



WORKING GROUP ON ARTICLE 8(J) HIGHLIGHTS: THURSDAY, 10 OCTOBER 2013

Delegates met in plenary throughout the day to consider draft recommendations on: customary sustainable use; repatriation of traditional knowledge; *sui generis* systems; the contribution of tasks 7, 10 and 12 of the Article 8(j) work programme (benefit-sharing from, and unlawful appropriation of, traditional knowledge) to the work under the CBD and the Nagoya Protocol; and on UNPFII recommendations.

CUSTOMARY SUSTAINABLE USE

Delegates continued consideration of the draft recommendation on customary sustainable use (UNEP/CBD/WG8J/8/CRP.4). Under possible actions for the task to identify best practices, the IIFB, supported by CANADA, suggested adding language on parties that may wish to “scope and compile existing guidelines and operationalize them.” Delegates agreed to the recommendation as amended today and on Wednesday.

REPATRIATION OF TRADITIONAL KNOWLEDGE

Delegates considered a draft recommendation on best-practice guidelines for the repatriation of traditional knowledge (UNEP/CBD/WG8J/8/CRP.1/Rev.1). Contact Group Co-Chair Posse reported that the contact group had proposed to encourage governments to translate information and best-practice guidelines into local languages “to the extent possible,” rather than “subject to resource availability.”

On preambular text “acknowledging that the repatriation of traditional knowledge through the sharing and exchange of information should be consistent with international agreements, such as the Nagoya Protocol, and national legislation relevant to the conservation and sustainable use of biodiversity,” the IIFB and COLOMBIA suggested, and delegates agreed to, deleting “such as the Nagoya Protocol.” Delegates agreed to the recommendation with these and other minor amendments.

SUI GENERIS SYSTEMS

Delegates discussed a draft recommendation (UNEP/CBD/WG8J/8/CRP.5). CANADA requested to refer to protection, preservation and promotion of traditional knowledge “of ILCs.”

Regarding a reference to the draft glossary of terms, SWITZERLAND proposed, and delegates agreed, to take into account the need to further refine the glossary; and, opposed by BRAZIL, to introduce reference to the WIPO glossary of

key terms. On producing a technical series publication on the possible elements of *sui generis* systems, CANADA proposed drawing from a geographically balanced set of existing case studies. Delegates agreed to the recommendation with the agreed amendments.

TASKS 7, 10 AND 12

Delegates discussed a draft recommendation (UNEP/CBD/WG8J/8/CRP.2) on how tasks 7, 10 and 12 of the Article 8(j) work programme could best contribute to work under the CBD and Nagoya Protocol. The EU proposed to add text noting the ongoing preparation for COP/MOP 1 of the Nagoya Protocol and efforts towards its implementation, and requesting the Secretariat to present the outcomes of this Working Group to ICNP 3.

SWITZERLAND, supported by NORWAY, proposed preambular text on avoiding any inconsistencies with the Nagoya Protocol and duplication of work undertaken in international fora, including the IGC. BRAZIL opposed specific reference to the IGC. Delegates agreed to refer only to international fora.

NORWAY suggested preambular text recognizing that the Article 8(j) Working Group can contribute positively to the implementation of the Nagoya Protocol, the scope of which is limited to traditional knowledge associated with genetic resources.

On operative text on implementing tasks 7, 10 and 12 in an integrated manner, SWITZERLAND, supported by NORWAY, suggested adding that this should be mutually supportive with the Nagoya Protocol and the work undertaken in other international fora, such as the IGC. BRAZIL and ETHIOPIA opposed specific reference to the IGC. Following informal consultations, delegates agreed to retain only the general reference to other international fora. NORWAY enquired about what was meant by “integrated” implementation of tasks 7, 10 and 12. The Secretariat explained that task 12 is the umbrella task and tasks 7 and 10 provide elements contributing to it. NORWAY underscored the need for a sequence of actions also in the context of integrated implementation. ARGENTINA recommended specifying that guidelines to be developed will be “voluntary.” CANADA requested stipulating the full and effective ILC participation in the integrated implementation of tasks 7, 10 and 12.

CANADA, supported by NEW ZEALAND, NORWAY, AUSTRALIA and SWITZERLAND but opposed by BRAZIL and ETHIOPIA, proposed moving to the preamble references



to the development of guidelines on PIC or approval and involvement, benefit-sharing, and prevention and reporting of unauthorized access to traditional knowledge; and insert as operative text a request to compile model clauses, best practices and a gap analysis, to prioritize remaining work, avoid duplication and ensure complementarity with the work under the Nagoya Protocol and WIPO.

