



## SUMMARY OF THE THIRD MEETING OF THE AD HOC OPEN-ENDED INTER-SESSIONAL WORKING GROUP ON ARTICLE 8(J) AND RELATED PROVISIONS OF THE CONVENTION ON BIOLOGICAL DIVERSITY: 8-12 DECEMBER 2003

The third meeting of the *Ad Hoc* Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity (CBD) met from 8-12 December 2003, in Montreal, Canada. Approximately 240 participants attended the meeting, representing 84 governments, as well as indigenous and local community groups, UN agencies, inter-governmental and non-governmental organizations (NGOs), academia and industry.

The Working Group on Article 8(j) was established by decision IV/9 of the Conference of the Parties (COP) to provide advice to the COP and, where relevant, to the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) on the implementation of CBD Article 8(j) (traditional knowledge) and related provisions. More specifically, the Working Group on Article 8(j), composed of CBD Parties and representatives from indigenous and local communities, is mandated to: provide advice on the application and development of legal and other appropriate forms of protection for the knowledge of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biodiversity; develop a programme of work; identify objectives and activities falling within the scope of the CBD, and recommend priorities, including equitable benefit-sharing; and provide advice on measures to strengthen international cooperation among indigenous and local communities.

Delegates at the third meeting of the Working Group considered and adopted nine recommendations on: the integration of the work programme on Article 8(j) into the CBD thematic areas; progress in the implementation of the work programme; recommendations from the UN Permanent Forum on Indigenous Issues (PFII); genetic use restriction technologies (GURTs); elements for a *sui generis* system for the protection of indigenous and local communities' knowledge, innovations and practices; participatory and communication mechanisms for the effective involvement of indigenous and local communities in matters related to the objectives of Article 8(j); draft guidelines for the conduct of cultural,

environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities; the composite report regarding the knowledge, innovations and practices of indigenous and local communities; and technology transfer and cooperation.

The recommendations adopted by the Working Group will be forwarded to the seventh meeting of the CBD Conference of the Parties (COP-7), to be held from 9-20 February 2004, in Kuala Lumpur, Malaysia.

Blessed by a Mohawk opening prayer, delegates to the meeting led their discussions in a constructive and efficient spirit, which was acknowledged by many during the closing Plenary. While expected stalemates were encountered regarding the role of international and national law and the recognition of customary law, the adoption of the Akwé: Kon guidelines on impact assessments, recommendations for concrete steps to increase indigenous participation in the CBD process, and proposed elements for *sui generis*

### IN THIS ISSUE

A Brief History of the CBD and Article 8(j) .....	2
Report of the Meeting .....	3
Progress Reports .....	4
Recommendations from the UN Permanent Forum on Indigenous Issues .....	4
Genetic Use Restriction Technologies .....	4
<i>Sui Generis</i> Systems for the Protection of Traditional Knowledge .....	5
Participatory Mechanisms .....	7
Draft Guidelines for Cultural, Environmental and Social Impact Assessments .....	8
Composite Report on Status and Trends .....	10
Technology Transfer and Cooperation .....	11
Closing Plenary .....	11
A Brief Analysis of the Meeting .....	12
Things to Look For Before COP-7 .....	13

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systems for the protection of traditional knowledge bode well not only for the future of the Article 8(j) Working Group, but also for the implementation of the Convention.

### A BRIEF HISTORY OF THE CBD AND ARTICLE 8(J)

The CBD, negotiated under the auspices of the United Nations Environment Programme (UNEP), was adopted at the Earth Summit in Rio de Janeiro in June 1992, and entered into force on 29 December 1993. To date, there are 188 Parties to the Convention, which aims to promote “the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.” CBD Article 8(j) states that Parties will, subject to national legislation: respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity; promote their wider application with the approval and involvement of knowledge-holders; and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.

Related CBD provisions include: Article 10(c), which calls on Parties to protect and encourage customary use of biological resources in accordance with traditional cultural practices; Article 17.2, related to scientific, technical and socioeconomic information exchange, with specific reference to traditional knowledge; and Article 18.4, which states that Parties shall encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, pursuant to the CBD’s objectives.

Additionally, CBD discussions on thematic areas and cross-cutting themes, such as the ecosystem approach, access and benefit-sharing (ABS), and the Clearing-House Mechanism (CHM), have addressed issues relating to Article 8(j) and indigenous and local communities.

**COP-2:** At its second meeting (November 1995, Jakarta, Indonesia), the COP adopted decision II/12 on intellectual property rights (IPR), which calls for a preliminary analysis of IPR systems, stating that it could focus on the preservation and maintenance of traditional knowledge. The decision also calls for consultation with all stakeholders, particularly indigenous and local communities, to improve understanding of their needs and concerns.

**COP-3:** The third COP (November 1996, Buenos Aires, Argentina) adopted decision III/14, which, *inter alia*: requests Parties to develop national legislation to implement Article 8(j); invites case studies on the implementation of Article 8(j) and related provisions; requests the interim financial mechanism to examine support of capacity-building projects for indigenous and local communities; and establishes a process to advance work on implementation of Article 8(j), including the organization of an intersessional workshop.

**WORKSHOP ON TRADITIONAL KNOWLEDGE:** The Workshop on Traditional Knowledge and Biological Diversity (November 1997, Madrid, Spain) produced recommendations to the COP regarding ways to advance the implementation of Article 8(j). The recommendations relate to: participatory mechanisms; status and trends in relation to Article 8(j); traditional cultural prac-

tices for conservation and sustainable use; equitable benefit-sharing; information exchange and dissemination; monitoring; and legal elements. The Workshop also recommended actions at the national and international levels, and suggested terms of reference for an open-ended working group or a subsidiary body on Article 8(j).

**COP-4:** At its fourth meeting (May 1998, Bratislava, Slovakia), the COP adopted decision IV/9, which establishes the *Ad Hoc* Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions. The decision calls for: representation from indigenous and local communities to the widest extent possible; short- and medium-term work programmes; case studies relating to Article 8(j); and application for observer status to, and development of a memorandum of understanding with, the World Intellectual Property Organization (WIPO). COP-4 also adopted decision IV/8, establishing a Panel of Experts on ABS, composed of representatives from the public and private sectors, and indigenous and local communities, to develop a common understanding of basic concepts and explore options for ABS on mutually agreed terms (MAT).

**FIRST MEETING OF THE WORKING GROUP ON ARTICLE 8(J):** The first meeting of the Article 8(j) Working Group (March 2000, Seville, Spain) considered elements for a work programme on Article 8(j), including: participatory mechanisms for indigenous and local communities; equitable benefit-sharing; legal elements; status and trends in relation to Article 8(j); traditional cultural practices for conservation and sustainable use; exchange and dissemination of information; and monitoring. The Working Group also addressed: the application and development of legal and other appropriate forms of protection for traditional knowledge; international cooperation among indigenous and local communities; and opportunities for collaboration and implementation of the work programme.

**COP-5:** At its fifth meeting (May 2000, Nairobi, Kenya), the COP adopted decision V/16 establishing a work programme on Article 8(j). The decision extends the Working Group’s mandate to address progress in implementation and increased participation of indigenous and local communities in other CBD thematic work programmes. COP-5 also adopted decision V/26, which established the *Ad Hoc* Open-Ended Working Group on ABS to develop guidelines and other approaches on prior informed consent (PIC); MAT, roles, responsibilities and participation of stakeholders; aspects of *in situ* and *ex situ* conservation and sustainable use; benefit-sharing mechanisms; and the preservation and maintenance of traditional knowledge.

**FIRST MEETING OF THE WORKING GROUP ON ACCESS AND BENEFIT-SHARING:** The first meeting of the ABS Working Group (October 2001, Bonn, Germany) developed draft guidelines on ABS (the Bonn guidelines), and discussed a draft action plan for capacity building, including an element for indigenous and local communities’ participation in decision making. The Working Group also considered the role of IPR in the implementation of ABS arrangements, and requested the CBD Executive Secretary to compile information on principles, legal mechanisms and procedures for obtaining PIC of indigenous and local communities under national access regimes.



