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WORKSHOP ON TRADITIONAL KNOWLEDGE
AND BIOLOGICAL DIVERSITY
Madrid, Spain
24 to 28 November 1997

TRADITIONAL KNOWLEDGE AND BIOLOGICAL DIVERSITY

Note by the Executive Secretary

INTRODUCTION

1. In paragraph 7 of Decision III/14, Implementation of Article 8(j), the Conference of the Parties decided that an intersessional process should be established to advance further work on the implementation of Article 8(j) and related provisions with a view to producing a report for consideration at the fourth meeting of the Conference of the Parties.

2. In paragraph 10, the Conference of the Parties requested the Executive Secretary to produce, in support of that intersessional process, a background document containing:

a) The consideration of the linkages between Article 8(j) and related issues including, *inter alia*, technology transfer, access to genetic resources, ownership, intellectual property rights, alternative systems of protection of knowledge, innovations and practices, incentives and Articles 6 and 7 and the remainder of Article 8;

b) The elaboration of concepts of key terms of Article 8(j) and related provisions such as Articles 10(c) on customary use of biological diversity, 17(2) on exchange of indigenous and traditional knowledge and 18(4) on development and use of indigenous and traditional technologies;

c) A survey of the activities undertaken by relevant organisations and their possible contribution to Article 8(j) and related articles.

3. In paragraph 9 the Executive Secretary is requested to arrange, as part of the intersessional process referred to in paragraph 7, a five-day workshop before the fourth meeting of the Conference of the Parties according to the terms of reference in the Annex to Decision III/14.

Paragraph 1(c) of the Annex states that the workshop would seek to consider the background document prepared by the Executive Secretary.

4. This note contains the background document requested of the Executive Secretary for consideration at the workshop. Its aim is to assist the participants at the workshop in the consideration of the agenda items. Since the workshop is part of the on-going process under the Convention to implement Article 8 (j) and related articles, this note draws upon previous notes and documents and updates and complements them.

5. It draws on a note prepared by the Executive Secretary for the Third Conference of the Parties which was held in Buenos Aires from 4-15 November 1996, *Knowledge, Innovations and Practices of Indigenous and Local Communities: Implementation of Article 8 (j)* (UNEP/CBD/COP/3/19). This note, in turn, updated the information contained in a note prepared by the Interim Secretariat for the second session of the Intergovernmental Committee on the Convention on Biological Diversity entitled *Farmers' Rights and Rights of Similar Groups: The rights of indigenous and local communities embodying traditional lifestyles: experience and potential for implementation of Article 8 (j) of the Convention on Biological Diversity* (UNEP/CBD/IC/2/14).

6. Another document of relevance is the contribution by the Executive Secretary to the preparation of the Report of the Secretary-General for Programme element 1.3 of the Intergovernmental Panel of Forests. This contribution has been reproduced as *Traditional Forest-Related Knowledge and the Convention on Biological Diversity* (UNEP/CBD/COP/3/Inf. 33). *Compilation of International Guidelines Concerning Indigenous and Local Communities* (UNEP/CBD/COP/3/Inf. 24) provides information of a selective range of international guidelines.

7. In this Note the term "traditional knowledge" is employed to mean the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity", in accordance with Article 8(j). Article 8(j) is used in this Note to denote the contents of Article 8(j), 10 (c), 17(2), 18(4) and other relevant articles in the Convention.

EXECUTIVE SUMMARY

8. The Convention on Biological Diversity recognizes the importance of indigenous and local communities to the conservation and sustainable use of biological diversity. The key provisions are to be found in Article 8(j) which requires that the traditional knowledge of indigenous and local communities be respected, preserved and maintained; that the use of such knowledge should be promoted for wider application with the approval and involvement of the holders of such knowledge; and that they should equitably share in the benefits which arise from the use of their knowledge. The Convention also requires, in Article 10(c), that customary uses of biological resources in accordance with traditional cultural practices should be protected and encouraged. Information concerning traditional knowledge and technologies should be included amongst the information to be exchanged, and where feasible, repatriated (Article 17(2)), while technological cooperation between Contracting Parties should also include cooperation regarding indigenous and traditional technologies (Article 18(4)). However, in order to achieve the objectives of the Convention, the linkages between Article 8(j) and

other provisions must be established so that they can be effectively implemented.

9. With regard to Article 16, while indigenous and local communities can contribute many useful technologies for the conservation and sustainable use of biodiversity, the field is rich for scientific and technological collaboration for the management of biodiversity. However, where indigenous and local community knowledge or technologies are involved, their intellectual property rights must be protected. Because current regimes require further strengthening, consideration must be given to a range of additional options, such as alternative legal means, the adaptation of existing systems and the development of *sui generis* systems based on such concepts as traditional resource rights, WIPO's Model Provisions, the Principles and Guidelines for the Protection of the Heritage of Indigenous People, or the rights regimes proposed by a number of international agencies as well as non-governmental organizations. For *sui generis* systems to be successful they should also take account of indigenous and local community customary law systems. Satisfactory protection of traditional knowledge will most probably require that all options be addressed.

10. The issue of access to genetic resources raises concerns about the need for the prior informed consent of indigenous and local communities, where they are stakeholders, and that they should be included in contractual arrangements.

11. Incentive measures are important for the maintenance of traditional knowledge, and its transmission to subsequent generations, as expressed by many indigenous and local communities at the various meetings under the Convention on Biological Diversity. A range of appropriate (monetary and non-monetary) incentives must be tailored to suit the social, cultural and environmental contexts of each community and must be negotiated between communities and the various providers, whether they be public or private sector, or both.

12. Traditional knowledge is an invaluable contribution to the identification and monitoring processes required by Article 7. Given the incomplete state of the taxonomies of most of the world's genetic traits, species and ecosystems and the scarcity of scientifically-trained taxonomists, community systems of taxonomic classification can also add new dimensions of information and understanding to our knowledge of biodiversity and the many factors which affect it.

13. The whole of Article 8 is of particular relevance to Article 10(c) as customary use of biological resources in accordance with traditional cultural practices can only exist within the context of *in-situ* conservation. Likewise, the knowledge, innovations and practices identified in Article 8(j) are relevant to the other provisions of Article 8.

14. The Convention contains a number of key terms which require further elaboration in order to successfully achieve its objectives. While many of these terms have been explored in other documents prepared by the Secretariat, further elaboration is provided here to shed light on their interpretation from indigenous and local community perspectives and in order to take their needs into account in achieving the objectives of the Convention.

15. In considering the implementation of Article 8(j) and related

provisions there is an urgent need to focus on national legislation to which it is subject. It may therefore be considered helpful to the

cause of the Convention if a set of guidelines can be established on which national laws necessary for the implementation of Article 8(j) can be based. Such guidelines could also address the issue of the protection of indigenous and local community knowledge.

**I. TRADITIONAL KNOWLEDGE AND CONVENTION ON BIOLOGICAL DIVERSITY:
CRITICAL LINKAGES**

1. The Convention's Provisions Regarding Traditional Knowledge

16. In Article 8(j), the Convention recognizes the importance of indigenous and local communities to the conservation and sustainable use of biological diversity. It also recognizes that indigenous and local communities should share in the benefits derived from their traditional knowledge. Indeed, these communities need incentives to conserve biological diversity, if they are to overcome pressures from other economic, developmental, strategic and social forces which may have adverse impacts on biological diversity.

17. Several other articles contain references to indigenous and local communities, namely, 10(c), 17.2 and 18.4. These provisions overlap with Article 8(j) and thereby mutually reinforce each other and further elucidate the requirements of Article 8(j). The closely related nature of all these provisions points to the advantages of dealing with them together in any consideration of the involvement of indigenous and local communities in the implementation of the provisions of the Convention.

18. With regard to the exchange of information, Article 17.2 provides that: "Such exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1. It shall also, where feasible, include repatriation of information."

19. As such, the Convention recognizes the need to exchange information in conjunction with technology transferred pursuant to Article 16(1). This naturally includes operational information, but might also include information to assess the appropriateness or environmental impact of technology. It also includes information concerning indigenous knowledge, innovations and practices relevant to conservation and sustainable use, subject to the approval and involvement of and the sharing of any benefits which arise from its use with the holders of such knowledge, innovations and practices. Repatriation of information to indigenous and local communities is an important consideration in aiding such communities to conserve and sustainably use biological diversity. Thus the link between Articles 17.2 and 8(j) is established.

20. Article 18(4) requires technology cooperation to be encouraged and developed through national legislation and governmental policies in order to develop and use technologies that will help attain the objectives of the Convention. Technology cooperation applies to all types of technologies, including biotechnology. There is a need to embed in national legislation provisions which explicitly cover the use of indigenous and traditional technologies with respect to such matters as access, prior informed consent (PIC), mutually agreed terms (MATs), intellectual property protection and benefit sharing.

2. Technology Transfer

21. According to the United Nations Conference on Trade and Development (UNCTAD), technology transfer is the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service. Matters of technology transfer as provided in Articles 16 and 18 of the Convention are addressed in document *Promoting and Facilitating Access to and Transfer and Development of Technology* (UNEP/CBD/COP/3/21) prepared by the Secretariat. It is also noted that at its third meeting, the Conference of the Parties, in paragraph 3 of Decision III/16, endorsed the Recommendation II/3 of the second meeting of the SBSTTA and requested that the third meeting of the SBSTTA conduct its work on technology transfer within sectoral themes related to the priority issues under its programme of work, as set out in Recommendation II/12.

