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Convention on
Biological Diversity

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AD HOC OPEN-ENDED INTER-SESSIONAL WORKING
GROUP ON ARTICLE 8(j) AND RELATED
PROVISIONS OF THE CONVENTION ON
BIOLOGICAL DIVERSITY

Seventh meeting

Montreal, 31 October - 4 November 2009

Item 7 of the provisional agenda*

**RECOMMENDATIONS ARISING FROM THE NINTH AND TENTH SESSIONS OF THE
UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES TO THE
CONVENTION ON BIOLOGICAL DIVERSITY**

Note by the Executive Secretary

INTRODUCTION

1. Recommendations to the Convention on Biological Diversity arising from both the seventh session in 2008 and the eighth session in 2009 of the United Nations Permanent Forum on Indigenous Issues (UNPFII) were considered by the sixth meeting of the Working Group on Article 8(j) and related provisions, in November, 2009 and subsequently by the tenth meeting of the Conference of the Parties, held in Nagoya, Japan, in October 2010. Recommendations arising from the ninth and tenth sessions of the UNPFII will be considered by the seventh meeting of Working Group on Article 8(j) and Related Provisions, and draft recommendations will then be forwarded to the eleventh meeting of the Conference of the Parties.

2. Since recommendations arising from the reports of the UNPFII at its previous sessions have been or are being addressed, a quick update on these current or ongoing recommendations is provided in section I of the present document. Section II draws attention to new recommendations arising from the ninth and tenth sessions of the UNPFII, and provides some guidance. Section III provides possible draft recommendations for the consideration of the Working Group.

3. Following the adoption of a new method of work by the UNPFII whereby each year up to six agencies may self-nominate to participate in an in-depth dialogue with the members of the Forum, the Secretariat of the Convention on Biological Diversity committed to an in-depth dialogue at the ninth session of the UNPFII in 2010. The in-depth dialogue led to increased interest in the work of the Convention, reflected in a large number of recommendations directed to the Secretariat of the Convention

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on Biological Diversity (12 specific recommendations and 3 general recommendations) from the ninth session of the UNPFII.

**I. UPDATE ON DEVELOPMENTS IN RESPONSE TO RECOMMENDATIONS
MADE BY THE UNPFII AT ITS SEVENTH SESSION**

21 April – 2 May 2009

E/2008/43 and E/C.19/2008/14

Paragraph 81. *The Permanent Forum requests the Secretariat of the Convention on Biological Diversity to complete its work on the draft code of ethical conduct for the recognition and protection of indigenous intellectual property and cultural heritage, taking into account the Declaration on the Rights of Indigenous Peoples, as a minimum standard, with a view to adopting the code at the tenth meeting of the Conference of the Parties in 2010, the International Year of Biodiversity.*

4. The tenth meeting of the Conference of the Parties finalized the negotiations of, and adopted the “The Tkarihwaié:ri¹ Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity”², inviting Parties and governments to make use of the code and to undertake education and awareness-raising and to develop communication strategies that assist relevant Government departments and agencies, academic institutions, private sector developers, potential stakeholders in development and/or research projects, extractive industries, forestry and the public at large, to be made aware of elements of the code of ethical conduct, for incorporation, as appropriate, into policies and processes at the transnational, national and local level governing interactions with indigenous and local communities (ILCs).

5. The Conference of the Parties also invited those Secretariats of intergovernmental agreements, as well as agencies, organizations and processes whose mandates and activities are related to biological diversity to take into consideration and implement in their work the elements of the code of ethical conduct and finally invited the Global Environment Facility (GEF), international funding institutions and development agencies and relevant non-governmental organizations, where requested, and in accordance with their mandates and responsibilities, to consider providing assistance to indigenous and local communities, particularly women, to raise their awareness and to build capacity and understanding of the elements of the code of ethical conduct. A side event was conducted at the tenth session of the UNPFII by the Secretariat of the Convention on Biological Diversity to draw attention to the outcomes of the tenth meeting of the Conference of the Parties, including the adoption of the code of ethical conduct.

6. Copies of the Tkarihwaié:ri Code of Ethical Conduct will be made available at future sessions of the UNPFII in the six United Nations official languages and through the web pages of the Secretariat of the Convention on Biological Diversity.

¹ Pronounced {Tga-ree-wa-yie-ree}, a Mohawk term meaning “the proper way”.

