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IMPLEMENTATION OF ARTICLE 8 (J) AND RELATED PROVISIONS

Note by the Executive Secretary

I. INTRODUCTION

1. This note has been prepared to assist the Conference of the Parties at its fourth meeting by providing a synthesis of shared experience gathered from a selection of case studies, reviews and other documentation on the implementation of Article 8 (j) and related articles. This synthesis should be read in conjunction with the report of the Workshop on Traditional Knowledge and Biological Diversity (UNEP/CBD/TKBD/1/3), which was arranged as part of the intersessional process referred to below.

2. Paragraph 3 of decision III/14, on the implementation of Article 8 (j), invited Governments, international agencies, research institutions, representatives of indigenous and local communities and non-governmental organizations to submit to the Executive Secretary, in time for consideration by the workshop referred to in paragraph 9 of the decision, case studies on measures taken to develop and implement the Convention's provisions relating to indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. These studies should highlight key areas of discussion and help in considering the implementation of Article 8 (j) and related articles, including, inter alia, interactions between traditional and other forms of knowledge relating to the conservation and sustainable use of biological diversity; the influence of current laws and policies on knowledge, innovations and practices of indigenous and local

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communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity; and incentive measures.

3. Section II of this note contains a synthesis of the 74 studies received by the Executive Secretary. Of these, 44 studies were submitted by 10 Governments; 22 by indigenous and local communities; and eight by non-governmental organizations and other organizations.

4. The geographical distribution of the studies is very uneven: half are from the United States of America and Canada, while there are none from Africa and only a very few from indigenous and local communities in the Southeast Asia and Latin American regions. Similarly, while certain elements involving the implementation of Article 8 (j) and related provisions are the focus of a number of studies, other elements, such as national legislation, benefit sharing, incentive measures and technology transfer, have not been the subject of the same kind of detailed attention.

II. MEASURES TO IMPLEMENT ARTICLE 8 (J)

A. National legislation

5. Article 8 (j) requires that its implementation be subject to national legislation. Paragraph 1 of decision III/14 requests those Parties that have not yet done so to develop national legislation and corresponding strategies for the implementation of Article 8 (j) in consultation particularly with representatives of their indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

6. While information about such national legislation and strategies may have been included in national reports in accordance with paragraph 2 of decision III/14, none of the case studies and other documents reviewed for the purposes of this note specifically addresses the matter of national legislation for the implementation of Article 8 (j) and related provisions. A number of studies do, however, address the matter indirectly and to the extent that they reveal that:

(a) Legislation provides the foundation for the involvement of indigenous and local communities in a range of different aspects of biological diversity conservation and its sustainable use, for example, cooperative management agreements regarding indigenous/local community involvement in protected areas (Australia, United States of America); continued sustainable management of an endangered species (Alaska Eskimo Whaling Commission);

(b) The most potent source of national legislation for the implementation of Article 8 (j) and related provisions is the various treaties concluded by indigenous and local communities and the governments of those countries in which these people are located, for example, the Treaty of Waitangi in New Zealand, and the many treaties concluded between the United States Government and native American peoples;

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(c) None of the studies submitted refers to a single piece of legislation which specifically addresses the implementation of Article 8 (j), but rather, its implementation is carried out, sometimes indirectly, through provisions contained in a wide variety of statutes regarding such matters as land tenure, protected areas, protection of endangered species, land development, water quality, waste disposal, intellectual property and cultural heritage protection, religious expression, natural resources (fisheries, forests), soil conservation, habitat protection, and so on. This wide variety of statutes is sometimes further complicated because similar legislation often exists at national, sub-national and local levels, with resultant inconsistencies.

7. While endorsing the Convention on Biological Diversity as a whole, many of the submissions received from indigenous and local communities note that, because Article 8 (j) is subject to national legislation, the Convention ultimately "stands or falls" on this issue. Such communities are therefore eager to see the formulation of a set of standards or guidelines for national legislation regarding the implementation of Article 8 (j). Laws which empower indigenous and local communities by requiring their representation on statutory bodies will be more likely to ensure that their concerns and interests are considered at the decision-making levels of government. Similarly, laws which offer security of land tenure to indigenous and local communities and allow community self-governance enable situations of respect and equality to emerge.