22. Article 8(j) provides for the equitable sharing of benefits arising out of the utilization of knowledge, innovations and practices of indigenous and local communities. This benefit sharing may take the form of reciprocal sharing of technologies. What kind of technology may be useful to the community in consideration of its providing its knowledge would have to be decided by the community itself.

23. It may well be that national Government agencies need to act as brokers or mediators to facilitate technology transfer to indigenous and local communities within their jurisdiction. This, however, should take into account the fact that many of the necessary transactions will be governed by market practices. This should occur in any case--within or outside a benefit sharing agreement--with the approval of the community concerned. In terms of facilitating technology transfer, government agencies may be able to provide legal and technical advice, supply infrastructure and training, subsidise the purchase of equipment, guarantee wages until the technology becomes economically viable, assist with environmental and social impact assessments and commercial feasibility studies, and ensure that the technology meets the standards required by regulation.

24. As regards the transfer of technologies to indigenous and local communities, information relating to the technology is a particularly important factor. Such information is required as to the existence of the technology as well as on the various operational aspects of the technology, especially to be able to modify the technology to the needs of the community, e.g. its infrastructure, scale of usage and technical environments. Other factors include access to finance, knowledge of what to negotiate in a technology transfer package, the overall technological capability of the host community and the available infrastructure for acquiring and utilizing the technology.

25. The exchange of "modern" technologies with traditional knowledge and practices of indigenous and local communities can be mutually reinforcing and meet many of the obligations under Article 8 and 10(c). It can for example assist in the determination and maintenance of sustainable levels for the harvesting of particular biological resources and ensure a more effective joint-management of protected areas.

26. When considering the implications of the term "under fair and most favourable terms" of Article 16.2, indigenous and local communities are

among those least able to pay for new technologies and the training required to operate and maintain them. "Package deals" may have to be considered which include such things as hardware, training, servicing of

equipment and backup, up-grading (including skills) and maybe other considerations such as purchasing arrangements; employment arrangements of the operator; need and extent of government assistance.

3. Access To Genetic Resources

27. In Decision III/15, the Conference of the Parties noted that the implementation of Article 15 is closely linked to that of other Articles, such as 8(j), 11, 16.2, 16.5, 17.2, 19.1 and 19.2 and, in paragraph 3, urged Governments, regional economic integration organizations, the interim financial mechanism, and competent international, regional and national organizations to support and implement human and institutional capacity-building programmes for Governments, non-governmental organizations and local and indigenous communities, as appropriate, to promote the successful development and implementation of legislative, administrative and policy measures and guidelines on access, including scientific, technical, business, legal and management skills and capacities.

28. Paragraph 5 of Decision III/15, encourages the exploration and development of guidelines and practices to ensure mutual benefits to providers and users of access measures.

29. Access to genetic resources and benefit sharing arising out of the use of genetic resources cannot be separated from the traditional knowledge of indigenous and local communities. Traditional knowledge can be highly valuable in identifying sources of new products derived from genetic resources, including pharmaceuticals and crop varieties (UNEP/CBD/IC/2/14).

30. Given the connections between genetic resources and local and indigenous knowledge and innovations which has been recognised in Decision III/15, it is important that Article 8(j) is implemented in conjunction with Article 15 of the Convention. For example, procedures of prior informed consent as required in Article 15.5 might also provide that access seekers must obtain the informed consent, the approval, of local and indigenous communities.

31. National measures might include definitions of the term "access", to clarify what kind of activity constitutes access; for instance, physical taking, collection, exchange etc.; definitions of the kind of use for which access has been granted, and the scope of the national legislation. Access is often defined by geographical scope, and the scope of genetic resources covered, rather than by the nature of the physical activity that constitutes it. Innovations and knowledge of local and indigenous communities, however, is often inherent in the genetic resource as intangible component or only the information given by the community makes the resource interesting to users outside that community.

32. Representatives of indigenous and local communities should be integrally involved in policy formulation and implementation regarding access to genetic resources. Capacity-building is needed for them to be able to participate as equal partners. This includes access to and use of plant genetic resources for food and agriculture. Issues concerning access to genetic resources and farmers' rights are being addressed in the ongoing negotiations for the adaptation of the International Undertaking on Plant Genetic Resources (IU) to bring it into harmony with the Convention, as reflected in Decisions III/15 and III/11. Under these negotiations the "scope" of the IU is also being considered in

terms of its coverage of different categories of plant genetic resources (i.e. all/certain food crops; including/not including under-valued or under-utilized plant genetic resources, etc.). In addition to farmers' rights it is critical that due attention is also paid in these negotiations to the rights of indigenous and local communities, including access to land and security of tenure issues which underpin issues regarding access to genetic resources. The outcome of these negotiations could lay the building bricks for further progress at international and national levels regarding other genetic resources.

33. With regard to *ex-situ* collections, the effect of Article 15(3) of the Convention is to exclude from the remit of its provisions on access and benefit-sharing, those genetic resources acquired before its entry into force. Thus, *ex-situ* collections of genetic resources acquired before the Convention came into force fall outside these provisions. Notwithstanding, it is open to governments to consider introducing access requirements and benefit-sharing for these resources, although there are important legal considerations related to the retrospective nature of any such legislation as well as the fact that the resources may be privately owned.

34. Numerous indigenous and local communities are seeking to have access to *ex-situ* collections, whether subject to the Convention or not, and want to have samples of genetic materials which originate from their territories returned. However, this might also be subject to having the appropriate facilities for their maintenance and care in order for such materials to be returned. Another option is to have such materials lodged with appropriate national institutions subject to access agreements negotiated with these indigenous and local communities.

35. There are some concerns regarding the promotion of *ex-situ* conservation in the country of origin, in that national institutions may develop traditional genetic resources in the national interest and develop them on the basis that the sharing of benefits may not be fully justified.

4. Intellectual Property Rights

36. The utility of intellectual property rights with regard to the protection of such rights for indigenous and local communities was reviewed in a note by the Secretariat entitled *Knowledge, Innovations and Practices of Indigenous and Local Communities: Implementation of Article 8(j)* (UNEP/CBD/COP/3/19). It was concluded that there were "no international legal instruments or standards which adequately recognize indigenous and local communities' rights over their knowledge, innovations or practices "It went on to observe that "[c]urrent systems of intellectual property rights alone are not sufficient to ensure that benefits flow back to indigenous and local communities". It is difficult to classify indigenous knowledge, innovations and practices into categories of intellectual property developed for use in industrialized countries. Some sort of intellectual property protection for indigenous and local communities may be valuable "but that "even if the system is effectively adapted, or a *sui generis* system is created, most indigenous communities lack the financial, technical and legal means to claim such rights or ensure their effective implementation. Also, it is unclear what mechanism would need to be in place so that the form or type of benefits returning to the community support the conservation and sustainable use of biological diversity".

37. The Secretariat concluded that "[a]t present, any protection afforded the knowledge, innovations and practices of indigenous and local communities seems to depend on contractual agreements and the guidelines used or recommended by intergovernmental, academic, and public and private sector institutions in their dealings with these communities. Reliance on the goodwill of these companies and institutions is unlikely to be sufficient to implement the relevant provisions of the Convention. Positive action by Governments is apt to be necessary".

38. In Decision III/17, the Conference of the Parties recognizes that further work is required to help develop a common appreciation of the relationship between intellectual property rights and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Convention on Biological Diversity, in particular on issues relating to technology transfer and conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising out of the use of genetic resources, including the protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity (para. 8).

39. It is also recalled that at the fourth session of the *Ad Hoc* Intergovernmental Panel on Forests, in document E/CN.17/1997/12, in its proposals for action with regard to Traditional Forest-Related Knowledge (TFRK), "[i]nvited the World Intellectual Property Organization (WIPO), together with the United Nations Conference on Trade and Development (UNCTAD), taking into account Decision III/14 of the Conference of the Parties to the Convention on Biological Diversity, to undertake a study aimed at advancing international understanding of the relationship between intellectual property and TFRK, and to develop ways and means to promote effective protection of TFRK, in particular against illegal international trafficking, and also to promote the fair and equitable sharing of benefits arising from such knowledge".

5. Alternative Systems Of Protection Of Knowledge, Innovations And Practices

40. Legal protection can be gained through a variety of legal agreements, such as material transfer agreements, non-disclosure agreements and information transfer agreements.

41. Reliance upon such contractual methods to capture benefit for indigenous and local communities is widely thought of as the most practical approach to ensure the equitable sharing of benefits referred to in Article 8(j). It is considered attractive because the contractual concept is one with which most societies are familiar and because it is a relatively private bargain involving minimal governmental intervention. However, the contractual approach presents severe limitations. Factors such as contracts being binding only on the immediate parties thereto, high transaction cost for the parties, the unfamiliarity of indigenous and local communities with formal national legal systems and the disparity in bargaining power, lack of resources to hire the best legal expertise, all limit significantly the extent to which this approach can be used by indigenous and local communities to capture the true value or benefit of their traditional knowledge.