² Decision X/42.

Paragraph 7. *The Permanent Forum welcomes such initiatives as the indigenous and local community, business and biodiversity consultation, held at United Nations Headquarters in New York on 12 and 13 May 2009, as a useful dialogue between the private sector and indigenous peoples, and encourages further discussions with a view to ensuring the effective implementation of the United Nations Declaration on the Rights of Indigenous Peoples while stimulating community-level businesses based on the sustainable use of biodiversity through such creative partnerships.*

7. In its decision X/40, the tenth meeting of the Conference of the Parties welcomed creative initiatives and partnerships between private-sector representatives and indigenous and local community representatives, taking note of the Indigenous and Local Communities, Business and Biodiversity Consultation and requested the Executive Secretary to report on such continuing efforts at the seventh meeting of the Working Group on Article 8(j) and Related Provisions.

8. Further to this, the private sector and in particular the aromatic, flavorings, cosmetic and perfumery industrial sector (referred to as the Natural Resource Stewardship Circle), has expressed interest in building their capacity to adhere to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity and opportunities will be provided to the private sector as well as ILCs for capacity-building on the Protocol in this biennium. The Members of the Natural Resources Stewardship Circle (NRSC) also adopted at their annual meeting in October 2010 and presented at the tenth meeting of the Conference of the Parties, the NRSC Guidelines, which are self-regulatory guidance based on the previously mentioned consultations facilitated by the Secretariat of the Convention on Biological Diversity with indigenous and local community representatives, which aim to ensure that the industry adheres to goals of the Convention on Biological Diversity, as well as other international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples (DRIP) and relevant International Labour Organizations (ILO) conventions.

II RECOMMENDATIONS ARISING FROM NINTH AND TENTH SESSIONS OF THE UNPFII FOR CONSIDERATION BY THE WORKING GROUP

(Refer to E/2010/43 AND E/C.19/2010/15)

9. The following recommendations are being submitted by the UNPFII to the seventh meeting of the Working Group. Relevant complementary information is provided, as appropriate, where the work has been on-going and/or builds on previous recommendations.

Ninth session UNPFII 2010³

A. *General recommendations*

³ Extracts taken from E/2010/43-E/C.19/2010/15.

Recommendation paragraph 13: The Permanent Forum recognizes the importance of indigenous peoples knowledge systems as the basis of their development with culture and identity and therefore recommends that ongoing international processes, such as negotiations on the international regime on access and benefit-sharing of the Convention on Biological Diversity, the Ad Hoc Working Group on Long-term Cooperative Action of the United Nations Framework Convention on Climate Change, and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization, should recognize and integrate the crucial role and relevance of indigenous knowledge systems in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.

10. The Nagoya Protocol on Access and Benefit Sharing, adopted at COP 10, recognizes the importance of traditional knowledge systems. The purpose of the Protocol is to effectively implement one of the three core objectives of the Convention: the fair and equitable sharing of benefits arising from the utilization of genetic resources. It applies to genetic resources and associated traditional knowledge.

11. The preamble contains a number of provisions relevant to indigenous and local communities and traditional knowledge, including references to: Article 8(j) and the interrelationship between genetic resources (GR) and traditional knowledge (TK) and their inseparable nature, the diversity of circumstances in which traditional knowledge is owned or held (including by countries), the identification of the rightful holders, the Declaration on the Rights of Indigenous Peoples and the non-extinguishment of existing rights.

12. The Protocol also contains significant provisions relating to traditional knowledge associated with genetic resources held by indigenous and local communities, as well as to genetic resources held by indigenous and local communities where the rights of these communities over these resources have been recognized. The Protocol establishes clear obligations to seek the prior informed consent of indigenous and local communities in these situations. It also provides for the sharing of benefits arising from the use of traditional knowledge associated with genetic resources, as well as benefits arising from the use of genetic resources in accordance with domestic legislation. Benefit-sharing must be based on mutually agreed terms.

13. In addition, Parties to the Protocol must ensure that their nationals comply with the domestic legislation and regulatory requirements of provider countries related to access and benefit-sharing of traditional knowledge associated with genetic resources.