## SECOND MEETING OF THE WORKING GROUP ON

**ARTICLE 8(J):** The second meeting of the Article 8(j) Working Group (February 2002, Montreal, Canada) considered: an outline for the composite report on the status and trends of traditional knowledge; draft recommendations and guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed on, or impacting, the lands of indigenous and local communities; participatory mechanisms; and the effectiveness of existing instruments impacting the protection of traditional knowledge, particularly IPRs.

**COP-6:** At its sixth meeting (April 2002, The Hague, the Netherlands), the COP adopted decision VI/10, requesting the Executive Secretary to: develop a report on the integration of Article 8(j) and related provisions into the CBD thematic programmes; review implementation of the work programme on Article 8(j); and conduct the first phase of the composite report for consideration at the third meeting of the Article 8(j) Working Group. The decision also requests the Article 8(j) Working Group to further work on guidelines for cultural, environmental and social impact assessments, and address *sui generis* systems for the protection of traditional knowledge and benefit-sharing. The decision further calls for establishing a thematic focal point in the clearing-house mechanism to improve communication and capacity-building for indigenous participation. The decision contains annexes on the outline of the composite report and recommendations for impact assessments. COP-6 also adopted decision VI/24 on ABS, which adopts the Bonn Guidelines and, *inter alia*, requests the Article 8(j) Working Group to consider the Guidelines.

**MYPOW:** The Open-ended Inter-Sessional Meeting on the Multi-Year Programme of Work (MYPOW) for the COP up to 2010 (March 2003, Montreal, Canada) invited indigenous and local communities, among others, to submit views on the process, nature, scope, elements and modalities of an international regime on ABS prior to the second meeting of the ABS Working Group. It also discussed, *inter alia*, developing a compendium of technologies arising from the use of traditional knowledge, providing support to developing-country Parties on capacity building and empowerment of indigenous and local communities, and promoting wider community participation in national reporting processes.

## SECOND MEETING OF THE WORKING GROUP ON

**ABS:** The second meeting of the ABS Working Group (December 2003, Montreal, Canada) discussed the nature, process, scope, and elements of an international ABS regime, including whether it should: take into account customary law and traditional cultural practices of indigenous and local communities; and include a recognition and protection of indigenous rights over their traditional knowledge subject to their country's legislation, and codes of ethics addressing benefit-sharing with indigenous and local communities. The meeting recommended promoting indigenous participation in the elaboration of the regime, and establishing national mechanisms to ensure compliance, when required by domestic law, with the PIC of indigenous and local communities.

## REPORT OF THE MEETING

The third meeting of the Article 8(j) Working Group officially began with an indigenous opening ceremony on Monday, 8 December 2003. Representatives of the Mohawk nation welcomed other nations to their territory, calling for maintaining Mother Earth's integrity, and inviting delegates to clear their eyes, ears, and minds to be open for negotiations.

CBD COP President Hans Hoogeveen (the Netherlands) stressed the role of indigenous and local communities for the CBD's implementation.

CBD Executive Secretary Hamdallah Zedan thanked the Spanish government for its financial support for indigenous participation, and outlined the meeting's agenda.

Nehemiah Rotich, on behalf of UNEP Executive Director Klaus Töpfer, called for full and effective participation of indigenous and local communities at all levels and in all sectors of society.

The International Indigenous Forum on Biodiversity (IIFB) reported on the indigenous forum, held prior to the meeting, highlighting the need to: consider *sui generis* systems for the protection of traditional knowledge based on customary law; recognize indigenous peoples' rights over their traditional knowledge; and establish a financial mechanism to support indigenous participation. She drew delegates' attention to a massacre of indigenous leaders that happened a week prior to the meeting, in Arahuacos, Colombia. The Indigenous Peoples of Saint Lucia said the proposals of the indigenous peoples of the Caribbean Antilles may differ from those of other indigenous communities. The Kitasoo Xai'xais First Nation asked that COP-7 consider using the model of indigenous and local communities' participation in the Working Group on Article 8(j) for the ABS Working Group.

Italy, on behalf of European Community (EC) Member States and acceding countries (EU), stressed the need for a common understanding of conservation concepts and collaboration among international fora addressing traditional knowledge. Namibia said the cultural wealth of indigenous and local communities has been depleted by the appropriation of knowledge. Canada highlighted the UN Development Programme's Equator Initiative, stressing local communities' role in achieving sustainable livelihoods. Yemen and Ethiopia stressed the need to raise awareness and recognize the diversity of indigenous practices. Turkey raised concerns about the disappearance of traditional agricultural communities. Several countries reported on their experience regarding involvement of local and indigenous communities in resource management and legislation addressing traditional knowledge.

The Food and Agriculture Organization (FAO) said indigenous and farmers' rights are recognized by the International Treaty on Plant Genetic Resources for Food and Agriculture. An indigenous representative, on behalf of the Millennium Ecosystem Assessment (MA), highlighted the MA's recognition of the importance of traditional knowledge in policy making and its analysis of community knowledge. WIPO described the work of its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The PFII outlined its recommendations to the CBD.



**ORGANIZATIONAL MATTERS:** Delegates agreed that COP President Hoogeveen would chair the Working Group, and the COP-6 Bureau would act as the Working Group Bureau. They elected Esther Camac (Asociación Ixacavaa de Desarrollo e Información Indígena), Vladimir Bocharnikov (Russian Association of Indigenous People of the North), Debra Harry (Indigenous Peoples Council on Biocolonialism), Jannie Lasimbang (Asia Indigenous Peoples Pact Foundation), and Myrle Traverse (Canadian Indigenous Biodiversity Network) as indigenous Friends of the Bureau.

Delegates adopted the agenda and organization of work (UNEP/CBD/WG8J/3/1 and Add.1/Rev.1), agreeing to establish two sub-working groups. They agreed that Sub-Working Group I (SWG-I) would also address remaining issues from SBSTTA-9 regarding technology transfer and cooperation, as proposed by Mexico, and that Sub-Working Group II (SWG-II) would consider the report of the *Ad Hoc* Technical Expert Group (AHTEG) on GURTs, as proposed by Brazil. Delegates decided to convene a brief daily Plenary to review progress.

John Herity (Canada) and Earl Stevenson (Peguis First Nation) were elected as SWG-I co-chairs, and Diann Black Layne (Antigua and Barbuda) and Lucy Mullenkei (African Indigenous Women Organization) as SWG-II co-chairs. Soumayila Bance (Burkina Faso) was elected as Rapporteur.

Plenary convened on Monday afternoon to consider progress reports, and held brief daily afternoon sessions from Tuesday to Thursday to review progress. Plenary reconvened on Friday to adopt recommendations to the COP and the meeting's report, and hear closing statements. The sub-working groups met from Monday afternoon to Thursday evening. SWG-I addressed: the composite report on status and trends; draft guidelines for impact assessments; technology transfer; and recommendations from the PFII. SWG-II considered: participatory mechanisms; elements for *sui generis* systems of protection of traditional knowledge; and GURTs. This report summarizes discussions and recommendations based on each agenda item.

### PROGRESS REPORTS

On Monday afternoon, the Plenary considered progress reports on the implementation of the work programme on Article 8(j) (UNEP/CBD/WG8J/3/3), and its integration into the CBD's thematic areas (UNEP/CBD/WG8J/3/2). IUCN – The World Conservation Union called on Parties to support SBSTTA-9's recommendation to address indigenous and local communities' involvement in the work programme on protected areas. The Peruvian National Indigenous Organization called for defending indigenous rights and territories.

On Friday, the closing Plenary adopted a recommendation on progress in the integration of the relevant tasks of the work programme on Article 8(j) into CBD thematic areas, without amendment. A recommendation on the implementation of the priority tasks of the work programme was adopted with one minor amendment.