42. In light of the above assessment, the following sections address a

number of alternative options for the protection of traditional knowledge of indigenous and local communities.

a) Adaptation Of Existing Intellectual Property Rights Systems

43. One strategy for indigenous and local communities is to use existing intellectual property laws for their own benefit where possible while promoting changes to encompass their cultural concerns and collective forms of ownership, having regard to the specific provisions of the Convention. Some countries, such as Australia and New Zealand are in the process of investigating ways in which their laws regarding the protection of different facets of intellectual property might be amended to accommodate appropriate protection for the intellectual property of their indigenous people.

b) Institutional Codes Of Research Ethics

44. In the absence of internationally accepted standards, international, governmental and non-governmental organizations, professional societies and the private sector have developed their own explicit or implicit methods of relating to indigenous and local communities. Examples of these include FAO Code of Conduct for Plant Germplasm Collecting and Transfer; the Manila Declaration; and the Declaration of Belmopan.

c) Traditional Resource Rights (TRR)

45. Given that knowledge and traditional resources are central to the maintenance of identity for indigenous and local communities, the management of these resources then becomes significantly important. The issue of land tenure rights, in particular, security of tenure, is paramount in this consideration as access to genetic resources can only be assured if access to land and other natural resources is assured. Moreover, gender considerations are equally crucial to ensure that due recognition is attributed to differential roles and responsibilities of men and women in different societies and their different knowledge regarding the management and use of natural resources. Decision III/11 gives recognition to the importance of gender considerations in the conservation and sustainable use of agricultural biodiversity. For these reasons the concept of Traditional Resource Rights (TRR) has emerged as a unifying concept that more accurately reflects the views and concerns of indigenous and local communities. TRR brings together principles of "bundles of rights" that are widely recognized by international legally and non-legally binding agreements, thereby integrating environmental conservation with intellectual property rights. This integrated rights approach offers mechanisms for creating synergy between the CBD and other international agreements and conventions.

46. TRR is based on the following bundles of basic rights and customary law and relevant concepts: human rights, land and territorial rights, religious rights and religious freedom, development rights, cultural property, environmental integrity, intellectual property rights, collective rights, farmers' rights, neighbouring rights, cultural heritage, prior informed consent and full disclosure, contracts and covenants, customary law and practice, folklore and cultural landscapes, rights to privacy. Although wide-ranging, TRR are still inadequate, because some are enshrined in legally-binding Conventions,

while others are found in non-legally binding documents or model proposals. The concept, however, can grow as additional rights accrue and are adapted through the development of national and international legislation.

47. A highly significant feature of these rights is that they are overlapping and synergistic. Consequently, an integrated rights approach allows States not only to implement their international obligations on trade, environment and development, but also to put into effect commitments that they have agreed to undertake by signing human rights treaties.

48. TRR is more than a system; it is a framework of principles that can serve as a foundation for the diverse and flexible systems that indigenous and local communities are seeking. In other words consideration of a range of alternative (*sui generis*) systems can be derived out of the TRR concept. Although TRR are rights driven and not economically motivated, they acknowledge basic rights of the indigenous and local communities to control access over and receive benefits from traditional resources and their knowledge of them.

6. *Sui generis* Systems

49. In terms of models for *sui generis* protection of indigenous and local community knowledge at least three are considered as having potential for consideration, namely: WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, the Principles and Guidelines for the Protection of the Heritage of Indigenous People, elaborated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Third World Network's proposal for a Rights Regime for The Protection of Indigenous Rights and Biodiversity.

a) WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions

50. The Model Provisions are based on a definition of folklore which confines its expressions to artistic forms, however, despite this restrictions, the Model Provisions afford indigenous and local communities three unique elements that are especially appropriate to the protection of biological products and processes. First, communities (rather than specific individuals) can be the legally registered innovators; they can either act on their own behalf or be represented by the State. Second, community innovations are not necessarily fixed and finalized, but can be ongoing or evolutionary and still be protected by intellectual property law. And third, communities retain exclusive monopoly control over their folklore innovations for as long as the community continues to innovate.

51. The Model Provisions acknowledge the concept of ongoing indigenous and local community innovations. They do not, however, offer any obvious means of safeguarding community innovations - a practical problem that plagues all efforts to utilize the existing IPR framework. Nevertheless, the Model Provisions could either be expanded to include protection for the cooperative innovation system or it could serve as a precedent for including such protection in other conventions, particularly the Union for the Protection of New Varieties of Plants or

the Industrial Property Convention.

b) Principles and Guidelines for the Protection of the Heritage of Indigenous People

52. The Principles and Guidelines for the Protection of the Heritage of Indigenous People, elaborated by the Sub-Commission on the Elimination of Discrimination and Protection of Minorities, are based on a holistic definition of what constitutes indigenous heritage, namely, that: "[it] is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage"; and "includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous people's heritage on film, photographs, videotape, or audiotape".

53. In paragraph 28 of the Principles and Guidelines, Governments are urged to adopt national laws for the protection of indigenous people's heritage following consultations with the people concerned.

54. From the Principles and Guidelines it may be possible to formulate a set of provisions which could form the basis of *sui generis* legislation for the protection of the heritage of indigenous and local communities and specifically those components which relate to the protection of intellectual property in their traditional knowledge for the conservation and sustainable use of components of biodiversity.

c) A Rights Regime for the Protection of Indigenous Rights and Biodiversity

55. The Third World Network has formulated A Conceptual Framework and Essential Elements of a Rights Regime for the Protection of Indigenous Rights and Biodiversity. This framework is based on draft laws for The Community Intellectual Rights Act, The Collector's Act, and A Model Contract between Collectors and the state, and which are considered to be "by no means final, as the search for a legal framework within which indigenous and local communities can reclaim their inalienable right to their own culture, their knowledge systems and practices is arduous and ongoing."

56. The supporting legislation requires those who wish to use biological resources to apply for a license. The license is subject to conditions, one of which is that a contract be signed between the applicant and the Government where the resource is sought. By the contract, the licensee undertakes a series of obligations, one of which is to abide by the rights regime outlined above.

57. A contract is thought to be a more effective device as laws do not have extra-territorial effect. On the other hand, a contract is binding on signatories. Any judgment obtained for its breach is usually enforceable as countries provide for reciprocal enforcement. In respect

of those countries where no such mutually enforceable mechanisms exist, the legal provisions require the licensee to deposit a sum sufficient to cover any potential damages for non-compliance. Additionally, or in lieu of this deposit, the licensee may be required to obtain the agreement by their Government to indemnify the country whose resource is sought for any loss arising from any breach of the agreement. Ultimately, it will be necessary to set up a multilateral regime which can then oversee and enforce obligations undertaken.

7. Customary Law Systems

58. Instead of IPR as a means of regulating access to and control over knowledge, the Four Directions Council finds that indigenous and local communities possess their own locally-specific systems with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language. For this reason, attempts to devise uniform guidelines for the recognition and protection of indigenous and local communities' knowledge into a single model will not fit the values, conceptions or laws of any such community. This approach would require the international community to agree that traditional knowledge must be acquired and used in conformity with the customary laws of the indigenous and local communities concerned.

59. Relevant customary laws could be recognized within the framework of the general law of a Contracting Party and, in terms of dealing with the issue of intellectual property protection for indigenous and local communities, will need to address such matters as: the area and nature of the respective jurisdictions of the national government and indigenous and local communities regarding intellectual property; rules of evidence and procedure; locus standi; the nature and composition of the judicial authority assigned to deal with customary intellectual property; the role of indigenous and local community justice mechanisms; the appropriateness and nature of any penalties imposed for infringements against customary laws governing access and use of knowledge and how they will be imposed; as well as many other issues.

60. The recognition of indigenous and local community customary laws in national legislation may be an important facet of the implementation of both Articles 8(j) and 10(c).

8. Incentive Measures

61. The rate of erosion of the traditional knowledge of biodiversity held by indigenous and local communities has never been so high as it is in the current generation. It is therefore submitted that the major thrust for the development of appropriate incentives should be to secure the survival of traditional knowledge within and beyond this generation, that is, such incentives should also be targeted towards the next generations to ensure that it is worth their while to carry the knowledge and skills of their forebears. Young people must feel that it is rewarding to pursue careers based on the traditional knowledge of their forebears.

62. It should also be borne in mind that the conservation of the knowledge, skill, practice and spirit of innovation cannot take place without looking at the socio-cultural and ecological context of the knowledge system. Incentives only in the material form and only in the

short term will not help in changing the context of biodiversity conservation. It should be noted that no one incentive will be appropriate for all situations within a community or across communities. Incentive measures must therefore be tailored to suit:

- i. different kinds of knowledge, skills, practices and innovations including holders of traditional knowledge, and trainees as future holders of such knowledge;
- ii. needs of particular communities and of particular members of the community. In this regard attention should be paid to ensure that the incentive measures are gender responsive and do not discriminate against disadvantaged groups in the community.

63. Most importantly, incentive measures should be developed and applied in such a way as to maintain community and ecological balance. Heaping huge rewards, for example, on one or a few individuals who possess particular knowledge or skills found to be of great commercial significance can have profound repercussions for community stability. Likewise, sudden focus on the exploitation of a particular traditional natural resource can also have destabilizing effects on both the community and the local ecosystem.