Recommendation paragraph 23: The Permanent Forum welcomes the “International Conference on Biological and Cultural Diversity: Diversity for Development – Development for Diversity” (8-10 June 2010, Montreal, Canada) as a useful dialogue on the interface of diversities and development and notes its goal to consider a future collaborative programme of work between the Secretariat of the Conference on Biological Diversity, the United Nations Educational, Scientific and Cultural Organization (UNESCO), other relevant agencies, including the Forum and relevant indigenous organizations and non-governmental organizations, and decides to send the Chair of the Forum to report on the outcomes of the ninth session of the Permanent Forum regarding the theme.

14. The “International Conference on Biological and Cultural Diversity: Diversity for Development – Development for Diversity” produced a report and recommendations which were considered by the tenth meeting of the Conference of the Parties, in October 2010. In paragraph 16 of decision X/20, the Conference of the Parties welcomed the adoption of the programme of work between the Secretariat of the Convention on Biological Diversity and the United Nations Educational, Scientific and Cultural

Organization (UNESCO). Indigenous and local communities are key partners in the implementation of the joint programme of work.

Recommendation paragraph 24: The Permanent Forum calls upon UNESCO, the Secretariat of the Convention on Biological Diversity, UNDP, the United Nations Children's Fund (UNICEF), the United Nations Population Fund, the World Intellectual Property Organization and the United Nations Development Group to support indigenous peoples in their process of cultural heritage restoration and strengthening. This process should be guided by indigenous peoples in order to avoid the misuse and distortion of indigenous peoples' culture, practices and knowledge and to respect their perspectives and aspirations.

15. In paragraph 6 of decision X/43, the Conference of the Parties decided to initiate task 15 of the programme of work for Article 8(j) and related provisions concerning the development of guidelines that would facilitate repatriation of information, including cultural property, in accordance with paragraph 2 of article 17 of the Convention, in order to facilitate the recovery of traditional knowledge of biological diversity. At its seventh meeting, the Working Group will consider the terms of reference proposed in order to advance work based on best practice guidelines for the eventual consideration of the Conference of the Parties.

Recommendation paragraph 29: The Permanent Forum recommends that UNESCO, the Convention on Biological Diversity, UNICEF and other relevant United Nations agencies convene an expert meeting, in conjunction with the Forum, comprising intercultural and educational experts and United Nations agencies to explore themes and concepts related to bilingual, intercultural and multilingual education in the context of teaching in mother tongue indigenous languages.

16. Although the Convention works on community, education and public awareness, as well as capacity-building, the pursuit of bilingual, intercultural and multilingual education in the context of teaching in mother tongue indigenous languages is beyond the scope of the Convention. However, many Parties to the Convention have reported on such initiatives in their efforts to respect, promote, and protect traditional knowledge. Hence the Secretariat will be pleased to contribute to discussions on this issue lead by the relevant agencies, and in particular with UNESCO, which is mandated to deal with education.

B. specific recommendations directed to the Convention or its Secretariat

Recommendation paragraph 106: The Permanent Forum notes with concern the slow progress made in the negotiations on the final protocol on access and benefit-sharing. The Permanent Forum reiterates its requests to the parties to the Convention to take into account the United Nations Declaration on the Rights of Indigenous Peoples in the negotiation, adoption and implementation of the access and benefit-sharing protocol.

17. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol) was adopted by the Conference of the Parties at its tenth meeting.

18. In the penultimate preambular paragraphs of the Nagoya Protocol, the Parties to the Protocol:

“Noting the United Nations Declaration on the Rights of Indigenous Peoples, and

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Affirming that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities”

19. The Protocol also contains significant provisions relating to traditional knowledge associated with genetic resources held by indigenous and local communities, as well as to genetic resources held by indigenous and local communities where the rights of these communities over these resources have been recognized.

20. The Protocol establishes clear obligations to seek the prior informed consent of indigenous and local communities in these situations. It also provides for the sharing of benefits arising from the use of traditional knowledge associated with genetic resources, as well as benefits arising from the use of genetic resources in accordance with domestic legislation. Benefit-sharing must be based on mutually agreed terms.

21. In addition, Parties to the Protocol must ensure that their nationals comply with the domestic legislation and regulatory requirements of provider countries related to access and benefit-sharing of traditional knowledge associated with genetic resources.

Recommendation paragraph 107: The Permanent Forum congratulates the Secretariat of the Convention on Biological Diversity for considering the important role of indigenous peoples in its activities related to the International Year of Biodiversity in 2010 and recommends that it fund and organize a workshop on indigenous peoples and biological diversity as part of its celebration of the Year.