**PROGRESS REPORT ON INTEGRATION: Recommendation:** In the final document (UNEP/CBD/WG8J/3/L.2), the Article 8(j) Working Group recommends that COP-7 note progress made in the integration of the relevant tasks of the work programme in CBD's thematic programmes, and request the Executive Secretary to prepare a progress report on the integration of the

relevant tasks of the work programme into the CBD's thematic areas for the consideration of the Article 8(j) Working Group at its fourth meeting.

**PROGRESS IN IMPLEMENTATION: Recommendation:** In the final document (UNEP/CBD/WG8J/3/L.3), the Article 8(j) Working Group recommends that COP-7 note progress made in the implementation of the priority tasks of the work programme on Article 8(j), and urge Parties to include information in their national reports on the status and trends regarding traditional knowledge, innovations and practices of indigenous and local communities, and on progress made in the implementation of the priority tasks. The Working Group also recommends preparing a progress report on implementation of the work programme for the next meeting of the Article 8(j) Working Group.

### RECOMMENDATIONS FROM THE UN PERMANENT FORUM ON INDIGENOUS ISSUES

On Wednesday, SWG-I considered recommendations from the PFII on progress in environmental development, and on environmental impact assessment (EIA) and cultural diversity (UNEP/CBD/WG8J/3/8). Many delegates encouraged cooperation with the PFII and supported organizing a workshop on protecting sacred sites. Canada suggested convening a side event on the draft guidelines for impact assessments during the next PFII session. The Bahamas expressed concern over language on establishing a mandatory legal framework for impact assessments.

Regarding a recommendation to develop a UN report on implementing indigenous peoples-related chapters of Agenda 21, the IIFB suggested that the CBD Executive Secretary coordinate preparation of the report, ensuring communities' participation.

SWG-I agreed to forward the PFII recommendations and delegates' comments to the Working Group Chair for preparation of draft recommendation to be presented to Plenary.

On Friday, the closing Plenary adopted the final document with a minor amendment.

**Recommendation:** In the final document (UNEP/CBD/WG8J/3/L.4), the Working Group stresses the need for a better understanding among UN agencies on issues related to communities and their traditional knowledge. It recommends that COP-7 welcome increasing collaboration with the PFII and request the Article 8(j) Working Group to develop elements of an ethical code of conduct to ensure respect for communities' cultural and intellectual heritage.

It further recommends requesting the Executive Secretary to: contribute to the preparation of the PFII report on implementing relevant chapters of Agenda 21; transmit to the third session of the PFII the guidelines for impact assessments; and coordinate with the PFII to organize a workshop on impact assessments.

### GENETIC USE RESTRICTION TECHNOLOGIES

SWG-II considered GURTs on Tuesday and Thursday. On Tuesday, the Secretariat introduced: the report of the AHTEG on GURTs (UNEP/CBD/WG8J/3/INF/2); COP decision VI/5 on agricultural biodiversity, requesting the AHTEG to report to the Article 8(j) Working Group prior to COP-7; and SBSTTA-9's recommendation to transmit the AHTEG's report to COP-7.



The Indigenous Peoples Council on Biocolonialism (IPCB) and the IIFB supported considering the AHTEG's report as soon as possible, highlighting that testing and commercialization of GURTs will pose serious threats to indigenous livelihoods. The IPCB called on the Working Group to recommend establishing a process to review and assess the impacts of GURTs on indigenous peoples and implement the AHTEG's conclusions. Uganda said GURTs can make communities dependent on foreign technologies. The IIFB and Zambia called for a precautionary approach.

Brazil presented its proposal on GURTs, emphasizing: development of national regulatory frameworks to assess their use; promotion of further research, including field testing; and disapproval of commercial use that may adversely affect smallholder farmers and indigenous agrobiodiversity. She requested forwarding the proposal to COP-7.

The EU, supported by Namibia, the IIFB, Uganda and Switzerland, opposed the Brazilian proposal, noting that it encourages field testing and focuses on the environmental impacts on agrobiodiversity, and suggested that the Working Group discuss the socioeconomic aspects of the AHTEG's report. Argentina expressed concern regarding the AHTEG's composition, and suggested forwarding the Brazilian proposal as an information document to COP-7, including reservations made by parties. Noting the lack of reliable scientific data on GURTs, the US said claims about their negative impacts on communities were premature. Tanzania suggested considering the issue at the next meeting of the Article 8(j) Working Group.

On Thursday, SWG-II Co-Chair Black Layne presented a Co-Chairs' text. Regarding an invitation to develop capacity-building programmes, El Salvador stressed the need for prior need and gap analyses. Regarding a recommendation that COP-7 request the Article 8(j) Working Group to consider the AHTEG's report on GURTs at its next meeting, El Salvador said the COP should examine the report. The EU requested that the Working Group review Article 8(j)-related aspects of the report, and a reference to the deliberations of SBSTTA-10.

The FAO drew attention to its study on GURTs' implications on agricultural biodiversity, and Brazil, Argentina and the IIFB proposed that it be considered at the Working Group's next meeting.

On Thursday afternoon, SWG-II considered and approved the draft recommendation (UNEP/CBD/WG8J/3/SWG.II/L.1) without amendment. On Friday, the Plenary adopted the recommendation.

**Recommendation:** In the final document (UNEP/CBD/WG8J/3/L.5), the Working Group notes the report of the AHTEG and the potential socioeconomic impacts of GURTs on small holder farmers and indigenous and local communities. It recommends that COP-7:

- invite Parties to urgently create and develop, in accordance with identified needs and priorities, capacity-building programmes to involve and enable smallholder farmers, indigenous and local communities, and other relevant stakeholders to effectively participate in decision-making processes related to GURTs;
- request the Article 8(j) Working Group to consider, at its next meeting, the potential socioeconomic impacts of GURTs on indigenous and local communities, on the basis of the

AHTEG's report, SBSTTA-10's deliberations, and the study undertaken by FAO; and

- invite Parties and indigenous and local communities to review the recommendations of the AHTEG as they relate to Article 8(j) and related provisions, and provide comments to the Executive Secretary to be compiled and considered at the fourth meeting of the Article 8(j) Working Group.

### **SUI GENERIS SYSTEMS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE**

SWG-II considered the development of elements of *sui generis* systems for the protection of traditional knowledge, innovations and practices on Monday, Wednesday and Thursday.

On Monday, the Secretariat presented a document on this item (UNEP/CBD/WG8J/3/7). The IIFB and Uganda said the system should recognize the inherent, inalienable and proprietary rights of indigenous peoples over their resources and knowledge. The IIFB stressed that national authorities granting access to traditional knowledge violate the right to self-determination. The African Group called for empowering indigenous communities to participate in the development of a *sui generis* system and an international ABS regime. Indigenous representatives emphasized the importance of customary laws and practices.

Delegates discussed databases and registers, with Argentina supporting a single register, and Namibia and Brazil expressing concern over their security. Jamaica and the Tulalip Tribes supported creating a glossary of terms. Haiti called for protecting local traditional religions. Many delegates cautioned against duplicating work done by WIPO. Canada proposed collaborating with the World Health Organization and the FAO.

On Wednesday, SWG-II Co-Chair Black Layne invited comments on a Co-Chairs' text on elements for a *sui generis* system to protect traditional knowledge. Regarding the preamble, the IIFB stressed that *sui generis* systems should respect the rights, rather than be sensitive to the interests, of indigenous and local communities. On registers, delegates agreed: to recognize the need for funding communities' participation; that they be voluntary and established with communities' PIC; and to refer to "full and effective" community participation in their establishment. Delegates agreed to recognize that traditional knowledge is sometimes accessed without communities' consent and, reflecting proposals from the IIFB and others, to stress that communities have the right to deny, grant and determine the level of access. Uganda, Costa Rica, Malaysia and Canada proposed distinguishing *in situ* and *ex situ* traditional knowledge. The IIFB stressed the need for relevant communities' PIC for continued access to *ex situ* traditional knowledge.

Delegates debated the nature of traditional knowledge, agreeing that it is collective and inter-generational, and that some biological and genetic resources and associated knowledge are transboundary.