64. In considering a range of appropriate incentive measures to support and promote the survival and maintenance of traditional knowledge relevant to the conservation and sustainable use of biodiversity, that is, traditional knowledge, it is necessary to consider those conditions or incentives which are essential to cultural survival and those which enhance or further promote its survival. With regard to the former, essential conditions to enable cultural survival and maintenance include:

- i. security of tenure in general and rights over customary lands and resources, in particular those related to subsistence;
- ii. management over natural wealth and resources;
- iii. the right of communities to practice their own cultures and languages.
- iv. respect for customary laws

65. Incentives, which would further enhance or promote the maintenance of traditional knowledge, based on those essential conditions, include: respect for traditional knowledge; recognition and protection of indigenous intellectual property rights; adequate compensation (monetary and/or non-monetary) for the use of their traditional knowledge; status enhancement of holders of traditional knowledge; employment in work which uses traditional knowledge; educational support to ensure the traditional knowledge is passed on to younger community members; legislative empowerment; and fair enforcement of national resource laws.

9. General Measures For Conservation And Sustainable Use

66. The implementation of the provisions of Article 6 will require countries that have not already done so to establish linkages in order to promote integration of the conservation and sustainable use of biological diversity into the development and implementation of relevant

sectoral and cross-sectoral plans, programmes and policies or to adopt those presently in existence. To be effective, this will require coordination among all stakeholders to promote the necessary levels of participation in the development and implementation of plans, programmes and policies, including indigenous and local communities.

67. The integration of biological diversity considerations into relevant sectoral or cross-sectoral plans, programmes and policies through an open and participatory process will assist Parties and countries to identify the underlying causes of biodiversity loss, as well as policies that have positive effects. In this respect, Parties

should bear in mind the decisions adopted concerning incentive measures, in particular paragraphs 3 and 4 of Decision III/18 and paragraph 9(b) of Decision III/9 as well as the incentive measures discussed above.

68. The status of the implementation by Parties of Article 6(b) in the evaluation of the lessons learned for the establishment of an enabling environment at the national level is fundamental for the integration of biodiversity. Consideration into relevant sectoral and cross-sectoral plans, programmes and policies will thus best be undertaken in coordination with future work by the Conference of the Parties on the implementation of Articles 6(b) and 8(j) and related provisions.

10. Identification And Monitoring

69. In Decision III/10, the Conference of the Parties reaffirms the central importance of the implementation of Article 7 in ensuring that the objectives of the Convention are met, and stresses the fundamental role of taxonomy in identifying the components of biological diversity. In Decision III/14, the Conference of the Parties, in preambular paragraph 9, has recognized that traditional knowledge should be given the same respect as any other form of knowledge in the implementation of the Convention.

70. In paragraph 8 of Recommendation II/2 concerning agenda item 3.4: *Practical Approaches for Capacity-Building for Taxonomy*, the SBSTTA noted for consideration at the third meeting of the Conference of the Parties, *inter alia*, that: "It should also be recognized 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 sub-regional levels".

71. It also recommended, in paragraph 2 of Recommendation II/2, that the third meeting of the Conference of the Parties should consider that: "Capacity-building for taxonomy should be linked to the effective implementation of the Convention on Biological Diversity, particularly the national identification of areas of high diversity; improving the understanding of ecosystem functioning; giving priority to threatened taxa, taxa that are or may be of value to humanity, and those with potential use as biological indicators for conservation and sustainable use of biological diversity."

72. Underlying Recommendation II/2, however, is deep concern about the general lack of taxonomists that are required for Parties to implement the Convention, together with taxonomic collections and institutional facilities and the need for recruitment, training and employment opportunities to increase the number of taxonomists.

73. In Recommendation II/1, in paragraph 4, it was also noted by the SBSTTA that improvement of taxonomic knowledge was fundamental to the development of indicators and assessments, and that, in paragraph 7, *inter alia*, "traditional knowledge could play a valuable role in the development of indicators, as well as in monitoring and assessment".

74. Indigenous and local community taxonomic systems also extend to non-biological phenomena of the physical environment, e.g., types of ice, soils, seasons, meteorological phenomena, etc. The employment of this knowledge in the implementation of Article 7 will also constitute a way of respecting, preserving and maintaining the traditional knowledge of indigenous and local communities, as required by Article 8(j) and

elaborating the application of the ecosystem approach.

11. Other Provisions Of Article 8

75. Article 8(j) emphasizes the use to which the traditional knowledge of indigenous and local communities, relevant to conservation and sustainable use, might be applied either by the holders of such knowledge, or by others (subject to the approval and involvement of the holders of such knowledge and that benefits from such use are shared equitably with them). The use of such knowledge, etc., is therefore relevant to the implementation of the other sections of Article 8.

76. Attention should also be drawn to the particular relevance of Article 10(c) to the whole of Article 8. Article 10(c) provides for the protection and encouragement of customary uses of biological resources in accordance with traditional cultural practices and thus forms a critical link with Article 8, because such customary use can only effectively occur within the framework of *in-situ* conservation.

77. A Contracting Party's primary goal should be to encourage government policies which minimize or eliminate any antagonism and competition between government and indigenous and local communities which might exist over management of biological resources. With foresight, appropriate customary uses, traditional knowledge and cultural institutions could supplement more recent modern practices and institutions to achieve specific management goals for the conservation and sustainable use of biodiversity.

78. In some cases, more appropriate biological resources management could involve delegating day to day management responsibility from the national to the sub-national or local levels, where local communities offer extensive manpower and wealth of traditional knowledge. This could be undertaken while allowing compatible customary uses to be encouraged and maintained within a local framework of checks and balances, supplemented by supervisory controls.

79. An approach involving modern techniques and practices could be introduced, as appropriate, to help communities overcome problems they have not traditionally had to deal with such as over-population, presence of alien species, specific pollution problems, tourism or restoring degraded landscapes to productive uses. The decision to initiate such an approach, in accordance with Article 8(j), rests with national governments in fulfilling the obligations of the Convention.

80. This decentralized approach could be attractive to natural resource management agencies for more than one reason, particularly when budgetary and personnel resources are over-stretched. The first steps to achieving this include:

- i. identifying and amending, where appropriate, current national laws, institutions and policies which, through inadvertence, promote conflict, competition and disenfranchisement;
- ii. identifying customary uses and traditional knowledge compatible with conservation of biological diversity and the sustainable use of its components; and
- iii. strengthening community level institutions and promoting

effective community participation in management decisions.

81. Following these steps would go a long way in fulfilling the obligations under Article 8(j) and 10(c).

II. ELABORATION OF KEY TERMS OF ARTICLE 8(j) AND RELATED PROVISIONS IN ARTICLES 10(c), 17.2 AND 18.4

1. Subject To Its National Legislation"

82. The provisions of Article 8(j) are made subject to national legislation, therefore guidelines for such national legislation to facilitate the implementation of Article 8(j) should be formulated. This would enable consistency to be achieved regarding national laws and assist Contracting Parties in their monitoring of such laws.

2. Respect, Preserve And Maintain Knowledge"

83. Respect with regard to the traditional knowledge of indigenous and local communities can be understood as the requirement to accord such traditional knowledge a status comparable to that shown to other types of knowledge, innovations and practices. This, in itself, acts as a considerable incentive for the conservation and maintenance of traditional knowledge. This has been recognised in preambular paragraph 14 of Decision III/14 of the third meeting of the Conference of the Parties. Relevant traditional knowledge should thus be accorded a status in national life comparable to that shown to scientific knowledge. Relevant innovations carried out by indigenous and local communities should be given a status similar to innovations arising from the scientific and technological communities. Relevant practices and customary uses should be recognized as comparable, when not superior, to modern land-use management, agricultural, fishing, medicinal and other activities using biological resources.

3. Knowledge, Innovations and Practices"

84. Traditional knowledge, as used in this note, is a term used to describe a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use.

85. Adapting the summary contained in document UNEP/CBD/COP/3/19, traditional forest-related knowledge is associated with the following features:

- i. information about the various physical, biological and social components of a particular landscape;
- ii. rules for using them without damaging them irreparably;
- iii. relationships among their users;
- iv. technologies for using them to meet the subsistence, health, trade and ritual needs of local people; and
- v. a view of the world that incorporates and makes sense of all the above in the context of a long-term and holistic perspective in decision-making.

86. In the context of knowledge, innovation is a feature of indigenous and local communities whereby tradition acts as a filter through which innovation occurs. In this context, it is traditional methods of research and application and not always particular pieces of knowledge that persist. Practices should therefore be seen as the manifestations of knowledge and innovation.

87. Indigenous knowledge, innovations and practices are likely to be highly specific to the locality which each community inhabits and thus may be of limited application outside of those localities. However, it is because of the innovations which take place under locality-specific conditions that subtle variations in the genetic characteristics of local varieties of particular species occurs as traditional innovators seek to accommodate the local environmental conditions under which they live and nurture useful species. Such conditions include soil types, climatic variations, pests, species composition of the area, etc.

88. It is thus the combination of accumulative knowledge and potential for innovation and adaptation of traditional systems, and the equivalent knowledge base and innovative capacity of modern or scientific systems, which, if encouraged, offers unquantifiable, but probably substantial, opportunities for identifying improved techniques for conservation and sustainable use of biological diversity.

89. Article 17.2 obliges Parties to facilitate the exchange of information, *inter alia*, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16.1. Article 18.4 provides that Parties shall encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of the Convention. Notwithstanding the view expressed above that much traditional knowledge will mean little outside the environment where it arises and is likely to be most valuable as a means to achieve *in-situ* ecosystem management, it follows that, for Parties to have arrived at an identification of such information meriting exchange between Parties, or of indigenous and traditional technologies to be developed and used in cooperation, they must have fulfilled these provisions of Article 8(j) through the establishment of the requisite ownership, planning and management partnerships.

