

Consultation Report on the third meeting of the *Ad Hoc* Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity

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Introduction :

I had the privilege of participating in the Canadian delegation, as an environmental non-governmental organisation (ENGO) representative, for the third working group on article 8(j) dealing with Indigenous and Local Communities (ILC) of the Convention on Biological Diversity (CBD) that took place in Montreal from the 8th to the 12th of December 2003. The meeting dealt with the following main issues:

1. Integration of the work programme on article 8(j) into the thematic areas of the CBD
2. Progress in the implementation on the 8(j) work programme
3. Permanent Forum on Indigenous Issues
4. GURT (i.e. Terminator and Traitor Technology)
5. *Sui generis* (i.e. without precedent within western law) system for the protection of indigenous knowledge, innovations and practices
6. Enhanced participatory and communication mechanisms for ILC
7. Impact assessments of projects to take place on sacred sites, land and water of ILC
8. Composite report on knowledge, innovations and practices of ILC
9. Technological transfer and cooperation

Given that there were several indigenous representatives on the delegation (e.g. Assembly of First Nations and Metis National Council) as well as dozens of others attending the meeting outside the delegation, I decided to concentrate specifically on environmental issues. I judged that the other issues would be better covered by indigenous representatives, themselves being experts on the matter. The two issues which I decided to focus on were: Genetic Use Restriction Technology (GURT) and Impact Assessment.

GURT

Genetic Use Restriction Technology (GURT) comprises of **Terminator** technology (which renders subsequent generation of seeds sterile) and **Traitor** technology (which seeks to make a plant's trait's expression dependent on the external application of inducers). Terminator technology is a more powerful tool to control genetic resources than intellectual property rights. Indeed contrary to patents, terminator seeds are not limited in time as there is no expiry date after which they become domain of the public. Furthermore, Terminator technology bypasses the mandatory licence that exists between an intellectual property right and its user.

GURTs have been treated in the CBD since its 4th Conference of the Parties (COP) in 1998. Throughout the subsequent COPs, the question of GURT has been one of the most contentious issues within agricultural biodiversity. Governmental negotiators have not yet been able to take a strong stance against GURTs and have adopted to use the precautionary principle by calling for a weak and partial moratorium on such technology at COP-5 (decision V/5).

An **expert group**, composed of representatives from governments, FAO, International Union for the Protection on New Plant Varieties (UPOV), NGOs and industry, was convened in February 2003 to examine the potential impacts of GURTs on smallholder farmers, ILC as well as on farmers' rights. This group produced a report that was supposed to be used at SBSTTA-9 as a basis from which to recommend decisions to be adopted at COP-7. However, the report was dismissed at SBSTTA-9 by Canada, New Zealand, Argentina and Brazil that argued that it lacked scientific rigour.

Since insufficient time did not allow GURTs to be adequately treated at SBSTTA-9, the report was sent to the article 8(j) meeting. At this meeting, several developing countries and NGOs supported the report highlighting that GURTs will pose serious threats to indigenous livelihoods. Brazil then introduced a

lengthy proposal calling for 1) a regulatory framework to assess the potential use of GURTs; 2) the disapproval of commercial use that may adversely affect ILC and 3) to promote further research to assess the potential risks of GURTs, including field testing. At first glance, this proposal may seem to share ENGOs perspective on GURTs but the third proposal is actually trying to discretely reintroduce field testing of GURTs. Such a shrewd attempt to reintroduce field testing was however not overlooked. The EU, Switzerland, Namibia, Uganda and few other Indigneous Peoples Organizations (IPO) immediately opposed the proposal. The usual pro-GMO countries such as Argentina and the USA questioned the validity of the report and hoped it would be quickly dismissed as it was at SBSTTA-9. The traditional allies of ILC with respect to GURT, such as the EU, were unwilling to open negotiations on GURTs and were content to have decision V/5 on the moratorium of its field testing prevail. The EU argued that decision V/5 had sufficiently strong language to prevent field testing before COP-8. The truth of the matter was that, because GURTs were not initially an issue on the agenda, most Parties were not prepared to deal with GURTs at this meeting.