Regarding provision of information, Canada proposed including information on measures supporting customary law. The EU, opposed by Brazil, proposed a reference to WIPO's work. Regarding a glossary of Article 8(j)-relevant terms, the EC requested cooperation with the Working Group on ABS. The EU proposed that the Article 8(j) Working Group review the relevance of the Bonn Guidelines on ABS and an international ABS regime



for the protection of traditional knowledge. Delegates opposed requesting the Article 8(j) Working Group to identify elements of a regime for *sui generis* traditional medicines. Mexico called for examining IPR mechanisms complying with CBD Article 8(j).

On Thursday, the Secretariat introduced a conference room paper (CRP). Regarding preambular recognition of communities' right to grant, refuse and determine the level of access, China, opposed by the IIFB, said it should be subject to national legislation, and the EU to international law. The EU proposed that the continued use of traditional knowledge already accessed without communities' PIC be subject to national and international law. China and Malaysia requested bracketing both references to international law.

Regarding future work of the Article 8(j) Working Group, the IIFB, opposed by Brazil, said benefit-sharing arrangements should only be referred to in the annex containing potential elements for *sui generis* systems.

SWG-II approved the CRP as amended and bracketed.

On Friday, in the closing Plenary, delegates discussed proposed compromise language on preambular references to international law relating to communities' right to control access, and the need for communities' PIC when using traditional knowledge already accessed without PIC. After consultations, the EU suggested, and the IIFB opposed, deleting the preambular paragraph on *ex situ* traditional knowledge and recognizing the right of communities to grant, refuse and determine the level of access "consistent with Article 8(j)." The closing Plenary adopted the recommendations retaining bracketed references to international law in both preambular paragraphs.

**Recommendation:** The final text (UNEP/CBD/WG8J/3/L.6) consists of a recommendation and an annex with draft elements to be considered in the development of *sui generis* systems for the protection of traditional knowledge, innovations and practices of indigenous and local communities.

The preamble recognizes, *inter alia*:

- indigenous and local communities have their own systems, as part of their customary laws, for preserving and transmitting traditional knowledge;
- the transboundary distribution of some biological and genetic resources;
- the collective and inter-generational nature of traditional knowledge;
- the need to halt the misuse and misappropriation of traditional knowledge through effective mechanisms for protecting communities' rights;
- the importance of access and benefit-sharing arrangements;
- a *sui generis* system at the international level should be flexible, respect communities' interests and rights and take into consideration customary law and practices;
- databases and registers are only one approach to protect traditional knowledge and that their establishment should be voluntary and with the communities' PIC; and
- the need for continued collaboration with other relevant organizations.

The Working Group recognizes that traditional knowledge is sometimes accessed without communities' consent, and that these communities have a right to grant, refuse, and determine the level

of such access consistent with CBD Article 8(j) and subject to national law.

The Working Group also recognizes that some traditional knowledge has already been accessed without communities' PIC, and therefore the continued use of such knowledge should be granted with communities' PIC, subject to national law. References regarding consistency with international law remain bracketed.

The Article 8(j) Working Group recommends that COP-7:

- invite Parties and indigenous and local communities to communicate information on existing *sui generis* regimes and innovative measures supportive of customary law, to be compiled by the Executive Secretary;
- request the Executive Secretary to: compile information on the nature of customary laws; develop, in cooperation with the ABS Working Group, indigenous and local communities and international organizations, a glossary of Article 8(j)-relevant terms; and, collect information on the role of databases and registers in protecting traditional knowledge; and
- decide on appropriate mechanisms for better cooperation between the ABS and Article 8(j) Working Groups to ensure indigenous and local communities' involvement in the former.

It further recommends that COP-7 request the Article 8(j) Working Group, in collaboration with relevant international organizations and the PFII, to:

- consider non-intellectual property-based *sui generis* forms of protection;
- further develop elements for *sui generis* systems listed in the annex, including benefit-sharing arrangements when traditional knowledge and associate genetic resources are accessed;
- review the Bonn Guidelines on ABS;
- make recommendations regarding the international ABS regime with a view to including *sui generis* systems and traditional knowledge protection measures;
- assess the role of databases and registers in the protection of traditional knowledge; and
- explore the potential of, and conditions under which, existing forms of IPRs can contribute to achieving Article 8(j) objectives.

The Working Group also recommends that COP-7 invite:

- Parties to consider appropriate measures, with full and effective communities' participation, for implementation of *sui generis* systems and other new innovative mechanisms;
- Parties and international organizations to strengthen communities' capacity to protect, use, preserve, maintain and promote traditional knowledge,
- Parties and communities to share experiences on local, national and international approaches and consider harmonization at the regional level; and
- WIPO to make available the result of its relevant work, in particular on the protection of traditional knowledge and its recognition as prior art, to the Article 8(j) Working Group.

The annex to the recommendation contains potential draft elements to be considered in the development of *sui generis* systems, including:

- clarity on ownership of traditional knowledge and biological and genetic resources;
- relevant definitions;



- recognition of relevant elements of customary law;
- requirements governing PIC, MAT and benefit-sharing;
- rights of traditional knowledge holders;
- the rights conferred;
- a system for the registration of indigenous/local knowledge;
- competent authority;
- enforcement and remedy provisions;
- the relationship to other laws; and
- extra-territorial protections.

### **PARTICIPATORY MECHANISMS**

SWG-II considered participatory mechanisms for indigenous and local communities on Tuesday and Thursday. On Tuesday, the Secretariat introduced a note on mechanisms to promote effective participation of indigenous and local communities (UNEP/CBD/WG8J/3/6), the report of the AHTEG on Traditional Knowledge and the CHM on communication mechanisms (UNEP/CBD/WG8J/3/6/Add.1) and a note on cooperation among environmental conventions concerning indigenous and local communities' participation (UNEP/CBD/WG8J/3/6/Add.2).

Many delegates supported creating a fund to support indigenous participation, with China recommending that it be voluntary. The Indigenous Women's Biodiversity Network (IWBN) recommended references to indigenous women's role in preserving and transmitting traditional knowledge. Canada suggested considering communication arrangements other than national focal points for countries with decentralized governments and diverse indigenous communities. The Caribbean Antilles Indigenous Peoples Caucus supported developing electronic communication mechanisms.

On Thursday, the Secretariat introduced a Co-Chairs' text. After discussions, delegates agreed with a Canadian proposal to encourage incorporating practical measures to enhance communities' participation in the CBD's COP, SBSTTA and working groups, where appropriate. Argentina, supported by Brazil, Mexico and Uganda, suggested that the voluntary funding mechanism facilitate community participation from developing countries and countries with economies in transition. On developing communication networks, the IIFB requested indigenous and local communities' consultation, with Argentina, Brazil and Uganda suggesting consultation through national focal points.

On Thursday afternoon, the Secretariat introduced a CRP and Working Group Chair Hoogeveen explained revisions to the Canadian proposal to enhance indigenous participation in other CBD bodies, noting that enhanced participation should be in accordance with the rules of procedure. Mexico, the EU and the IIFB proposed, and delegates accepted, language on promoting synergies between conventions. On the voluntary funding mechanism, the EU, New Zealand and the IIFB, opposed by Argentina, reiterated the need to facilitate participation of communities from developing countries and countries with economies in transition "in particular." The reference was bracketed and SWG-II approved the text as amended.

On Friday, the closing Plenary agreed to also facilitate participation of indigenous and local communities from small island developing states (SIDS) through the voluntary funding mechanism. After further discussion on the voluntary fund, delegates retained brackets on funding "in particular" participation of

communities from developing countries, countries with economies in transition, and SIDS. Delegates adopted the recommendation as amended and bracketed.

**Recommendation:** In the final document (UNEP/CBD/WG8J/3/L.7), the Article 8(j) Working Group recommends that COP-7 urge Parties to further enhance participation of indigenous and local communities in official delegations to CBD meetings.