8. Because the conservation of biological diversity affects so many different sectors, it is necessary to take into account the requirements of Article 8 (j) within a wide range of relevant laws and policies (those affecting natural resource sectors, land tenure, protected areas, cultural heritage protection and language maintenance, intellectual property, appellations of origin, appropriate labeling and other such measures, and planning and development, for example) at national and sub-national levels.

B. Measures which respect, preserve and maintain traditional knowledge, innovations and practices

9. Article 8 (j) requires that each Contracting Party shall as far as possible and as appropriate, "subject to its 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 biological diversity".

10. A variety of measures to respect, preserve and maintain the traditional knowledge, innovations and practices of indigenous and local communities have been undertaken. These include:

(a) Basic measures to compile inventories and document traditionally-used species (Republic of Korea);

(b) Conduct of extensive community consultation (New Zealand) as part of the groundwork for the formulation of the necessary policies, legislative provisions and strategies which may lead to, the

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establishment of conservation partnerships which will encourage and promote respect for, and the preservation and maintenance of such knowledge;

(c) Articulation and promotion by indigenous and local communities of their world views of human-nature relationships and conservation ethics (Institute for the Advancement of Hawaiian Affairs);

(d) Cultural heritage protection legislation, which, for example, protects and regulates access to sacred sites; hunting, gathering and fishing places;

(e) Provision for indigenous and local community involvement in the management and continued sustainable use of endangered species of particular cultural significance to a community (for, example, the bowhead whale);

(f) Permitting indigenous and local communities access to public lands for ceremonial and subsistence purposes, and to perform tasks necessary for habitat conservation (usually under a cooperative management agreement);

(g) Provision of incentives and benefits to enable the retention and recording of traditional knowledge and maintenance of languages (for example, the production of educational manuals, establishment of culture and language centres).

C. Applications of traditional knowledge, innovations and practices

11. Article 8 (j) requires that each Contracting Party shall, as far as possible and as appropriate, "subject to its national legislation, [...] promote the wider application of traditional knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity with the approval and involvement of the holders of such knowledge, innovations and practices.

12. In some countries, traditional knowledge, innovations and practices are comparatively well-documented and Governments seek to apply or incorporate such knowledge, within their strategies to conserve and sustainably use biological diversity (Australia). In other countries, while the value of traditional knowledge is recognized, further studies are required in order to determine how it might best be applied in order to overcome various environmental problems and achieve conservation objectives (Sri Lanka).

13. Indigenous and local community groups embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and organizations have also undertaken their own studies to demonstrate how their knowledge and expertise can be most beneficially used to manage and conserve biological diversity (Indigenous Peoples Aquatic Biodiversity Working Group, Inuit Circumpolar Conference, National Aboriginal Forestry Association). Studies by other agencies have also pointed out the necessity of retaining traditional knowledge and expertise in order to maintain

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agroecosystems which themselves are dependant on the maintenance of biodiversity (University of the Philippines Los Banos Institute of Environmental Science and Management).

14. A common feature of the studies reviewed is the successful integration of indigenous and local community traditional knowledge with western science and technology, and the collaboration of their practitioners. In one study, it was concluded by the government department involved that "the blending of traditional knowledge and western science will change forever the way scientific research, inquiry, and assessment is done in the Arctic". (MMS; Traditional Knowledge Case Study).

D. Equitable sharing of benefits

15. Article 8 (j) requires that each Contracting Party shall, as far as possible and as appropriate, subject to national legislation encourage the equitable sharing of the benefits arising from the utilization of traditional knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity.

16. Two case studies provided some focus on the equitable sharing of benefits: both involved research institutions working with indigenous and local communities in other countries. The main indication from the studies concerns the diversity of benefits to indigenous and local communities which may result from research activities. These include, in addition to monetary benefits stipulated in bioprospecting contracts, vehicles, equipment, computers, training, infrastructure, and opportunities for travel, including international travel, to participate in seminars and conferences.

17. The equitable sharing of benefits may also be considered to include provision of appropriate incentive measures to ensure the conservation of biodiversity and the maintenance of traditional knowledge and cultural practices.

E. Intellectual property rights

18. A great deal of attention has been paid by Governments, indigenous and local community organizations and non-governmental organizations to the issue of providing intellectual property rights protection to traditional knowledge. The shortcomings of existing systems have been noted and a number of proposals have been put forward. In some countries measures have already been taken to protect the intellectual property rights of traditional knowledge holders. Much of this information is reviewed in document UNEP/CBD/TKBD/1/2 on traditional knowledge and biological diversity, paras. 36-60. Some countries are currently undertaking detailed reviews of their legislation and policies and examining a range of options to protect traditional knowledge (Australia).