4. Promote The Wider Application Of Knowledge, Innovations And Practices"

90. The realization of this provision of Article 8(j) is dependent on the fulfillment by Parties of the preceding provision. In other words, if Parties fail to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities' in the ways suggested with regard to incentive measures, cultural diversity will be lost and with it the traditional knowledge in question. There will thus be fewer examples of traditional knowledge, innovations and practices for wider application.

91. Aspects of the traditional knowledge associated with a particular environment have various kinds of meaning and usefulness to global society, but may only be used with the approval and involvement of the holders of such knowledge, through negotiation and partnership. Much traditional knowledge will mean little outside the environment in which it arose, however, and is likely to be most valuable as a means to achieve *in-situ* sustainable ecosystem management. To do this the owners

of traditional knowledge must be involved in:

- i. ownership partnerships, in which local people and the State agree to ownership regimes for traditional lands and its derivatives;

- ii. planning partnerships, in which traditional and other forms of knowledge are used together in making decisions on the use of the biodiversity on such lands; and
- iii. management partnerships, in which the partners collaborate to put their plans into effect. Such application would need to be through the planning and management partnerships referred to above.

5. Approval And Involvement

92. Article 8(j) requires that the wider application of traditional knowledge be "with the approval and involvement of the holders of such knowledge, innovations and practices". The provisions of the Convention on access to genetic resources similarly require that this be on the basis of prior informed consent (PIC) and mutually agreed terms (MATs) (Article 15, paras 4, 5 and 7). The provisions of the Convention on technology transfer require this to be on mutually agreed terms (Article 16.3). The transmission of knowledge necessary for its wider application requires mutual respect and understanding. For indigenous and local communities to participate fully in such partnerships and to offer their knowledge for the benefit of other stakeholders, certain conditions will need to be met. Holders of traditional knowledge will need to:

- i. feel secure in tenure arrangements regarding their traditional land, forest and marine/inland water estates;
- ii. feel reassured that they have been accorded equal status to the other members of the partnerships; and
- iii. be convinced of a common purpose compatible with their cultural and ecological values.

93. Furthermore any special needs regarding participation should be attended to. These may include the need for capacity building (e.g., negotiation skills, understanding of the environmental management issues under review and of the reasons behind the outside interest in their knowledge, legal support) and mechanisms for compensating the real costs of participation (foregone labour or social investments as well as out of pocket expenses).

6. Equitable Sharing Of Benefits

94. Article 8(j) provides for the equitable sharing of benefits arising from the utilization of traditional knowledge with the holders, while Article 15(7) requires Parties "to take legislative, administrative or policy measures with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from commercial and other utilization of genetic resources with the Contracting Party providing such resources.

95. This latter provision recognises that access and benefit sharing are closely linked, with the production and subsequent sharing of benefits growing out of and being dependent upon the control of access. The Convention refers to specific forms of benefit and their fair and equitable sharing in a number of articles, including: the participation of providers in the scientific research process [Article 15(6)]; the access to and transfer of technology [Article 16(3)]; exchange of

information, including the repatriation of information [Article 17.2]; effective participation in the research process by providers [Article 19(1)]; priority access to results and benefits derived from biotechnologies based on genetic resources provided [Article 19(2)], and the equitable sharing of benefits with indigenous and local communities Article 8(j).

96. The Philippines Executive Order No. 247 of 1995, "Rescribing Guidelines and Establishing a Regulatory Framework for the Prospecting of Biological and Genetic Resources", and its specifying Administrative Order define both: "Benefit sharing refers to the sharing of results of bioprospecting activity and benefits arising from the utilization or commercialization of the biological or genetic resources fairly and equitably with the indigenous cultural community/local community/protected area/private land owner concerned and the national government by the Principal/Collector."

97. Among the results and benefits that may be shared are payment for access to specimens, royalties, data, technology, capacity building, training, joint research; equitable sharing - refers to the benefit-sharing mutually agreed upon by the parties to the Research Agreement.

98. The practical relationship between access-control and benefit-sharing must be fleshed out on national and local levels. As described above, national measures often outline the nature of benefits - both monetary and non-monetary - that will accrue to the country through biological-diversity prospecting relationships. These measures will also require the sharing of benefits with indigenous peoples and local communities involved in research programs.

7. Protect And Encourage"

99. In order to protect and encourage, the necessary conditions may be in place, namely, security of tenure over traditional terrestrial and marine estates; control over and use of traditional natural resources; and respect for the heritage, languages and cultures of indigenous and local communities, best evidenced by appropriate legislative protection (which includes protection of intellectual property, sacred places, and so on). Discussions on these issues in other United Nations forums have also dealt with the issue of respect for the right to self-determination, which is often interpreted to mean the exercise of self-government.

100. These conditions may also be considered in the context of incentive measures.

8. Customary Use of Biological Resources In Accordance With Traditional Cultural Practices"

101. Customary use of biological resources must take into account the spiritual and ceremonial dimensions of such use in addition to the more strictly economic and subsistence functions. Such use may also entail restrictions in accordance with customary laws: such restrictions must be respected as a necessary function of cultural survival. Also, the methods of taking various species have frequently changed as a result of the introduction of new technologies, however, it is the traditional purposes for such taking which should remain paramount in considering customary uses of biological resources and traditional cultural practices.

102. In terms of implementing Article 10(c), in consideration of the terms "as far as possible and as appropriate", it would seem appropriate to provide for customary uses of biological resources in accordance with traditional cultural practices within national laws.

9. Mutually Agreed Terms (MATs)"

103. The approval and involvement of the holders of traditional knowledge within the context of the wider application of Article 8(j) and in the context of Articles 15.4 and 16.3, must take place on the basis of mutually agreed terms (MATs). However, MATs whether explicitly, as required by the relevant articles of the Convention, or implicitly, underwrite virtually all transactions necessary for the implementation of the Convention. This is no less true for the planning and management partnerships considered essential to the wider application of traditional knowledge, as it is for the formulation and implementation of incentive measures at the local level.

104. In order to encourage equitable benefit sharing, Parties may wish to consider requiring that access seekers include one or more of the following elements in at least some categories of access and benefit sharing (ABS) arrangements in arriving at mutually agreed terms:

- i. Providing monetary benefits through fees for shipments of samples and royalties on profits from future products, to *inter alia*, the community involved;
- ii. Providing technology transfer or training, or agreeing to joint research to the community involved;
- iii. Reporting on results of future research or development involving the genetic resources to the providing party or institution;
- iv. Agreeing on respective intellectual property rights over the genetic resources and technologies developed using them;
- v. Agreeing to cite or acknowledge sources of genetic resources that contribute to research findings, including products or inventions; for example, a scientist could acknowledge the country of origin of genetic resources that are the subject of a publication in a professional journal, or an inventor could acknowledge in a patent application the country of origin of genetic resources used in the invention;
- vi. Providing benefits to local and indigenous communities.

105. It may be useful to design guidelines that reflect the different types of uses to which access seekers may put genetic resources. In addition, guidelines must be flexible enough to accommodate the diversity of situations that will arise, and the rapid change in relevant technologies.

106. Other MAT considerations of particular relevance to indigenous and local communities include:

- i. terms governing access to country (no-go areas re: sacred

sites; ecologically sensitive areas, seasonal breeding grounds, etc.);

- ii. non-disclosure clauses to protect confidentiality of sources and information;
- iii. right to review research and authorize texts of research before release/publication;
- iv. right to receive copies of research in a form or format intelligible to the community (e.g., audio/video tape rather than written format);
- v. repatriation of information relevant to the research; and
- vi. community ownership or joint ownership of copyright over any publications resulting from research.

10. Prior Informed Consent (PIC)"

107. Prior informed consent has emerged as the central procedural device enabling Parties to achieve the specific provisions of Article 15. However, as required by Article 15.2, Parties must endeavour to facilitate access, thereby ensuring the continued exchange of genetic resources. National measures may need to strike a balance between the need to control access so as to ensure benefit-sharing and mutually agreed-upon terms, and the need to ensure that access procedures, as well as requirements for PIC and benefit-sharing, are flexible and simple enough that they do not block access.

108. Prior informed consent is broadly understood to mean consent to an activity that is given after receiving full disclosure regarding the reasons for the activity, the specific procedures the activity would entail, the potential risks involved, and the full implications that can realistically be foreseen.

109. A first step in defining PIC consists of resolving who has the authority to give consent, i.e., to determine access. To date, Parties have defined a two-tiered set of authorities: (a) the Contracting Party, at the national level; and (b) at the local level, private individuals and groups, including indigenous and local communities.

110. With regard to the requirement of "full disclosure", the Andean Pact Common Regime on Access requires the applicant to provide legally correct, complete and trustworthy information (Article 22). The information to be provided concerns the applicant for access and the resources to which access is sought. Article 26 of the Andean Pact Common System on Access requires the applicant for access to submit an application containing the following information:

- i. Identification of the applicant and, as appropriate, documents demonstrating that the natural or legal person is legally entitled to enter a contract;
- ii. Identification of the supplier of genetic or biological resources and their derivatives or of the associated intangible component;
- iii. Identification of the national support institution or individual;
- iv. Identification and curriculum vitae of the project manager

and working group;

- v. Nature of the access activity being requested;
- vi. Locality or area in which access will be made, together with the geographical coordinates.