It recommends that COP-7 request the Executive Secretary to:

- compile information on communities' participation in the CBD process and in its implementation at the national level, and make it available through the CHM;
- incorporate practical measures to enhance communities' participation, where appropriate, in the working groups of the CBD, SBSTTA and the COP, in accordance with the rules of procedure;
- consider the spacing of CBD meetings, particularly between the ABS and Article 8(j) Working Groups, to allow sufficient time for community representatives to prepare and secure financial support for attendance; and
- continue to promote synergies between international environmental conventions.

It is recommended that COP-7 invite Parties, in consultation with indigenous and local communities, to:

- promote effective participation in developing national participatory mechanisms;
- establish community biodiversity committees at all levels;
- enhance the capacity of national institutions, governmental, civil and community organizations to take into account and implement Article 8(j) requirements;
- build capacity to ensure that national biodiversity focal points make information on documents and outcomes of CBD meetings available to communities in their appropriate and accessible languages; and
- enhance the capacity of communities to collaborate with national research institutions to identify research and training needs.

The Article 8(j) Working Group also recommends that:

- Parties pay particular attention, when providing funding and other support for *in situ* conservation, to establishing and implementing participatory mechanisms;
- Parties assist communities to hold regional meetings on the COP's outcomes and in preparation for CBD meetings, in particular the ABS and Article 8(j) Working Groups; and
- Parties include in their national reports information on the level of communities' participation and on measures and approaches used to encourage it.

It recommends that COP-7 establish a voluntary funding mechanism to facilitate communities' participation in CBD meetings, operating under criteria developed by the COP in consultation with communities and taking into account UN practice in this field. Language noting that the fund is to facilitate communities' participation from developing countries, countries with economies in transition, and SIDS "in particular" remains bracketed.

The Working Group recommends that COP-7 request the Executive Secretary to develop the thematic focal point on Article 8(j) under the CHM to: assist national focal points in disseminating CBD-related information more effectively and in appropriate and



accessible languages to indigenous and local communities; organize capacity-building and training workshops for communities on the use of information and communication technologies; and compile information on existing networks, experts, tools and resources relevant to communities' needs.

The Working Group also recommends that COP-7 request the Executive Secretary, in consultation with indigenous and local communities, through the national focal points, to assist in the development of communication networks and tools by, *inter alia*: publishing information on formats, protocols, standards for use, electronic communication tools, network architecture and custodianship of data; assisting in the development of communication networks; and identifying other traditional, alternative and non-electronic communication tools.

### **DRAFT GUIDELINES FOR CULTURAL, ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENTS**

SWG-I discussed draft recommendations and guidelines on cultural, environmental and social impact assessments regarding proposed developments on sacred sites and lands or waters occupied or traditionally used by indigenous and local communities on Tuesday, Wednesday and Thursday.

On Tuesday, the Secretariat introduced draft recommendations and guidelines (UNEP/CBD/WG8J/3/5). The African Group stressed that communities are "holders and owners," rather than "custodians," of traditional knowledge. Sweden called for considering ways to achieve the document's integrated approach and for collaborating with the UN Educational, Scientific and Cultural Organization (UNESCO).

The IIFB, opposed by Argentina, Canada, Kenya and the Bahamas, proposed that the guidelines be binding. Argentina and Jamaica stressed the need for a compilation of sacred sites.

Regarding the draft recommendations, Mexico proposed acknowledging local biodiversity conservation strategies. Care Earth-India suggested reference to sacred species. The African Group proposed encouraging information exchange between communities. The IIFB, Ethiopia and Jordan supported transparency and community participation in prior planning processes. Jordan stressed management of negative environmental impacts. Egypt called for protecting communities and their knowledge from the threats of globalization. The Russian Association of Indigenous People of the North (RAIPON) highlighted threats caused by extractive activities to traditional lifestyles.

Regarding a section on the guidelines' purpose and approach, Canada suggested considering the inter-relationship between environmental, cultural and social aspects. The IIFB recommended addressing prevention and mitigation of impacts on traditional lifestyles, and effects on, and participation of, women. Sweden and the US called for differentiating between the assessment and decision-making processes.

Regarding the use of terms, Mexico requested considering economic, social, cultural and political rights. The IUCN emphasized communities' social and physical integrity in a section on social impact assessments. Canada suggested deleting the definition of customary law, but the IIFB disagreed. India proposed using CBD definitions. Jamaica suggested that environmental impact

assessments (EIAs) include appropriate mitigation measures. The IIFB suggested, and delegates agreed, to name the guidelines "Akwé: Kon" Guidelines, meaning "everything in creation."

On Wednesday, delegates continued discussion on the draft guidelines. Under a section on procedural considerations, the African Group stressed that agreed terms or an agreement should be concluded between communities and proponents of development projects. Several delegates noted that agreements based on assessments could pre-empt communities' rights to oppose a project. The US suggested including a no-action option. On mechanisms for community participation, Canada and Burkina Faso supported indigenous participation at all stages of the assessment process. Kenya called for reference to national legislation, and RAIPON recommended listing participants in, and identifying stages of, assessments. On public consultation regarding proposed developments, the African Group said means of notification should include village and town meetings. The African Group and RAIPON called for establishing processes for recording communities' views and, with Canada, Yemen and Côte d'Ivoire, shared concerns regarding the appropriateness of using audio or video recording. While the African Group proposed rural appraisal methods, RAIPON, the Coordinating Body of Indigenous Organizations in the Amazon Basin (COICA) and the IIFB suggested choosing recording means in agreement with affected communities.

Regarding a section on assessment integration, the Bahamas and RAIPON suggested addressing the economic valuation of cultural resources. Regarding EIAs, delegates discussed language on the need to respect land and treaty rights. Canada said national EIA legislation should respect community rights established under domestic law, but the IIFB objected to references to domestic legislation. The IIFB proposed language differentiating direct and indirect impacts of development projects, and addressing the impacts of invasive alien species.

On social impact assessments, Jamaica said evaluation of changes to traditional economies should include economic valuation of negative social impacts. Regarding their scope, the IIFB proposed considering traditional lifestyles, and Care Earth-India proposed considering impacts on access to biological resources for livelihoods. On areas to be addressed when conducting baseline studies, the African Group suggested considering human settlements, the IIFB suggested use of traditional medicines, and Pakistan said involuntary resettlement and expulsion of indigenous people. The IIFB and Burkina Faso highlighted threats of expropriation of traditional lands. Mexico said benefits of proposed developments should include payment for environmental services.

Regarding a section on ways and means and a sub-section on capacity building, delegates agreed to include indigenous and traditional knowledge experts in impact assessment teams. Saint Lucia and Pakistan proposed language on financial, technical and legal resources to ensure indigenous participation in all stages of impact assessment.

The IIFB presented a proposal for additional sections under general considerations, including: PIC; strategic EIAs and community development plans; legal considerations; ownership, protec-



tion and control of traditional knowledge; mitigation and threat-abatement measures; transparency; review and dispute resolution procedures; and reporting.

On PIC, the IIFB requested, *inter alia*, recognizing indigenous rights and knowledge, and providing sufficient time and accurate information for communities to make a decision regarding their consent to proposed developments. Canada and Jamaica preferred wording agreed upon by the COP, subjecting PIC to national legislation. On strategic EIAs, the IIFB suggested, and delegates agreed, encouraging communities to formulate community development plans, including strategic EIA and poverty alleviation mechanisms, and requiring development projects to: balance economic, social, cultural and environmental concerns; maximize opportunities for biodiversity conservation; and share benefits and protect traditional knowledge.

On legal considerations, the IIFB proposed language recognizing indigenous rights to territories and to control access, and addressing jurisdictional matters and liability and redress. Regarding traditional knowledge, the IIFB stressed the need to respect communities' customary laws and IPRs over their traditional knowledge, PIC of knowledge holders, and access protocols established by communities.

The IIFB also called for transparency and public accountability at all assessment phases, and for information in national reports on measures adopted on the basis of the guidelines. Canada proposed that all human rights be respected, including social, cultural and environmental rights.