Following informal consultations, the afternoon plenary considered a revised draft recommendation (UNEP/CBD/WG8J/8/CRP.2/Rev.1). The MARITIME ABORIGINAL PEOPLES COUNCIL emphasized the need to ensure development of guidelines. The Secretariat indicated that the verb “ensure” is used in various parts of the draft recommendation. ARGENTINA suggested, and delegates agreed to, adding reference to the voluntary character of the guidelines.

NIGER asked for a clarification about changed language on developing guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure that private and public institutions interested in using traditional knowledge obtain ILC’s “prior informed approval,” from previous text referring to “PIC or approval and involvement.” The Secretariat explained that, although “prior informed approval” could be interpreted as “PIC or approval and involvement” in light of subsequent COP decisions and the text of the Nagoya Protocol, some delegations felt more comfortable using the original wording of the work programme.

UNPFII RECOMMENDATIONS

Clare Hamilton (UK) reported on the results of Wednesday’s informal consultations on UNPFII recommendations, including the use of the term “indigenous peoples and local communities” and introduced revised text (UNEP/CBD/WG8J/8/CRP.6). She stressed that the text, which is the result of difficult and polarized discussions and represents a delicate compromise, notes that the term “indigenous peoples” is used in UNDRIP and the Rio+20 outcome document, affirms that there is no intention to reopen or change the text of the Convention or its Protocols, and recommends COP 12 to decide on appropriate use of terminology in future decisions.

Accepting the text as a basis for work at COP 12, FRANCE expressed concern that the change in terminology in future COP decisions and documents may have implications for the scope of Article 8(j) and requested that the Secretariat prepare a study addressing: whether the change in terminology would have the same legal effect as an amendment of Article 8(j); and legal implications for parties if new terminology is used in future COP decisions. The AFRICAN GROUP expressed preference for continuing to use the terminology of the CBD and the Nagoya Protocol, seconding the request to fully analyze legal repercussions of a possible change in terminology.

IN THE CORRIDORS

Thursday’s discussions were dominated by linkages between the Article 8(j) Working Group and the Nagoya Protocol. Plenary’s consideration of the draft recommendation on repatriation of traditional knowledge led to deletion of an explicit reference to the Nagoya Protocol, which surprised some participants, given a lengthy discussion on this very point in yesterday’s contact group. While many remain puzzled as to whether the Nagoya Protocol is at all relevant in the context

of repatriated traditional knowledge, those who believe it is, appeared satisfied that a reference to “consistency with international agreements and national legislation” suffices to allow national ABS legislation implementing the Nagoya Protocol to apply PIC requirements to repatriated knowledge. A few veteran negotiators opined that specifically referring to international agreements and national legislation “relevant to the conservation and sustainable use of biodiversity” is also useful in linking repatriation clearly to MEAs, and not including other international agreements, such as those under WIPO and WTO.

On tasks 7, 10 and 12 of the Article 8(j) work programme, informal consultations were necessary to resolve continued divergence of views on whether the Working Group should develop guidelines on PIC, benefit-sharing and prevention of misappropriation of traditional knowledge. Those against it were of the opinion that this work could overlap with developments under the Nagoya Protocol. Some appeared concerned, in particular, that developing detailed (even if voluntary) guidelines could provide a direction that takes away from the flexibility built into the Nagoya Protocol for parties to choose their preferred way of providing for “PIC or approval and involvement.” On the same side of the debate, others were wary of possible inconsistencies that could arise between the guidelines and the Protocol, particularly before it enters into force.

Advocates of the guidelines, however, emphasized that the scope of work on traditional knowledge under the Working Group is broader than under the Protocol: the latter only applies to traditional knowledge “associated with genetic resources,” whereas the Working Group can explore questions related to other types of traditional knowledge more broadly associated with the conservation and sustainable use of biodiversity. In addition, those in favor of developing the guidelines believed that a better understanding of how to implement PIC and benefit-sharing in relation to traditional knowledge across the board should not wait for the Protocol’s entry into force, as in the meantime many CBD parties that are struggling to come up with national ABS frameworks could be provided with much needed starting points.

Overall, many remained convinced that the Working Group still has a critical role to play in providing ideas for, and contributions to, the implementation of the Convention and its Nagoya Protocol. Some, though, wondered how it could more effectively contribute to linking different knowledge systems. It remains to be seen – a participant wondered – whether any of the discussions entertained under the in-depth dialogue will at all percolate into next week’s deliberations at SBSTTA, including on inputs to IPBES, and into the IPBES negotiations in December.

ENB SUMMARY AND ANALYSIS: The *Earth Negotiations Bulletin* summary and analysis of the Working Group on Article 8(j) will be available on Monday, 21 October 2013, along with the summary of SBSTTA-17, online at: <http://www.iisd.ca/biodiv/sbstta17/>. Daily coverage of SBSTTA-17 will begin on Monday, 14 October 2013.