111. Such application is to be accompanied by a project proposal, taking into account a reference model provided by the Andean Pact Board. Another example which can be used as a model is the Philippines Executive Order No.247 of 1995.

112. The instruments mentioned above both require PIC not only from government, but also from private individuals and groups, including indigenous and local communities. These provisions reflect existing rights, laws and emerging policies within the countries concerned. Even if Article 15 of the Convention itself is interpreted as not requiring PIC at the local level, these requirements may be linked to the phrase "otherwise determined", as in Article 15.5.

113. It is important to embed in the relevant national laws and institutional codes of practice, as part of the requirements for PIC, the consent of indigenous and local communities. Additionally, with regard to those Contracting Parties who exercise jurisdiction over indigenous and local communities, their national laws should also empower such communities to set their own conditions with regard to the giving of PIC. Such conditions should also include the right to refuse access to territories, biological resources, knowledge and technologies.

III. ACTIVITIES OF RELEVANT ORGANIZATIONS

1. UN Organizations

a) Commission on Human Rights (CHR)

114. The CHR, through its Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Working Group on Indigenous Populations has been active in developing a Draft United Nations Declaration on the Rights of Indigenous Peoples, promoting the protection of the heritage of indigenous peoples and working towards the establishment of a permanent forum for indigenous people.

115. In its Resolution 1995/32 of 3 March 1995, the Commission on Human Rights decided to establish an open-ended inter-sessional working group to elaborate a draft United Nations Declaration on the Rights of Indigenous Peoples, considering the draft agreed upon by the members of the Working Group on Indigenous Populations and contained in the Annex to Resolution 1994/45 of the Sub-Commission on the Prevention of Racial Discrimination and Protection of Minorities.

116. At its forty-seventh session in 1995, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities considered the final report submitted by the Special Rapporteur on the Protection of the Heritage of Indigenous People (E/CN.4/Sub.2/1995/26) and the Annex containing Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People. This report represents an expansion of the Special Rapporteur's earlier study on the protection of the cultural and intellectual heritage of indigenous peoples (E/CN.4/Sub.2/1993/28). The report contains, in its Annex "Principles and Guidelines for the

Protection of the Heritage of Indigenous Peoples" provisions of relevance to the issues raised by Article 8(j) of the Convention. Of particular relevance are paragraphs 6 (Principles) and 12, 36, 41, 56 and 58 (Guidelines). The report also recommends "the convening of a United Nations technical meeting [...] to propose mainly practical modalities for the co-operation of relevant United Nations bodies and specialized agencies in protecting the heritage of indigenous peoples".

117. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights recommended that the establishment of a Permanent Forum for Indigenous People in the United Nations system be considered. Following consideration of this recommendation by the General Assembly and by the Commission on Human Rights, the Centre for Human Rights organized a workshop on the possible establishment of a permanent forum in the United Nations system. This workshop was held in Copenhagen in June 1995 at the invitation of the Government of Denmark and the Greenland Home Rule Government. A subsequent workshop took place in San Diego, Chile in June, 1997.

b) Commission on Sustainable Development

118. Document UNEP/CBD/COP/3/19 considers the previous note (UNEP/CBD/IC/2/14) regarding instruments containing provisions on indigenous and local communities and biological diversity adopted at the United Nations Conference on Environment and Development and the Commission on Sustainable Development. These include Principle 22 of the Rio Declaration, Chapter 26 of Agenda 21, and Principles 5(a) and 12(d) of the Forest Principles.

119. At its third session in 1995, the Commission on Sustainable Development established an open-ended *ad hoc* Intergovernmental Panel on Forests (IPF). Programme element 1.3 of the Programme of Work of the Panel required the Panel to make recommendations on how "consistent with the terms of the Convention on Biological Diversity, [to] encourage countries to consider ways and means for the effective protection and use of traditional forest-related knowledge, innovations and practices of forest-dwellers, indigenous people and other local communities, as well as fair and equitable sharing of benefits arising from such knowledge, innovations and practices."

120. The contribution to the preparation of the Report of the Secretary-General for the substantive discussion of this programme element at the third session of the Panel, prepared by the Secretariat in accordance with Decision II/9 of the Conference of the Parties, is contained in document UNEP/CBD/SBSTTA/2/Inf.3 (reissued as UNEP/CBD/COP/3/Inf.33). The report of the Secretary-General on "Traditional Forest-Related Knowledge" as submitted to the third session of the IPF is contained in document E/CN.17/IPF/1966/16.

121. The Intergovernmental Panel on Forests (IPF) completed its work in February 1997. The IPF made over 135 proposals for action towards addressing international forest issues. It represents a significant advance in the international discussion of forests, including issues on traditional forest-related knowledge (TFRK). The Panel brought forward the international consensus on forests to a more integrated concept of forests, including social, economic, cultural and ecological dimensions.

122. In June 1997, the informal High-Level Interagency Task Force on Forests (ITFF) prepared the document entitled "Interagency Partnership on

Forests: Implementation of IPF Proposals for Action by the ITFF". The ITFF members contributing to this Plan include: the Food and Agriculture Organization of the United Nations (FAO), the International Tropical Timber Organization (ITTO); the Secretariat of the Convention on Biological Diversity (CBD); the United Nations Department for Economic and Social Affairs (DESA); the United Nations Development Programme (UNDP); the United Nations Environment Programme (UNEP); and the World Bank. The Centre for International Forestry Research (CIFOR) has also been invited to contribute to this Plan.

123. This Implementation Plan is intended as a first response by the ITFF to the proposals for action adopted by the IPF and endorsed by the UN Commission on Sustainable Development (CSD) at its fifth session. In this Plan, the Secretariat of the Convention on Biological Diversity is the facilitator for the implementation of the IPF proposals for action concerning programme element 1.3 on traditional forest-related knowledge.

124. Also in June 1997, the nineteenth special session of the General Assembly decided to establish the Intergovernmental Forum on Forests (IFF) in order to maintain the momentum of the intergovernmental policy dialogue as generated by the IPF process. The main responsibility of IFF will consist in promoting and facilitating the implementation of IPF proposals for action, and reviewing, monitoring and reporting on progress, including those on traditional forest-related knowledge (E/CN.17/1997/12).

125. In October 1997, the IFF first session recognized the importance of continue considering traditional forest-related knowledge (TFRK), consistent with, *inter alia*, the terms of reference of the Convention on Biological Diversity", as part of its programme of work under Category II: Considering matters left pending and other issues arising from the programme elements of the IPF process needing further clarification.

126. It should also be noted that at the third meeting of the Conference of the Parties in paragraph 6 of Decision III/12, the Executive Secretary was requested to develop a focused work programme for forest biological diversity which should incorporate traditional systems of forest biological diversity conservation.

127. The optional elements for such a work programme should initially focus on research, cooperation, and the development of technologies necessary for the conservation and sustainable use of forest biological diversity. The programme should also take account of the outcome of the Intergovernmental Panel on Forests and other forest-related forums; facilitate the application and integration of the objectives of the CBD in the sustainable management of forests at the national, regional and global levels, in accordance with the ecosystem approach; complement and not duplicate the work of relevant international forums, notably the Intergovernmental Panel on Forests; and complement existing national, regional or international criteria and indicator frameworks for sustainable forest management.

128. The Executive Secretary has been requested to report on progress in the draft programme of work to the Fourth Conference of the Parties.

c) International Tropical Timber Organization (ITTO)

129. The ITTO is an intergovernmental organization established under an

international treaty to promote the conservation, management and sustainable development of tropical forest resources. The International Tropical Timber Agreement of 1994 entered into force on 1st January 1997.

130. Among the objectives in Article 1 of the Agreement, it is provided:

a) to encourage members to support and develop industrial tropical timber reforestation and forest management activities as well as rehabilitation of degraded forest land, with due regard for the interests of local communities dependent on forest resources.

b) to promote and support research and development with a view to improving forest management and efficiency of wood utilization, to contribute to the process of sustainable development, as well as increasing the capacity to conserve and enhance other forest values in timber producing tropical forests.

d) United Nations Development Programme (UNDP)

131. In document UNEP/CBD/COP/3/Inf.24, regarding UNDP, it is noted that:

- (i) The conditions in which indigenous peoples live are gradually receiving more attention as bilateral and multilateral organizations are reshaping their development strategies and policies. Of particular importance in this regard is the increased emphasis on current strategies of enlarging peoples' capabilities and of promoting their empowerment, and the introduction of the concept of "sustainability" which has brought development and environment into the one logical framework and built an ideological bridge between the "traditional" and "modern" sector by recognizing the significance of indigenous peoples' holistic traditional knowledge of the environment and their vision of their "stewardship" for nature and management of natural resources. Further, in para. (ii) it notes that: More and more it is being accepted that sustainable development can only exist in an environment where human rights are respected and where people are free to participate in decision-making processes and the implementation of follow-up programmes and activities.

UNDP has developed a set of guidelines, the operational part of which is mainly adapted from the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), 1989, and the Draft Declaration of the Working Group on Indigenous Populations as agreed upon at its eleventh session in 1993 and submitted to the Commission on Human Rights in 1994. Of particular relevance to Article 8(j) and related provisions are: (21) Many projects supporting indigenous peoples, will have an environmental component. Activities in this area should respect the right of indigenous peoples to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources. (WGIP, Article 28); and (22) Projects that gather, use and/or are

based upon indigenous customary knowledge should include measures that promote the recognition of this knowledge as "intellectual property", as well as measures that prevent the dissemination of this knowledge without the prior consent of the "proprietors" or without any acknowledgment or compensation to the indigenous custodian of this knowledge.