On Thursday, Co-Chair Herity presented a CRP including draft recommendations and the draft Akwé: Kon guidelines. Argentina and Brazil suggested preambular language on using the guidelines in a manner consistent with international obligations. The IIFB and the African Group opposed a compilation of sacred sites.

Many opposed a proposal by the Asian Region to define sacred sites in the draft guidelines as areas declared as such by national governments. Delegates agreed to refer to areas held to be of particular importance by national governments or indigenous and local communities. The IIFB proposed, and Canada and the US agreed to, retaining a definition of customary law. Delegates agreed that assessments should identify the actors responsible for liability, redress, insurance and compensation for preventable adverse impacts of development projects.

Regarding legal responsibilities and jurisdictional matters, delegates agreed on the need to clarify legal responsibilities for matters arising from the conduct of assessments. On indigenous participation, the IIFB requested record of its opposition to language requiring PIC of communities when required by national legislation. Canada suggested requesting Parties to include assessment-related information in their national reports. SWG-I approved the guidelines, as amended.

On Friday, the closing Plenary adopted the recommendation and the annexed draft Akwé: Kon guidelines with a reference requested by Brazil to using the guidelines consistent with international law, and a footnote explaining the meaning of Akwé: Kon, as proposed by the EU. The IIFB clarified that "Akwé: Kon" means "everything in creation," meaning that the guidelines should, in a holistic sense, have an impact on everything that is created.

**Recommendation:** The final document (UNEP/CBD/WG8J/3/L.8) contains recommendations and annexed draft voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to have an impact on, sacred sites and lands and waters traditionally occupied or used by indigenous and local communities.

The recommendation recognizes that the guidelines should be implemented in a manner consistent with international law and other international obligations. It recommends that COP-7, *inter alia*:

- endorse the draft voluntary guidelines;
- encourage Parties to explore options to incorporate the guidelines into national legislation, policies and procedures; and
- request Parties to: use the guidelines in conjunction with the guidelines for incorporating biodiversity-related issues into EIA legislation endorsed by COP-6; and
- conduct education and awareness-raising campaigns on the guidelines.

It further recommends that COP-7:

- encourage Parties, regarding developments likely to impact on communities' land and waters, to promote community participation, ensure full transparency of the assessment process, facilitate information exchange, and provide capacity and funding to ensure these measures can be put into effect, taking into account communities' views;
- call upon Parties to support communities in formulating their own development and biodiversity conservation plans, which should include a strategic EIA;
- call upon the international community to provide means to assist Parties to formulate and develop strategic plans to build or enhance the capacity of communities to conduct impact assessments;
- invite indigenous and local communities to take note of the guidelines and request their application;
- call for full transparency when developments are proposed; and
- request Parties to include in their national reports information on impact assessments and attempts to formalize these guidelines.

The annexed draft voluntary guidelines contain sections on: purpose and approach; use of terms; procedural considerations; integration of cultural, environmental and social impact assessments as a single process; general considerations; and ways and means. The purpose of the guidelines is to provide a collaborative framework to:

- support the full and effective participation and involvement of communities in screening, scoping and development planning exercises;
- take into account the communities' cultural, environmental and social concerns;
- take into account the communities' traditional knowledge as part of impact-assessment processes;
- promote the use of appropriate technologies;
- identify and implement appropriate measures to prevent and mitigate negative impacts of proposed developments; and
- take into consideration the inter-relationship among cultural,



environmental and social elements.

Definitions include the terms: cultural impact assessment; cultural heritage impact assessment; customary law; environmental impact assessment; sacred site; social impact assessment; strategic EIAs; and traditional knowledge.

Under procedural considerations, stages and steps that may be considered when carrying out impact assessments are identified. The section on integration of cultural, environmental and social impact assessments as a single process provides for elements to consider when carrying out cultural, social and environmental impact assessments including:

- impacts on customary use of biological resources;
- impact on the protection of traditional knowledge and the exercise of customary laws;
- protocols;
- impacts on sacred sites;
- baseline studies;
- economic considerations;
- impacts on traditional systems of land tenure;
- gender, generational and health considerations; and
- effects on social cohesion.

General considerations include elements on: PIC of affected communities; gender considerations; impact assessments and community development plans; legal considerations; ownership, protection and control of traditional knowledge and technologies used in impact assessments; mitigation and threat-abatement measures; need for transparency; and establishment of a review and dispute resolution process.

Ways and means include elements on: capacity strengthening and rebuilding; legislative authority; information exchange; and resources.

### **COMPOSITE REPORT ON STATUS AND TRENDS**

SWG-I addressed the composite report on the status and trends of indigenous and local communities' knowledge, innovations and practices on Monday and Thursday.

On Monday, the Secretariat introduced a report on the first phase of the composite report (UNEP/CBD/WG8J/3/4, INF/1, and INF/3-10). The UNEP World Conservation Monitoring Centre (UNEP-WCMC) reported on the report's elaboration.

The EU stressed its interest in agrobiodiversity-related traditional knowledge and practices. RAIPON highlighted the need to identify social and economic causes for the disappearance of lifestyles and populations. Care Earth, on behalf of several Indian NGOs, noted the need to share experiences with registers of traditional knowledge.

COICA said traditional knowledge is threatened by commercialization. The IIFB called for: full and effective indigenous participation; consideration of biological and cultural specificities; integration of recommendations from regional workshops; and, supported by Norway, peer review of the report. The IUCN recommended prioritizing: measures for addressing threats; financial resources for indigenous participation, particularly in protected area management; and land ownership issues. Canada, supported by Norway, recommended drafting an action plan for the retention of traditional knowledge based on the report's results. Lithuania

called for links with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Many delegates reported on national experience.

On Thursday, SWG-I considered a Co-Chairs' text, including draft recommendations and an action plan for the retention of traditional knowledge. Regarding the recommendations, Canada suggested preambular references to the desirability of ongoing work and to the PIC of knowledge holders.

Regarding the first phase of the report, the EC and Burkina Faso requested linking information gathering to the report's revision. The African Group proposed including feasible information-gathering means, other than the CHM. Following debate, delegates agreed to retain a reference to assessing advantages and limitations of traditional knowledge registers.

Delegates debated the necessity of a peer review, and agreed to a proposal by Burkina Faso and the IUCN that the indigenous advisory group, provided for in Annex I of COP decision VI/10 on the outline of the composite report, undertake the review. Regarding the second phase of the report, Burkina Faso proposed that field studies be undertaken by stakeholders, with the IIFB requesting that they be carried out according to community guidelines for obtaining consent for access and conducting research.

The EC, with Canada and the IUCN, stressed the need for further elaboration of the draft action plan and for identification of actors and timeframes before its adoption. The IIFB requested deleting a section on definitions. UNEP-WCMC suggested that communities participate in the preparation of a questionnaire for the compilation of thematic reports on CBD Article 8(j). On indicators, delegates opposed referring to indigenous population data. The EC cautioned against the premature development of indicators. On research ethics, Canada supported using and developing codes of ethics. On mechanisms to address the underlying causes of the decline of traditional knowledge, the Asian Region called for respecting indigenous rights when establishing new protected areas. The IIFB called for respecting the rights of voluntarily isolated peoples.

Delegates debated Canada's proposal to merge language encouraging fair and equitable resolution of land claims with language related to land tenure. The IIFB opposed and Canada withdrew the proposal. Delegates agreed to retain separate references, and, following proposals by Argentina, the EC and the IIFB, to state that land claims are subject to national law and international obligations. SWG-I approved the document as amended.

On Friday, during the closing Plenary, Brazil, Costa Rica and Mexico said measures facilitating the use of traditional knowledge should not be addressed in the text and delegates agreed. Argentina requested that work on the report continue through the national focal points, and Brazil, with the IIFB, added that work should continue with the full authorization of indigenous and local communities and respecting domestic legislation. The Bahamas noted that existing language on community consultation covers authorization by communities. Delegates agreed that work on the report should continue through the national focal points, in consultation with, and after approval by, communities. The final document was adopted, as amended.



