis* systems, as well as for capacity building. She said: “action on this item requires only the will of parties and donors.”

**UNPFII RECOMMENDATIONS:** The Secretariat introduced the document containing recommendations from UNPFII 11 and 12 to the CBD (UNEP/CBD/WG8J/8/8).

Argentina, for GRULAC, TOGO, GRENADA, BENIN, GUINEA, GABON and SENEGAL supported the use of the term “indigenous peoples and local communities,” clarifying that there is no need to amend the CBD or the Nagoya Protocol, with FINLAND, AUSTRALIA and SPAIN noting that the new term can be used in CBD future practice. Several others also supported the change in terminology. DENMARK pointed to consistency within the UN System, including with UNDRIP, with BRAZIL also pointing to the Rio+20 outcome document. NORWAY added that Ramsar Convention COP 11 also changed its terminology. THAILAND noted that the change in terminology will enhance communication with other international fora already using the term “indigenous peoples.” JORDAN highlighted that protection of traditional knowledge forms part of human rights. CHINA underlined the need to take into account specific national situations. The International Forum of Local Communities (IFLC) cited Decision XI/14 as evidence of the recognition that indigenous peoples and local communities should be treated and perceived in different ways. SPAIN reaffirmed its commitment to supporting indigenous peoples and their rights. SENEGAL underlined the importance of respecting indigenous peoples’ rights. SWEDEN favored referring to indigenous peoples as a key group of traditional knowledge holders, to provide definitional clarity vis-à-vis ongoing work on local communities.

CANADA opposed the change in terminology, pointing to the record of the negotiations of the CBD and the original and current purpose of Article 8(j), namely to focus on *in situ* conservation. Noting that the term ILC is used in the CBD and Nagoya Protocol, JAPAN requested further information on the need for a change in terminology. INDONESIA opposed reopening the discussion and preferred to use Convention terminology because of possible legal implications. The UK stressed the need to ensure that the change in terminology does not amend the CBD or the Nagoya Protocol explicitly or implicitly; expressed concern that all implications of the change in terminology have not been sufficiently considered; and recommended compiling implications into a document for COP 12 consideration. FRANCE opposed any renegotiation of the CBD and Nagoya Protocol concerning changes in terminology;



stressed that a change in terminology in CBD COP decisions would undermine legal coherence; and cited constraints under the French constitution. SUDAN proposed maintaining CBD terminology, as UNPFII 12 recommendations have not been discussed by the UN Economic and Social Council.

The GRAND COUNCIL OF THE CREES, speaking for a number of human rights organizations, highlighted that: according to international law, the term “peoples” has particular legal implications since all “peoples” have the right to self-determination; all rights based on customary use should be safeguarded; and distinguishing “established rights” is discriminatory. With the CONGRESS OF ABORIGINAL PEOPLES, he challenged Canada’s position by pointing to the Canadian constitutional reference to “aboriginal peoples.” The IIFB recalled that it had always recommended using the term “indigenous peoples,” since it implies specific rights, such as the right to self-determination, and proposed a new recommendation on using the term in COP 12 decisions and all future documents. ECOROPA supported “indigenous peoples and local communities” as “the spelling for the future.”

#### **CONTACT GROUP ON REPATRIATION**

Delegates agreed to the overall structure of the draft recommendation submitted by the Co-Chairs on the development of best-practice guidelines for the repatriation of traditional knowledge relevant to the conservation and sustainable use of biological diversity (UNEP/CBD/WG8J/8/CRP.1). CANADA recommended systematically referring to traditional knowledge “relevant to the conservation and sustainable use of biological diversity.” Preferring not to postpone the adoption of the proposed guidelines to COP 13, the EU suggested starting work on the guidelines for adoption at COP 12. NEW ZEALAND cautioned that budgetary implications arising from the development of the guidelines require agreement at COP 12 first.

BRAZIL suggested a new preambular paragraph acknowledging that repatriation of traditional knowledge through the sharing and exchange of information should be consistent with the rights of ILCs to their knowledge, in particular the right to control access to, and use of, such knowledge and to require PIC and the development of mutually agreed terms for any use of traditional knowledge, with NEW ZEALAND requesting adding “subject to national legislation.” SUDAN and the EU called for a reference to the Nagoya Protocol. CANADA questioned the relevance of the Nagoya Protocol as repatriation is not addressed in the Protocol. Following informal consultations, delegates, supported by the IIFB, agreed to “acknowledge that the repatriation of traditional knowledge through the sharing and exchange of information should be consistent with international agreements, such as the Nagoya Protocol, as well as national legislation.”

On operative text on convening an expert group to develop draft voluntary guidelines on repatriation, the IIFB enquired about the number of indigenous representatives and selection procedure. Co-Chair Gonzalez Posse suggested referring

to established procedure ensuring balanced participation. CANADA, supported by SUDAN, encouraged reflecting the expertise of a broad range of actors involved in the repatriation of traditional knowledge of relevance to conservation and sustainable use of biodiversity.

Delegates then discussed the process for the development of voluntary guidelines, and eventually agreed that the Secretariat: compile views and make them available to the expert group; taking into account the views received, prepare elements of the voluntary guidelines for consideration by the expert group; and transmit the result of the expert group’s work to the next Article 8(j) Working Group, with a view to its consideration by COP 13.

Delegates further debated whether to include a recommendation to encourage governments, subject to the availability of resources, to translate information and best practices on repatriation into local languages. Eventually delegates agreed to this in principle, with one delegation reserving the right to reopen the issue in plenary following consultation with capital.

#### **IN THE CORRIDORS**

The Article 8(j) Working Group tried to unpack some of its historic baggage when considering the possibility to split the term “indigenous and local communities” into “indigenous peoples” and “local communities.” A few delegations dug deep into their records of the negotiations of the Convention and contacted senior negotiators back home to refresh their memories on the rationale behind the original choice of the term “ILCs.” A seasoned delegate recalled that the countries that in the 1990s opposed using “indigenous peoples” in the text of the Convention have in the meantime revised their position, whereas some parties that initially did not have a problem with the term now seem to prefer the agreed “ILCs.”

“The irony of this debate,” a participant mused, “is that both sides are concerned about clarity: those favoring a historic interpretation do not wish to create confusion by using ILCs in the text of the Convention and the Nagoya Protocol, and “indigenous peoples and local communities” in future COP decisions; whereas those favoring an evolutive interpretation worried that keeping indigenous and local communities clustered together does not clarify the differences between these two groups.”

On the whole, observers were heartened by the growing and now vast support for the change in terminology to reflect intervening international developments, such as the universal endorsement of UNDRIP and the widespread reference to “indigenous peoples and local communities” in other MEAs. One delegate pondered whether the Working Group best seize the moment by implementing a quick Solomonic solution separating the terms, to avoid an endless debate.