Recommendation paragraph 108: The Permanent Forum welcomes the initiative of the Secretariat of the Convention on Biological Diversity and the United Nations Educational, Scientific and Cultural Organization to host the International Conference on Biological and Cultural Diversity: Diversity for Development (8-10 June 2010, Montreal, Canada) to develop a joint programme of work on biological and cultural diversity, and requests that future work include broad partnerships with the Permanent Forum, other relevant agencies, indigenous peoples' organizations and non-governmental organizations.

22. As reported above, the Conference of the Parties at its tenth meeting welcomed the adoption of the programme of work between the Secretariat of the Convention on Biological Diversity and UNESCO in paragraph 16 of decision X/20. Indigenous and local communities are key partners in the implementation of the joint programme of work.

Recommendation paragraph 110: The Permanent Forum welcomes the capacity-building efforts being carried out by the Secretariat of the Convention on Biological Diversity with the Indigenous Women's Biodiversity Network for the Latin American and Caribbean Region, thanks to the patronage of the Government of Spain, and encourages other donor Governments to consider sponsoring similar efforts in other regions, in particular in Africa and in the Pacific region.

23. In addition to the workshops referred to in the recommendation and held with the generous support of Spain, the Secretariat has secured additional funds for capacity-building in connection with the recently adopted Nagoya Protocol and is endeavoring to ensure that indigenous and local communities are represented in these events. The Government of Japan has provided funding for Article 8(j) activities in

2011 and will consider focusing funding for Article 8(j) in 2012 on capacity-building efforts. Furthermore, the Government of Japan has provided funding for a significant number of regional and sub-regional NBSAPs workshops and Protected Areas workshops and indigenous and local community representatives are being included, to build their capacity and to assist them to participate in the revision of national biodiversity strategies and national reporting processes.

Recommendation paragraph 111: The Permanent Forum notes the general capacity-building efforts on access and benefit-sharing in the African region carried out under Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) of Germany and encourages further efforts to bolster indigenous participation in those workshops and also in developing workshops specifically for indigenous peoples and local communities.

24. The Secretariat works closely with Deutsche Gesellschaft für International Zusammenarbeit (GIZ) in their capacity-building initiatives, which have largely focused on the African region. In May and September 2010, in Nairobi, and in Cape Town, respectively, the Secretariat made presentations at GIZ workshops focusing on ABS negotiations (at that time) and developments concerning Article 8(j). The Secretariat also presented at the capacity-building workshop for indigenous and local community women which was held in partnership with GIZ and the Indigenous Information Network during the tenth session of the UNPFII from 21 to 22 May 2011, with a focus on the Nagoya Protocol. During the intersessional period – between the sixth and seventh meetings of the Working Group on Article 8(j) – the Secretariat presented on issues concerning Article 8(j), 10(c) and the Nagoya Protocol at four university seminars (Lucerne University, Switzerland; Colombia University, New York; Dalhousie University, Halifax; and Southern Cross University, Australia), and two GIZ workshops (Nairobi and Cape Town), amongst others.

Recommendation paragraph 112: The Permanent Forum calls upon the parties to the Convention on Biological Diversity to adopt the terminology “indigenous peoples and local communities” as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention almost 20 years ago.

25. This matter has been raised from time to time during meetings of the Convention, both in the Working Group on Article 8(j) and related provisions and during meetings of the Conference of the Parties. The phrase “indigenous and local communities” is the phrase utilized in the text of the Convention and has been used consistently in decisions of the Conference of the Parties and its subsidiary bodies. However, the wording suggested by the Forum has been used in Conference of the Parties decisions in a few instances, notably in paragraphs 7, 8 and 10 of decision IX/13. The Conference of the Parties may wish to consider this matter and decide on an appropriate course of action.

Recommendation paragraph 113: The Permanent Forum reiterates to the parties to the Convention on Biological Diversity that, consistent with international human rights law, States have an obligation to recognize and protect the rights of indigenous peoples to control access to the genetic resources that originate in their lands and waters and any associated indigenous traditional knowledge. Such recognition must be a key element of the proposed international regime on access and benefit-sharing, consistent with the United Nations Declaration on the Rights of Indigenous Peoples

26. The Nagoya Protocol provides that access to traditional knowledge associated with genetic resources requires the prior and informed consent of indigenous and local communities concerned and

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where they retain rights to genetic resources in accordance with domestic legislation, prior and informed consent is also required for access to genetic resources.⁴ The Nagoya Protocol affirms in its final preambular paragraph that nothing in the Protocol “shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities”.