**Recommendation:** The final document (UNEP/CBD/WG8J/3/L.9) contains recommendations and annexed elements of an action plan for the retention of traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles.

Regarding the first phase of the report, the Working Group recommends that COP-7 undertake further activities to complete the phase, and urge provision of information to support its completion. It further recommends that COP-7 request the Executive Secretary to produce a revised version through the national focal points and through, *inter alia*:

- regional workshops;
- information gathering on measures protecting and supporting the retention of traditional knowledge, including advantages and limitations of registers, and field studies undertaken with communities' full involvement;
- preparation of a regional report on the Arctic region; and,
- creation of an advisory group/steering committee with community representation to assist with the completion of the report and a peer review.

Regarding the second phase of the report, the Working Group recommends that COP-7 encourage Parties and competent organizations to support communities' efforts to undertake field studies to determine the status, trends and threats related to traditional knowledge.

It also recommends:

- requesting the Executive Secretary to further develop the draft elements for an action plan, with a view to identifying actors and timeframes in order to facilitate synergies between existing initiatives and provide further guidance to implement the work programme on Article 8(j); and
- inviting Parties and relevant organizations to provide financial assistance for completion of the first phase, and take the annexed elements into consideration when deciding upon activities for the protection of traditional knowledge.

The annexed draft elements of an action plan include sections on: improved monitoring and reporting process; indicators; research ethics; research on, and implementation of, mechanisms and measures to address the underlying causes of the decline of traditional knowledge; and capacity building, education and training.

### **TECHNOLOGY TRANSFER AND COOPERATION**

SWG-I discussed outstanding issues from SBSTTA-9 regarding technology transfer and cooperation on Wednesday and Thursday.

On Wednesday, Co-Chair Herity presented SBSTTA recommendation IX/5 on technology transfer and cooperation, highlighting that SBSTTA-9 agreed to refer indigenous and local communities-related technology transfer issues to the Article 8(j) Working Group. Mexico, supported by many, suggested recommending that COP-7 take into account mechanisms to ensure that transfer of traditional and innovative technologies fully respect the rights of those who have developed them.

On Thursday, Co-Chair Herity presented a CRP on technology transfer and cooperation, which was approved.

On Friday, the closing Plenary adopted the recommendation without amendment.

**Recommendation:** The final document (UNEP/CBD/WG8J/3/L.10) recommends that COP-7, when reviewing the draft elements of a work programme on technology transfer and cooperation, take into account: both the traditional and the innovative technologies from indigenous and local communities; and mechanisms for ensuring that technology transfer and cooperation fully respect the rights of indigenous and local communities.

### **CLOSING PLENARY**

Working Group Chair Hoogeveen opened the closing Plenary on Friday morning. SWG-I Co-Chair Herity and SWG-II Co-Chair Black Layne reported on the proceedings of their groups, and, with SWG-I Co-Chair Stevenson and SWG-II Co-Chair Mullenkei, expressed their appreciation to delegates, the Secretariat and support staff. Delegates adopted the Working Group's recommendations to COP-7.

Under other matters, India drew attention to financial difficulties regarding the organization of a regional preparatory meeting for COP-7.

Meeting Rapporteur Bance introduced the report of the meeting (UNEP/CBD/WG8J/3/L.1), which delegates adopted with minor amendments.

India, on behalf of the Asian Region, Egypt, on behalf of the African Group, Colombia, on behalf of the Latin American and Caribbean Group, Mexico, on behalf of the Like-Minded Megadiverse Countries, Italy, on behalf of EC Member States and acceding countries, the IIFB and the US expressed their appreciation and gratitude to the organizers of the meeting.

The Asian Region recalled Gandhi's statement that there is enough on earth for everyone's need, but not enough for everyone's greed. The African Group stressed the need to coordinate efforts with other relevant organizations. Stressing the principle of common but differentiated responsibilities, the LMMC urged developed countries to provide additional financial resources to enable developing countries to fulfill their obligations with regard to Article 8(j).

The IIFB highlighted: concerns that free PIC and recognition of customary laws continue to be debated; the need for resources to ensure indigenous participation in the elaboration of the composite report; progress in shifting from using intellectual property-based systems for the protection of traditional knowledge to *sui generis* ones; the need for urgent action to implement COP decision V/5 on GURTs; access to information as a key for effective participation; and the need for indigenous networks.

The Aboriginal and Torres Strait Islander Commission stressed the need for a concerted global approach to addressing the problems faced by fragile environments. Colombia reiterated its rejection of the Arahucos massacre, noting that it was being investigated, and said the IIFB should have addressed its grievances under specialised international fora.

Malaysia invited delegates to Kuala Lumpur for COP-7.

The PFII thanked delegates for the opportunity to participate in the meeting, and invited everyone to its third session, to be held from 10-21 May 2004, at UN headquarters in New York. CBD Executive Secretary Hamdallah Zedan said indigenous involvement is essential to achieve the 2010 target to significantly reduce the rate of biodiversity loss, expressed his appreciation to the



Mohawk and indigenous communities, Working Group Chair Hooegeven and delegates, and expressed hope that COP-7 would be a success.

Working Group Chair Hooegeven commended delegates for their hard work, constructive, and cooperative spirit, expressed hope that the Article 8(j) Working Group would be used as a model for indigenous participation by the other Rio conventions, and gavelled the meeting to a close at 1:50 pm.

### A BRIEF ANALYSIS OF THE MEETING

Dynamics at previous meetings of the Working Group on Article 8(j) of the Convention on Biological Diversity (CBD) revolved around the novelty of equal-footing negotiations between governments and indigenous representatives. The third meeting of the Working Group has clearly moved beyond the initial get-to-know-each-other stage. The meeting's proceedings and outcomes prove that the unusual format of the Article 8(j) Working Group can produce valuable contributions for implementing the CBD's objectives.

Blessed by a Mohawk opening prayer, delegates led their discussions in a spirit of respect and increased understanding, resulting in constructive outcomes, as acknowledged by many during the closing Plenary. Expected stalemates were encountered regarding the role of national and international law, recognition of customary law and genetic use restriction technologies. However, the adoption of the Akwé: Kon guidelines on impact assessments, recommendations for concrete steps to increase indigenous participation in the CBD process, and proposed elements for *sui generis* systems for the protection of traditional knowledge bode well not only for the future of the Article 8(j) Working Group, but also for the implementation of the Convention.

Focusing on the main achievements of the meeting, this analysis will show that the Working Group has found its marks and is establishing itself as an invaluable partner in negotiations of a crucial nature for the CBD's future, including on access and benefit-sharing.

### PRIOR INFORMED CONSENT – COMMON GROUND ON PREVIOUSLY IMPOSSIBLE CONSIDERATIONS

At the outset, the tone was set by what many delegates noted as a significant milestone: the adoption of language calling for the prior informed consent (PIC) of indigenous and local communities where required by national law at the sixth meeting of the Conference of the Parties (COP-6).

With this threshold met, both indigenous representatives and government delegates seemed more flexible in their attempt to bridge their diverse perspectives and reach common ground on previously contentious issues. A number of delegations that opposed the concept of communities' PIC in earlier Working Group meetings, were now committed to keeping it as an element of the draft guidelines for cultural, environmental and social impact assessments. To some extent, related discussions of the Working Group on Access and Benefit-sharing (ABS), held a week prior to the Article 8(j) Working Group meeting, anticipated such an outcome. Delegates at the ABS meeting called for measures to support compliance with PIC of the indigenous and local commu-

nities providing traditional knowledge associated to genetic resources, a principle which is not recognized in the Bonn Guidelines.

### “AKWÉ: KON” – EVERYTHING IS IN THE GUIDELINES

While at COP-6 the guidelines on cultural, environmental and social impact assessments for developments on areas traditionally used by communities were passionately debated, and downgraded to voluntary “recommendations,” this Working Group's discussions were relatively smooth. Not only have those principles been operationalized with the identification of concrete steps for assessment and reinstated to the action-oriented category of “draft voluntary guidelines,” they now carry the revealing name of “Akwé: Kon” guidelines, according to the Mohawk custom not to exclude any aspect or outcome when negotiating.