The UNDP is supporting the Indigenous Knowledge Programme to be implemented through the Indigenous Peoples Biodiversity Network (IPBN) and the International Development Research Centre (IDRC) of Canada. In the Programme Justification, UNDP states: "For several reasons, the discussion on the need to preserve indigenous knowledge systems has taken place in a "policy vacuum". At the global level, indigenous peoples' organizations and representatives have hardly been allowed to participate in the discussion. [...] At the national level, few countries have begun to discuss national policies and strategies with regard to bioprospecting and the preservation of indigenous knowledge. At the local level, communities and local authorities are usually unaware of the value and importance of the innovation system. This "vacuum" has allowed scientists and industries to conduct research on indigenous knowledge without paying attention to some important broader, longer-term concerns and doubts. For example, with regard to the integrity of innovation systems, it is seriously doubted that it is possible to commodify and commercialize knowledge without destroying the continuation of the social structures that have generated this knowledge and on which the livelihoods of many indigenous communities depend. [...] Similarly, but at another level of abstraction, how do intellectual property rights over products based on biological resources relate to the sovereign rights - as reaffirmed in the Convention on Biological Diversity - of States over biological resources?" (draft project proposal, 31 August 1995, section B, para.1.8);

- (ii) "It] is of the utmost importance that indigenous people get the opportunity to voice and put forth their concerns, that they be able to ensure the continuation of indigenous innovative systems, and that they initiate their own programmes to protect their knowledge from being lost and appropriated without fair compensation" (para.1.9);
- (iii) "The overall question is how to preserve the social structures that have generated and continue to generate knowledge within indigenous communities. The basic issues to be tackled by this programme are how to strengthen the capacity of indigenous peoples to defend and advocate for their own interests in this area and to prepare and implement activities that ensure the continuation of their innovation systems" (para.1.10).

132. The UNDP expects of this programme:

- i. the overall awareness of governments, scientists, environmentalists, indigenous communities, and others as to the importance of conserving indigenous knowledge systems as an integral part of the social structures of indigenous peoples' and farmers' communities will have been raised;

- ii. the capacity of key indigenous peoples' organizations to advocate the position and interests of indigenous peoples, to conduct research on matters related to the conservation of their knowledge, and to conduct policy analysis and formulation will have been enhanced;
- iii. studies will have been conducted on, for example, the relation between biodiversity conservation and indigenous knowledge, bioprospecting agreements, intellectual property rights and customary laws, and the relations between indigenous knowledge and the emancipation of indigenous peoples; and
- iv. pilot projects will have been implemented in indigenous communities aimed at the revitalization [and] strengthening of indigenous knowledge systems (draft project proposal, 31 August 1995, Summary, page 2).

133. The project steering committee is constituted entirely of indigenous members. UNDP and donor agencies make up an advisory group. A secretariat is being established and two small-grants funds for participatory research and for community development projects are being set up.

e) United Nations Environment Programme (UNEP)

134. Part of the recent work of UNEP involves the development of a publication regarding the perspectives of indigenous and tribal peoples on biological diversity. The current draft, "Human Values and Biodiversity: Perspectives from Indigenous and Tribal Peoples." (Moles J. and Senanayake FR, eds.) has recently been revised for publication.

f) International Labor Organisation (ILO)

135. ILO Convention No.169 addresses in Parts I ("General Policy") and II ("Land") issues relevant to the implementation of Article 8(j) of the Convention. Article 2, paragraph 2 (b), provides for action to protect the rights of indigenous peoples, including measures "promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions". Article 4 provides that "special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned" in accordance with their own "freely-expressed wishes".

136. The two fundamental principles of Convention No. 169 are consultation and participation. Article 6 states that governments shall (a) consult with the peoples concerned "whenever consideration is being given to legislative or administrative measures which may affect them directly;" and (b) establish means of participation of these peoples at all levels of decision-making bodies responsible for policies and programmes of concern to them. In addition, the Convention specifies in Article 6 (2) that such consultations "shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." Further, Article 7 of the Convention states that "the Peoples concerned shall have the right to decide their own priorities for the process of development...and they shall participate in the formulation, implementation and evaluation of plans and programmes which may affect them directly." Article 7 (4) emphasizes that "governments shall take

measures, in cooperation with the peoples concerned to protect and preserve the environment of the territories they inhabit."

137. Article 13 obligates governments to "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the land or territories [...] which they occupy or otherwise use, and in particular the collective aspects of this relationship". Article 14 provides that "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized" and Article 15 provides that "the rights of peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources." Intellectual property rights of indigenous and tribal peoples are not dealt with as such in ILO Convention No.169, the reason being that at the time Convention 169 was adopted intellectual property was still an emerging concept. However, there is nothing in the Convention which is contrary to these rights.

138. A further three countries (Denmark, Guatemala and Honduras) have ratified ILO Convention No.169, bringing the total to ten countries, and ratification is under serious consideration in a number of other countries, including the Philippines. Germany has enacted legislation linking its development assistance to ILO Convention No.169 and several countries, including the Netherlands, are examining ratification with a view to orienting their development assistance programmes to the provisions of that Convention. Convention No. 169 has also been used as a point of reference by other intergovernmental institutions such as the World Bank and the Asian Development Bank when formulating their operational guidelines (in process), and the Organization of American States when drawing up a draft inter-American instrument on indigenous rights.

g) The World Intellectual Property Organization (WIPO)

139. WIPO has recently acknowledged that the question of the protection of the heritage of indigenous people and local communities is within its mandate, thus opening important opportunities for such communities.

140. Currently, WIPO identifies one of its main tasks as "cooperating with developing countries in their efforts for development as far as intellectual property is concerned." The goal of such cooperation is to encourage States to create or modernise domestic legislation and institutions, to accede to international treaties and to develop expertise in the field of intellectual property. Cooperation with developing countries is delivered in the form of advice, training and the provision of documents and equipment.

141. The inclusion of the issues raised by indigenous and local community intellectual property rights in the programs delivered internationally by WIPO could significantly advance international awareness about the need for the protection of such rights. Similarly, the opening of a dialogue between indigenous and local communities and WIPO, and the extension of these resources and programs to such communities could act as an important means of empowering indigenous and local communities to apply pressure at the national and international levels for the development of comprehensive and adequate protection measures for their intellectual property. This could occur, for example, by encouraging States to develop and enforce domestic legislation which is consistent with the WIPO/UNESCO Model Provisions on

Folklore or the Principles and Guidelines for the Protection of the Heritage of Indigenous People.

h) The United Nations Educational, Scientific, and Cultural Organization (UNESCO)

142. While UNESCO has a relatively long history within the UN in relation to cultural issues, it is becoming increasingly interested in the protection of the intellectual property rights of indigenous and local communities. Recent initiatives undertaken by UNESCO suggest that, as the designated "conscience of the United Nations, and in view of the ethical mission which underpins its Constitution, it is exercising its moral duty to promote and protect such rights. Such initiatives include the establishment of the World Commission on Culture and Development in 1992, which has prepared a detailed policy report entitled Our Creative Diversity and an international program of action entitled International Agenda, which is intended to mobilise action at the national and international levels to address cultural challenges in development. Among its strategies is the holding of conferences around the world, focusing on the preservation and protection of traditional cultures and, inter alia, the protection of their intellectual property. One such conference was the UNESCO/WIPO World Forum on the Protection of Folklore held in Thailand in April 1997. UNESCO proposes to report biennially on the state of the protection of the heritage of indigenous and local communities worldwide in its Report on the State of Culture.

143. UNESCO has established an Intersectoral Taskforce to deal with matters concerning indigenous and local communities. The Special Rapporteur on the Protection of the Heritage of Indigenous Peoples has recommended that this Taskforce convene, at the earliest possible opportunity, a technical conference with indigenous educators, scientists and artists to define the methodology that will be used to collect and evaluate information for future UNESCO reports, such as the proposed annual reports on the state of culture.

144. In 1994 the International Bioethics Committee (IBC) was established. In response to development in biomedical sciences, particularly in the field of human genetics and the controversy aroused by the Human Genome Diversity Project, the IBC has developed a Preliminary Draft of a Universal Declaration on the Human Genome and Human Rights with a view to adopting it in 1997. The Draft Declaration proclaims the human genome "a fundamental component of the common heritage of humanity", and it outlines the rights and obligations of researchers and States in these matters.

145. These developments within UNESCO offer indigenous and local communities important opportunities to participate directly in the discussion of matters which directly affect them. In particular, the development of new instruments in international law by various bodies under the auspices of UNESCO offers such communities a valuable opportunity to raise awareness and seek international recognition of their rights in such fields as the protection of their intellectual property rights.

i) World Bank

146. Operational Directive (OD) 4.20 (indigenous people) is the principal policy statement of the World Bank on the relationship between its operations and indigenous people. Paragraph 8 of OD 4.20 states: The Bank's policy is that the strategy for addressing the issues

pertaining to indigenous peoples must be based on the informed participation of the indigenous people themselves. Thus, identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any joint project that affects indigenous peoples and their rights to natural and economic resources."