Recommendation paragraph 116: The Permanent Forum recommends that the Ad Hoc Working Group on Access and Benefit-sharing consider at its next meeting the report of the international indigenous and local community consultation on access and benefit-sharing and the development of an international regime.

27. This was made available to the Working Group on Access and Benefit-sharing as requested (e.g., document UNEP/CBD/WG-ABS/5/INF/9).

Tenth session UNPFII 2011⁵

A. General recommendations

Recommendation 31. The Permanent Forum recognizes the right to participate in decision-making and the importance of mechanisms and procedures for the full and effective participation of indigenous peoples in relation to article 18 of the United Nations Declaration on the Rights of Indigenous Peoples. The Forum reiterates that the United Nations Framework Convention on Climate Change, the Stockholm Convention on Persistent Organic Pollutants, the Convention on Biological Diversity, the World Intellectual Property Organization and the International Maritime Organization should facilitate indigenous peoples' participation in their processes.

28. Parties to the Convention on Biological Diversity remain committed to the participation of indigenous and local community representatives in the work of the Convention, as is evidenced in a substantial report on ILC participation submitted to the UNPFII at its ninth session in 2010, under the agenda item *In-depth dialogue with the SCBD*, and also in an extensive report submitted in December 2009 to the Office of the High Commissioner for Human Rights (OHCHR) Contribution from the Secretariat of the Convention on Biological Diversity as a contribution to the OHCHR Expert Study on “indigenous peoples and the right to participate in decision-making”, undertaken by the Expert Mechanism on the Rights of Indigenous Peoples. The Convention on Biological Diversity remains the only Multi-lateral Environmental Agreement to have established a voluntary fund to facilitate the participation of indigenous and local community representatives in meetings held under the Convention.

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Recommendation 25. In regard to the rights of indigenous peoples, the Permanent Forum reiterates its long-standing position of encouraging the United Nations, its organs and specialized agencies, as well as all States, to adopt a human rights-based approach. At the international, regional and national level, the human rights of indigenous peoples are always relevant if such rights are at risk of being undermined. Human rights are indivisible, interdependent, and interrelated. They must be respected in any context specifically concerning indigenous peoples, from environment to development, to peace and security, and many other issues.

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~~28.~~29. Recommendation 25 has been included in the revised Recommendations arising from the UNPFII, at the request of the International Indigenous Forum on Biodiversity, for the consideration of the

⁴ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, article 5, paragraph 2.

⁵ Extracts taken from E/2011/43-E/C.19/2011/14.

Parties at the eleventh meeting of the Conference of the Parties. The Secretariat, along with other agencies, is committed to a human rights approach to service delivery. This is evidence by the provision of a voluntary fund to facilitate the participation of indigenous peoples in meetings held under the Convention, as well as dedicated staff and budget, as well as enhanced participation mechanisms within the ad hoc open-ended Working Group on Article 8(j) and related provisions, which is the main subsidiary body for discussions related to traditional knowledge and customary sustainable use of biodiversity. The Convention remains to only multi-lateral environmental agreement with a dedicated voluntary fund, and enhanced participation mechanisms for indigenous and local communities.

B. Specific recommendations directed to the Convention or its Secretariat

Recommendation 22. The Permanent Forum welcomes the adoption by the Conference of the Parties to the Convention on Biological Diversity at its 10th meeting of the Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity (the Tkarihwaié:ri code of ethical conduct), which arose from a Forum recommendation made at its second session, and invites parties and Governments, international agencies and all those working with indigenous communities to make use of the code for research and access to, use, exchange and management of information concerning traditional knowledge.