Just like at SBSTTA-9, the opportunity to recommend immediate action on GURTs at the 8(j) meeting was lost. While the entire report will be transmitted to COP-7 to be in turn retransmitted to SBSTTA-10, the socio-economic impacts of GURTs will be considered at the next 8(j) meeting. Thus, concrete measures on GURTs will be taken, at the earliest, during COP-8. The 8(j) meeting only recommended to COP-7 to increase capacity-building of ILC so they can better participate in the decision-making process on whether they want GURTs or not. Apparently, after the ILC have repeatedly rejected GURTs, governments still want to give ILC another chance to accept the technology by allowing them to be indoctrinated on the benefits of GURT via “capacity building programmes” by “relevant organizations”. One can only hope that governments do not interpret “relevant organizations” to include the biotechnology industry. This 8(j) meeting also recommended COP-7 to have this report serve as the basis for discussion on the socio-economic aspects at the fourth 8(j) meeting. To make matters even more ridiculous, the meeting also invited ILC to reread and provide comments on the 8(j)-related recommendations of the expert group, the very recommendations they participated in elaborating!

Overall, the GURT issue is being tossed like a hot potato from one body to another of the CBD machinery, each meeting recommending that it be dealt with at another meeting. By the time the CBD takes a firm stance on GURT, ILC and small farmers might well have already been rendered dependent on multinational gene giants to obtain their seeds.

Impact assessment

Another important item which I closely followed was the draft recommendations and guidelines on cultural, environmental and social impact assessment of development projects that take place on sacred sites, land and water of ILC. The latter was eventually called the **Akwé:Kon guidelines**. Some IPOs pushed for the guidelines to be binding but this proposal was immediately turned down by Argentina, Canada, Kenya and Bahamas. And so the Akwé: Kon guidelines on impact assessment remain a **voluntary draft**.

One ENGO, Care Earth-India, tried to insert “**sacred species**” but was not integrated in the report as some ILC believe that all living species are sacred. Nevertheless, I tried to push for the word “species” to be integrated in the title of the report along side “sacred site” foreseeing what a formidable tool this would have on impact assessment for environmentalists. Presently, entire projects can be stopped if endangered species are negatively affected by a project. And so, if sacred species are also to be incorporated in environmental impact assessments, social and environmentally damaging projects could be more easily blocked.

Although Canada tried to remove the definition of customary law in the report, it actually managed to stay in the report, to the relief of many IPOs. Canada also tried to make sure that Environmental Impact Assessment (EIA) legislation should respect community rights established under domestic law, i.e. EIA should respect domestic law and not necessarily inherent land treaty rights. Despite the attempt to make reference to domestic law, the final text still contains relatively progressive language such as “ National EIA legislation [...] should respect existing inherent land and treaty rights as well as legally-established rights of ILC.”

After 3 days of negotiations, delegates finally agreed that the Akwé:Kon guidelines should be in accordance with international law and other international obligations. Elements that were particularly progressive were: the inclusion of these guidelines into national EIA legislation (supported by EU); promoting community participation, transparency (supported by Ethiopia and Jordan); information exchange (supported by African group); providing adequate capacity and funding (supported by Kenya and IPOs); and supporting communities in formulating their own development and conservation plans, including a strategic EIA.

The guidelines actually sought to provide a framework to:

- Support full and effective involvement of communities throughout the impact assessment (Brazil repeatedly tried to remove the word “full” arguing that it would be impossible to involve the entire community).
- Take into account the communities’ cultural, environmental and social concerns
- Take into account traditional knowledge of communities in impact assessments
- Promote use of appropriate technology (introduced by Jordan)
- Prevent and mitigate negative impacts of proposed developments (suggested by IPOs)
- Integrate cultural, environmental and social elements in impact assessments (suggested by Canada)

Other issues worth commenting

Other unresolved issues at this meeting which may be problematic at COP-7 included the role of **national and international law** as well as recognition of **customary law** in 8(j) recommendations.