147. The World Bank is currently preparing an Operational Directive on social assessment, following which a revision of OD 4.20 will take place. The Bank's Operational Policies, Bank Procedures and Good Practices for Natural Habitats (OP/BP/GP 4.04) and for Forestry (OP/BP/GP 4.36) are also relevant.

j) Inter-American Development Bank (IDB)

148. In 1990 the IDB issued guidelines for dealing with environmental and social impacts in its operations. These guidelines are contained in Strategies and Procedures on Socio-Cultural Issues as Related to the Environment, and include: "The recognition that indigenous people have a unique socio-cultural heritage that should be preserved for future generations; that they are part of the biological diversity of the ecosystems they inhabit and are very valuable sources of knowledge on tropical species and on proven technologies for management of fragile ecosystems; that this body of knowledge should be preserved, understood and utilised; and that indigenous populations should be recognized as natural allies in the solutions to safeguard the environment."

149. In 1995 the IDB established an Indigenous Peoples and Community Development Unit and is currently in the process of drafting a strategy on indigenous peoples for submission to its Policy Committee (UNEP/CBD/COP/3/19).

k) Asian Development Bank (ADB)

150. In 1994 the ADB began drafting its first policy on indigenous people. Following agreement between indigenous peoples' organizations and ADB on a consultative process, a revised draft of the policy paper was prepared. This revised draft policy paper formed the basis of a regional consultative forum in November 1995 involving indigenous peoples groups and representatives from governments, NGOs, the ADB and other international organizations. Country-level consultations were also undertaken during 1996 and early 1997 to further refine the draft policy paper. Based on these consultations, a proposal policy on indigenous peoples was submitted to the ADB Board of Directors in August 1997 and it is hoped that a final policy statement will be approved in 1997.

l) African Development Bank (AfDB)

151. The AfDB has no specific policies on indigenous or local communities. In June 1996 the president of the AfDB stated that the Bank "is committed to ensure that the development process promotes indigenous people's participation and encourages full consideration of their dignity, human rights and cultural uniqueness. [...] The Bank recognizes that indigenous and forest-dwelling populations are important

social actors in forest-related programmes [possessing] forestry-relevant knowledge and skills". (UNEP/CBD/COP/3/19)

m) European Bank for Reconstruction and Development (EBRD)

152. The EBRD has no policy on indigenous and local communities. Its guidelines on political aspects of the mandate of the European Bank in relation to ethnic minorities support the principles contained in the Final Act of the Helsinki Agreement and in the European Convention on Human Rights". (UNEP/CBD/COP/3/19)

2. Indigenous Organizations

153. The following organization are among those which have been active in promoting indigenous and local community concerns regarding the Convention: Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonica (COICA); Indigenous Peoples Biodiversity Network (IPBN); International Alliance of the Indigenous/Tribal Peoples of the Tropical Forests (IAIPTF); International Indian Treaty Council; Inuit Circumpolar Conference; Pacific Concerns Resource Centre (PCRC); Saami Council; and the World Council of Indigenous Peoples.

3. Non-Governmental Organisations (NGOs)

154. Many NGOs have made important contributions to the debate concerning the implementation of Article 8(j) and related provisions. The following are only a few NGOs: Cultural Survival International; GRAIN; Rural Advancement Foundation International (RAFI); SEARICE; the Society for Research Initiatives for Sustainable Technologies and Institutions (SRISTI); Third World Network; and the World Wide Fund for Nature (WWF). This list is by no means exhaustive.

IV. **ELEMENTS FOR THE FORMULATION OF A WORK PROGRAMME**

155. In the light of the above the workshop might wish to consider the following issues as possible elements of a work plan for the implementation of Article 8(j) and the related articles. The work programme suggested below should be pursued in close cooperation with relevant conventions, international institutions and processes.

1. Programmatic Recommendations

a) Accommodating Knowledge, Innovations And Practices Within Existing IPR Regimes

156. The participants of the workshop might wish to include into a possible work plan the examination of the potential of existing IPR regimes to accommodate the elements of Article 8(j) and related articles.

b) Reviewing the relationship between appellations of origin or trademarks and knowledge, innovations and practices as referred to in Article 8(j).

157. Included in a possible plan of work could be also the examination of the potential for existing systems of appellations of origin or trademarks to ensure indigenous and local communities' prior approval of

wider use of traditional knowledge and practices and to encourage sharing of benefits from such use. A review of options for modifying or strengthening such systems in order to enhance the opportunities for prior approval and benefit sharing might be another aspect to be considered. Cooperation with institutions such as WIPO, UNESCO and WTO is essential in this respect.

c) The Development Of Elements Of New Systems Of Protection

158. The workshop might wish to consider as another element of a possible workplan the development of elements of new systems of protection which cover those knowledge, innovations and practices which are not protected by existing IPR regimes.

159. One element of work is the identification of elements to be taken into account when developing new forms of protection, with the participation of representatives of local and indigenous communities. This could be followed by an analysis of the rights and mechanisms developed in other fora for their usefulness to the protection of innovations, knowledge and practices as referred to in Article 8 (j). It might be useful to carry this analysis out in close collaboration with the bodies which have developed those mechanisms, such as the World Intellectual Property Organisation, UNESCO and the Commission on Human Rights.

160. As the implementation of Article 8 (j) is subject to national legislation, an analysis of the constraints under different national legal systems might be useful as another element of work, followed by the development of options to overcome those constraints.

d) Registering Of Knowledge, Innovations And Practices

161. The participants of the workshop might wish to consider how the knowledge, innovations and practices which are not held secretly by communities or members of communities could be registered on a local, regional, national or international level. This would help to identify the holders of the knowledge, innovations and practices and facilitate some possible protection in the future. It also contributes to the halt of erosion of such knowledge.

e) Support Appropriate Systems Of Land Use Practices

162. A possible element of the programme of work might be the examination how the protection of traditional lifestyles can be realised through existing systems of protected areas, such as the classification of protected areas developed by IUCN. This includes a whole range of protected areas and includes traditional cultural systems in category V and VI of their classification.

f) Integrate Traditional Knowledge In Work Related To Articles 6 And 7

163. The implementation of Article 6 includes the integration of biodiversity considerations into sectoral or thematic areas. In this regard, the Convention on Biological Diversity provides a unique opportunity to integrate the provisions of Article 8(j) into the thematic areas. One of the most obvious areas for such work is the on-going work on forest-related traditional knowledge of which the Convention Secretariat is a lead actor in the framework of the Commission on Sustainable Development (CSD). It may be advisable at

this stage to focus some of the activities related to Article 8(j) to forest biological diversity in light also of Decision III/12 paragraph 6. Other thematic areas of relevance are coastal and marine biological diversity, agricultural biological diversity and freshwater biological diversity.

164. The participants of the workshop therefore may wish to consider how to include traditional knowledge in the overall formulation of national strategies and action plans as well as in the taxonomic work and monitoring and assessment of biological diversity.

g) Compilation And Elaboration Of Key Terms Related To Traditional Knowledge

165 Since there is much debate about what constitutes traditional knowledge and how it might be applied to the conservation and sustainable use of biological diversity and in what context, particularly in relation to the remainder of Article 8, it might be useful to identify and elaborate some of the key elements which are related to such knowledge. While, for example, traditional forest-related knowledge, as a subset of traditional knowledge, has been elaborated in other notes of the Secretariat, such as UNEP/CBD/COP/3/Inf.33, widely used terms, such as traditional ecological knowledge need to be elaborated and as might be applied to other thematic areas, such as coastal and marine biodiversity, agricultural biodiversity and freshwater biological diversity.

166. The participants of the workshop therefore may wish to consider, as a possible element of a work programme, the compilation and elaboration of key terms related to traditional knowledge in order to clarify and contextualise its application in the service of the Convention.

2. Institutional Considerations

167. The workshop has the task to examine the need for an open-ended intersessional working group or a subsidiary body on the issue of Article 8(j). Bearing in mind the possible elements of a possible work plan laid out above, the workshop might wish to consider the following options:

- i. the implementation of Article 8 (j) and related articles in conjunction with other relevant conventions, international organizations and processes;
- ii. the establishment of an *ad hoc* technical panel of experts operating under the auspices of the SBSTTA or under any other arrangements determined by the COP;
- iii. the creation of an open-ended *ad hoc* working group covering Articles 8(j), 10(c), 17(2) and 18(4);
- iv. an open-ended *ad hoc* working group with the status of the open-ended *ad hoc* working group on biosafety;
- v. the establishment of a subsidiary body on knowledge, innovation and practices as referred to in Article 8(j) in accordance with Article 23(g) of the Convention.

168. All options have their advantages and disadvantages. What the

participants of the workshop might wish to consider when reflecting as to what might be the best way to organize future work, is that the implementation of Article 8(j) and related articles requires technical expertise and a broad understanding of the issues covered by the Convention. There are also clear linkages between the concerns of Article 8(j) and the rest of the provisions of the Convention as well as the mandates of other international conventions, institutions and processes. The search for synergy and cooperation among a wide range of international conventions, institutions and processes is essential for the effective implementation of Article 8(j). But ultimately, the effective implementation of Article 8(j) will depend largely on the extent that national governments as well as Parties implement Decision III/14 whether through constitutional change, legislative and regulatory reform as well as adjustments in administrative practices.