19. Some indigenous and local communities are grappling with the issues at the "grass-roots" level, raising community awareness as to what is involved and developing strategies to enable them to both

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protect and benefit from their knowledge (Koisaan Koubasanan Kadazandusun, South and Meso American Indian Rights Center).

20. Some non-governmental organizations are playing an important role in reviewing intellectual property protection regimes and informing indigenous and local community groups of how they might best go about securing at least some protection for their traditional knowledge (International Working Group on Indigenous Affairs, Rural Advancement Foundation International).

21. One report, through a number of case studies, examines the use of existing mainstream intellectual property rights laws by indigenous communities. While it notes that indigenous peoples in that country are increasingly using existing systems, these tend to be the less technical forms (copyright and trademark), while the more complex regimes (patents) appear not to be resorted to for products of indigenous knowledge (Canada).

F. Indigenous and local community involvement in in-situ conservation - implementing Article 10 (c) in relation to the whole of Article 8

22. It is pointed out in para. 76 of document UNEP/CBD/TKBD/1/2 on traditional knowledge and biological diversity that the requirements of Article 10 (c) can only be met within the context of the whole of Article 8. To this end, a number of Governments (Australia, Norway, the United States of America Territories of American Samoa and Guam) and indigenous and local community organizations (Algonquins of Barrière Lake, Quebec, Canada, New South Wales Aboriginal Land Council) are seeking to establish, or have established conservation partnerships to manage biological diversity in a range of land and marine tenure situations (protected areas, indigenous/local community-owned land, public lands, State forests, inland waters). Some of these initiatives are taking place at the regional level (Saami Council). Input into such initiatives through the formulation of guiding principles is also being provided by some non-governmental organizations (World Wide Fund for Nature).

23. Some of these conservation partnerships predate the Convention and are highly successful, to the extent that indigenous and local community project expertise is being applied elsewhere to carry out projects in, for example, water catchment rehabilitation, rangelands restoration and habitat monitoring. Others are looked upon, in the national context, as models for other jurisdictions to follow at the sub-national level.

24. It is clear that a number of cooperative management agreements have a legal foundation, whereby the State has to honour, for example, its treaty obligations to indigenous peoples. In other situations, the State has created the necessary statutory conditions which enable successful co-management of biodiversity or particular components of it.

25. Several indigenous and local communities have also been concerned about past misuses of their lands as a result of the forced

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introduction of inappropriate land-use activities and have therefore initiated their own habitat rehabilitation/restoration programmes.

26. Within the overall context of these indigenous and local community natural resource management programmes (whether undertaken in conjunction with other agencies or not), it would appear that the various requirements of Article 8 (j) are being met. Where joint/cooperative ventures are involved, the requirements of Article 8 (j) are most probably being met via a legally-binding agreement or statutory management plan whereby:

(a) Traditional knowledge, innovations and practices are being respected, preserved and maintained;

(b) Their application is taking place with the approval and often the involvement of the holders;

(c) Equitable sharing of benefits for the use of the knowledge, innovations and practices is occurring;

(d) Appropriate incentive measures are in place to ensure that the involved communities want to continue with the arrangement;

(e) Intellectual property rights regarding the recording and use of traditional knowledge are being enforced (often in accordance with customary law); and

(f) Technology transfer is taking place and traditional ecological knowledge and western science are successfully being blended to produce better biological diversity management and sustainable use.

G. Identification and monitoring (Article 7)

27. In decision III/14, the Conference of the Parties recognized that traditional knowledge should be given the same respect as any other form of knowledge in the implementation of the Convention. In its recommendation II/2, the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) noted that traditional taxonomic systems offer a valuable perspective on biological diversity and should be considered part of the total taxonomic knowledge base at national, regional and subregional levels. The worldwide shortage of scientifically trained taxonomists was also noted. Therefore traditional knowledge could play a valuable role in the development of indicators for conservation and sustainable use of biological diversity, as well as in monitoring and assessment.

28. While a number of studies concerning traditional ecological knowledge have been compiled, more are needed in terms of the practical applications of such knowledge for understanding and establishing baseline data for particular ecosystems and for evaluating changes over time. The study published jointly by the Canadian Arctic Resources Committee and the Environmental Committee of the Municipality of Sanikiluaq might be considered a model for studies of this kind.