Another issue that might turn up again is **reference to other indigenous fora**. For example, at several instances in this meeting, IPOs requested reference to Convention 169 on Indigenous and Tribal Peoples of the International Labour Organization (ILO). In fact, specific reference to Convention 169 was incorporated by the Secretariat of the CBD in the composite report on knowledge, innovations and practices of ILC. Canada internally was reluctant to accept references to other Conventions such as the ILO within the CBD but did not officially oppose it during negotiations. Such reference to Convention 169 was eventually removed in this meeting and there is no longer any such reference in the final texts.

With respect to participatory mechanisms, an issue that remained contentious was whether the **voluntary funding mechanism** to facilitate participation of ILC to CBD meetings would be directed exclusively to ILC from developing countries or to ILC in general. Argentina and southern IPOs argued that the funding mechanism should be exclusively reserved for ILC in developing countries while the EU, New Zealand and a northern IPO maintained that it should not discriminate against indigenous peoples coming from developing or from developed countries. The EU argued that Indigenous peoples from developed countries who may have different positions than their governments should also be assisted to attend the meeting.

Conclusion

The dealing of GURTs at the meeting was disappointing. Given that the 8(j) working group allows for the IPOs to have a stronger voice than in other fora of the CBD, it is unfortunate that IPOs and ENGOs did not adequately take advantage of this opportunity to send a strong message against GURT to COP-7. Also, I

got the impression that ENGOs will find it increasingly difficult to convince delegates to forbid field testing of GURTs. Brazil, which was traditionally very critical of GMOs, serve as an example of the increasing push to test GURTs and see if they really are as deleterious as they are made out to be.

On impact assessment, the final texts that emerged after negotiations were surprisingly quite progressive. Of course, progressive language is easy to agree to when the elements are not legally binding and remain draft voluntary guidelines. One can hopefully anticipate that at least these draft voluntary guidelines will not be too watered down at COP-7.

Another surprise was the relative absence of ENGOs at this meeting. As an ENGO representative, I found myself rather isolated because my participation in strategizing meetings of IPOs was not particularly welcomed and I could not count on other ENGOs for support due their almost absence at this meeting. The only ENGOs that participated in this meeting were Friends of the Earth-Ghana, Fundación Sociedades Sustentables, Care Earth and Terra Nuova, many of which were novices to the 8(j) process and unable to adequately lobby on most issues.

Recommendations

For COP-7

- ENGOs may not want to count on Canada for support on banning GURTs and their best allies are probably the EU¹ and many African countries.
- Concerning GURTs, delegates to be particularly weary at COP-7 are: Argentina, Australia, New Zealand, Brazil, USA (even if it is a non-party).
- ENGOs should count on Canada for support on keeping the Impact Assessment guidelines strong.

For next 8(j) meeting

- Strengthen synergy and trust between the ENGOs and the IPOs.
- Even though the 8(j) meeting essentially deals with indigenous issues best dealt and defended by IPOs, maintaining an ENGO position in the delegation is important. Indeed, the presence of an ENGO on the delegation was useful in lobbying on specific environmental issues and in liaising between IPOs, ENGOs and governments.
- ENGOs should ask IPOs permission to participate in indigenous caucus meetings well in advance of the start of the next 8(j) meeting.
- ENGO representative should be selected at least one month in advance of the meeting so that s/he may adequately prepare and establish an effective network of allies from the IPOs, ENGOs and delegates.
- Do count on IPOs for support on environmental issues for although there may be slight differences in strategies between ENGOs and IPOs, they both share many similar visions and values. Furthermore, ENGOs could greatly benefit from the IPOs' excellent cohesion, organization, preparedness and lobbying skills.

¹ Given that Italy was represented by a delegate who worked for Greenpeace for a decade, and given that Italy has the presidency in the EU for the Access and Benefit Sharing and 8(j) meetings, ENGOs can really count on the EU as an ally on GURT and indigenous issues, except when it comes to keeping World Intellectual Property Organization (WIPO) out of *sui generis* systems. Although Ireland will have the EU presidency at COP-7, this particular Italian delegate will continue to be an influential advisor to the Irish delegate and to the EU.