Drawing their name from indigenous custom, the guidelines will also seek to ensure the protection of communities' cultural heritage, ceremonies, sacred sites, customary law systems and political structures, namely the environment in which traditional knowledge grows and thrives.

### “SUI GENERIS” – A NEW APPROACH OF ITS OWN KIND

Customary law and protocols might also become the key to the successful development of *sui generis* systems for the protection of traditional knowledge. Recognizing the unique nature of traditional knowledge, delegates explored possibilities for its protection using innovative approaches, including non-intellectual property-based instruments.

Stalemates arose when it came to agreeing on whether customary law should be taken into consideration or constitute the basis for developing *sui generis* systems. While the final text on elements for *sui generis* systems requests Parties to take customary laws into consideration, it also recognizes the need for affected communities' PIC for access to their knowledge, and states their right to grant or refuse access. Indigenous representatives have always been skeptical about mainstream intellectual property rights instruments, often used to take traditional knowledge and innovations out of their control. This is also the case regarding the use of registers and databases. Promoted by some Parties as instruments for the protection of traditional knowledge, some indigenous representatives view them as a threat of unauthorized access. The recognition of communities' rights, albeit in preambular references, may ease some of their concerns.

### WORKING TOGETHER - LEARNING FROM EACH OTHER

The emphasis placed on the recommendations from the recently established UN Permanent Forum on Indigenous Issues (PFII) marked another step towards the recognition of the unique character of the Working Group on Article 8(j). While in the past, some governments approached the Working Group's agenda from a knowledge-management perspective, this meeting gave clear signs that the process is moving towards an increasingly rights-based approach, focusing on territorial and cultural rights as the necessary precondition for the protection of traditional knowledge. This shift was manifested in many statements, as delegates were quick to note that indigenous and local communities, far from being mere stakeholders, are knowledge and rights holders. One indication of this shift, the Working Group's recommendation for collaboration with



the PFI may well lay the foundation of a more comprehensive approach to environmental, and human and indigenous rights issues.

### **NEW MODELS OF PARTICIPATION**

The Working Group on Article 8(j) stands out among similar UN and even CBD bodies. Its procedural mechanisms allow indigenous representatives not only to negotiate on an equal footing with governments, but also to nominate representatives as co-chairs of sub-working groups and Friends of the Bureau. Reflecting the growing success of this original approach, several Parties supported, during discussions on participatory mechanisms, a Canadian proposal to incorporate these practical measures in other CBD bodies. If accepted by the COP, the recommendation could mean a new era for the involvement of indigenous and local communities in the work of the CBD, setting the stage for similar arrangements in other environmental and sustainable development fora.

### **A SPIRIT OF GOOD WILL**

With less than two months left before delegates start packing for Kuala Lumpur, the third meeting of the Article 8(j) Working Group contrasted with the recent ninth meeting of the Subsidiary Body on Scientific, Technical and Technological Advice and second meeting of the ABS Working Group: it operated in a problem-solving spirit. Building on successes and learning from shortfalls of the past, delegates left Montreal with concrete tools for implementation, and boosted by the cooperative and constructive mood of the last intersessional meeting before COP-7. It remains to be seen whether Mohawk prayers will reach out to delegates in Kuala Lumpur.

### **THINGS TO LOOK FOR BEFORE COP-7**

**MEETING FOR THE IDENTIFICATION OF ISSUES ON BIODIVERSITY FOR THE COOPERATION AND INTER-CHANGE AMONG SOUTH AMERICAN COUNTRIES:** This meeting, organized by the Ministry of Environment of Brazil, will take place from 15-17 December 2003, in Brasilia, Brazil. For more information, contact: Fatima Pires Almeida Oliveira, Ministry of Environment of Brazil; tel: +55-61-325-3987/5590/5774; fax: +55-61-325-5755; e-mail: fatima.oliveira@mma.gov.br; Internet: <http://www.mma.gov.br/ingles/sbf/chm/estrateg/apringl.html>

**THE CLEARING-HOUSE MECHANISM: EXCHANGE OF EXPERIENCES ON ITS IMPLEMENTATION AT NATIONAL LEVEL AND DEVELOPING SCIENTIFIC AND TECHNICAL COOPERATION:** This meeting, organized by the CBD Secretariat, will be held from 16-18 December, in Ouagadougou, Burkina Faso. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://bch-cbd.natural-sciences.be/belgium/cooperation/partnership/workshopburdec2003.htm>

**THIRTIETH MEETING OF THE RAMSAR STANDING COMMITTEE:** The 30th meeting of the Standing Committee of the Ramsar Convention on Wetlands will convene from 12-16 January 2004, in Gland, Switzerland. For more information,

contact: Dwight Peck, Ramsar Convention; tel: +41-22-999-0170; fax: +41-22-999-0169; e-mail: [peck@ramsar.org](mailto:peck@ramsar.org); Internet: <http://www.ramsar.org>

**ECE REGIONAL IMPLEMENTATION MEETING:** This regional implementation meeting, in preparation for the twelfth session of the Commission on Sustainable Development, will be held on 15-16 January 2004, in Geneva, Switzerland. For more information, contact: UN Division for Sustainable Development; tel: +1-212-963-2803; fax: +1-212-963-4260; e-mail: [dsd@un.org](mailto:dsd@un.org); Internet: <http://www.un.org/esa/sustdev/csd/csd12/rim.htm>

**PAN EUROPEAN REGIONAL PREPARATORY MEETING FOR CBD COP-7:** This regional preparatory meeting, organized by the Joint Secretariat of the Pan European Biological and Landscape Diversity Strategy, will be held from 19-22 January 2004, in Madrid, Spain. For more information, contact: Ivonne Higuero, UNEP; tel: +41-22-917-8395; fax: +41-22-917-8024; e-mail: [ivonne.higuero@unep.ch](mailto:ivonne.higuero@unep.ch); Internet: <http://www.unep.org>

**INTER-REGIONAL MEETING OF SMALL ISLAND DEVELOPING STATES:** The inter-regional meeting of Small Island Developing States (SIDS) will be held from 26-30 January 2004, in Nassau, Bahamas. The meeting aims to prepare for the International Meeting for the Full and Comprehensive Review of the Implementation of the Programme of Action for the Sustainable Development of SIDS (the Barbados Programme of Action), which will be held from 28 August - 3 September 2004, in Mauritius. For more information, contact: Diane Quarless, UN Division on Sustainable Development, SIDS Unit; tel: +1-212-963-4135; fax: +1-917-367-3391; e-mail: [mauritius2004@sidsnet.org](mailto:mauritius2004@sidsnet.org); Internet: <http://www.sidsnet.org>

**REGIONAL PREPARATORY MEETINGS FOR THE SEVENTH MEETING OF THE CONFERENCE OF THE PARTIES TO THE CBD:** Regional preparatory meetings for COP-7 will be held for the African, Asian and the Pacific, and Latin American and the Caribbean Regions in January 2004, venues and dates to be determined. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@biodiv.org](mailto:secretariat@biodiv.org); Internet: <http://www.biodiv.org/>

**SEVENTH MEETING OF THE CONFERENCE OF THE PARTIES TO THE CBD:** CBD COP-7 will be held from 9-20 February 2004, in Kuala Lumpur, Malaysia. The meeting will focus on mountain ecosystems, the role of protected areas in the preservation of biological diversity, and technology transfer and cooperation. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@biodiv.org](mailto:secretariat@biodiv.org); Internet: <http://www.biodiv.org/doc/meeting.asp?wg=cop-07>

**FIRST MEETING OF THE PARTIES TO THE BIOSAFETY PROTOCOL:** MOP-1 will immediately follow COP-7, from 23-27 February 2004, in Kuala Lumpur, Malaysia. For more information, contact: CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: [secretariat@biodiv.org](mailto:secretariat@biodiv.org); Internet: <http://www.biodiv.org/doc/meeting.asp?wg=MOP-01>