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H. Incentive measures (Article 11)

29. Only two studies focused on incentive measures appropriate to indigenous and local communities. However, the sharing of experience on incentive measures within the more general context of the Convention on Biological Diversity as a whole is the subject of an earlier note by the Executive Secretary, contained in document UNEP/CBD/COP/3/24.

30. Indigenous and local communities are concerned that the rate of knowledge erosion has never been so high as it is in the current generation, and that such knowledge erosion poses an even more serious threat to the conservation of biological diversity than resource erosion. There is therefore an urgent need to formulate an array of incentive measures to ensure that members of the younger generations will want to learn, value, adapt and apply the traditional knowledge, innovations and practices of their elders.

31. While many studies attest to the communal nature and ownership of indigenous and local community traditional knowledge, there is also a need to take into account those particular individuals with unique expertise. Incentive measures must therefore take into account both community and individual contexts when such measures are being formulated and applied.

32. The study by the Society for Research and Initiatives for Sustainable Technologies and institutions (SRISTI) offers typologies of different kinds of knowledge, skills, innovations and practices, pointing out the need to tailor incentive measures to suit each type. The central message is that no one incentive will be appropriate for all situations within a community or across communities, hence the need to tailor or contextualize the content of the incentive to suit the social, cultural, economic and biodiversity conservation needs of a particular community.

33. It may therefore be useful to consider two scales of incentives:

(a) A macro-scale which applies general incentive measures at the local community level (and which might also apply to a number of communities), legislative and institutional measures, capacity building, tax incentives, economic instruments; and

(b) Micro-scale incentives appropriate to specific kinds of knowledge, innovations and practices, and to particular knowledge holders.

34. There is a need for additional case studies dealing with incentive measures in relation to indigenous and local communities to be submitted before a synthesis of experiences can be offered. There may be a need, however, to articulate incentive measures which are appropriate to the needs of indigenous and local communities with the institutional framework developed in document UNEP/CBD/COP.3/24 (paras. 16-34), taking into account the outline for case studies developed by the Secretariat, which is posted on the Website <<http://www.biodiv.org>>. This work may be coordinated with the work

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on incentive measures under the Convention on Biological Diversity contained in document UNEP/CBD/COP/4/18.

III. CONCLUSIONS

35. Although the case studies surveyed provide a good starting point, best practices with regard to all aspects of the implementation of Article 8 (j) and related provisions are still emerging. It is therefore premature to attempt to draw final conclusions from the experience detailed in the case studies presented so far and important to review and readjust measures to implement Article 8 (j) on a regular basis.

36. It is evident from the uneven representation of studies, both in terms of geographical origins and in addressing the various elements of Article 8 (j) and related provisions, that additional case studies should be invited to enable wider sharing of experiences by Parties and indigenous and local communities and for contribution to the general literature on the implementation of Article 8 (j).

IV. RECOMMENDATIONS

37. The Conference of the Parties is invited to consider the following elements of a decision on implementation of Article 8 (j):

(a) The possible elements for the formulation of a work programme, to be pursued in close cooperation with relevant conventions, international institutions and processes and in particular:

(i) Programmatic recommendations; and

(ii) Institutional considerations, as set out in the report of the Workshop on Traditional Knowledge and Biological Diversity (UNEP/CBD/TKBD/1/2);

(b) That Article 8 (j) shall be a standing item for future meetings of the Conference of the Parties;

(c) Invitation to Governments, international agencies, regional organizations, research institutions, representatives of indigenous and local communities and non-governmental organizations to continue to prepare and submit to the secretariat of the Convention on Biological Diversity further case studies on the implementation of Article 8 (j) and related provisions, as outlined in paragraph 3 of decision III/14, with particular emphasis on the following topics:

(i) National legislation;

(ii) Specific applications of traditional knowledge, innovations and practices;

(iii) Benefit sharing arrangements;

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- (iv) Incentive measures;
 - (v) Use of traditional ecological knowledge for ecosystem monitoring and taxonomy; and
 - (vi) Technology transfer;
- (d) Request Governments to include in the national report, changes in law and policy concerning the implementation of Article 8 (j) and related provisions;
- (e) Request the Executive Secretary:
- (i) To update the synthesis of information contained in the submissions referred to above;
 - (ii) To develop indicative guidelines, based upon this synthesis;
 - (iii) To propose a format for the submissions referred to above.