~~29.~~ 31. At its tenth meeting, the Conference of the Parties also finalized the negotiation of, and adopted, the Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity (the Tkarihwaié:ri code of ethical conduct) and invited Parties and Governments to make use of its elements to guide the developments of models of codes of ethical conduct for research, access to, use, exchange and management of information concerning traditional knowledge. The code provides for prior informed consent and/or approval and involvement of indigenous and local communities. The code was developed and negotiated as the result of recommendations 1, 8 and 9 of the report of the second session of the United Nations Permanent Forum on Indigenous Issues endorsed by the Conference of Parties in paragraph 5 of decision VII/16/I, and decision VIII/5 F, concerning elements of an ethical code of conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant for the conservation and sustainable use of biological diversity, and taking into account task 16 of the programme of work on Article 8(j) and related provisions.

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Recommendation 23. However, elements of the Tkarihwaié:ri code of ethical conduct are voluntary. The Permanent Forum is concerned that paragraph one of the code is restrictive as it includes the following: "They should not be construed as altering or interpreting the obligations of Parties to the Convention of Biological Diversity or any other international instrument. They should not be interpreted as altering domestic laws, treaties, agreements or other constructive arrangements that may already exist."

~~30.~~ 32. The mandate established within the programme of work for Article 8(j) and related provisions (decision V/16, annex) is to develop guidelines and principles and to that extent it is common practice that such guidelines remain voluntary. However, although voluntary, such guidelines are adopted by the consensus of the Parties to the Convention and carry an ethical and moral weight and can over time become established standards in customary international law. Parties to the Convention provide regular reports to the Secretariat, which include actions taken regarding the implementation of Conference of the Parties decisions including voluntary standards and guidelines.

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Recommendation 24. The Permanent Forum welcomes the adoption by the Conference of the Parties to the Convention on Biological Diversity of two additional indicators for traditional knowledge: (a) status and trends in land use change and land tenure in the traditional territories of indigenous and local communities, and (b) status and trends in the practice of traditional occupations, to complement the

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adopted indicator on status and trends in traditional languages. The Forum urges the Secretariat of the Convention and agencies working on these issues, including the United Nations Educational, Scientific and Cultural Organization (UNESCO), ILO, FAO, IFAD and the International Land Coalition, to collaborate with a view to fully operationalizing those indicators.

~~31-30.~~ The Secretariat is currently focusing on the operationalizing of the three indicators adopted for traditional knowledge and is also exploring the development of indicators for Article 10(c) ,customary sustainable use, as per decision X/43 in coordination with the indicators work for the Strategic Plan for Biodiversity 2011-20. The inter-agency coordination is provided by the United Nations Inter-Agency Support Group on Indigenous Peoples' Issues and the indicators focal point within the Secretariat of the UNPFII. The Convention is the first agency to commence operationalizing indicators relevant to indigenous and local communities.

31. Recommendation 27. The Permanent Forum reiterates to the parties to the Convention on Biological Diversity, and especially to the parties to the Nagoya Protocol, the importance of respecting and protecting indigenous peoples' rights to genetic resources consistent with the United Nations Declaration on the Rights of Indigenous Peoples. Consistent with the objective of "fair and equitable" benefit sharing in the Convention and Protocol, all rights based on customary use must be safeguarded and not only "established" rights. The Committee on the Elimination of Racial Discrimination has concluded that such kinds of distinctions would be discriminatory.

32. Recommendation 27 has been included in the revised Recommendations arising from the UNPFII, at the request of the International Indigenous Forum on Biodiversity, for the consideration of the Parties at the eleventh meeting of the Conference of the Parties.

33. The Parties in adopting the Nagoya Protocol, have included seven preambular paragraphs of specific interest to indigenous and local communities, and which aid in the interpretation of the proceeding articles, including a final preambular paragraph, "Affirming that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities."

34. Article 12 concerning Traditional Knowledge associated with Genetic Resources, addresses customary use in paragraph 4, by stating that: "Parties, in their implementation of this Protocol, shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention.

35. Concerning the issue of equitable sharing of benefits arising from genetic resources, Article 5 of the Nagoya Protocol, on Fair and Equitable Benefit Sharing, requires in paragraph 2 that each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms. T

~~32-36.~~ The Nagoya Protocol also requires (Article 7, Access to traditional knowledge associated with genetic resources) that access to traditional knowledge is based on the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established, in order to ensure the equitable sharing of benefits.

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Recommendation 26. Affirmation of the status of indigenous peoples as “peoples” is important in fully respecting and protecting their human rights. Consistent with its 2010 report (E/2010/43 and E/C.19/2010/15), the Permanent Forum calls upon the parties to the Convention on Biological Diversity, and especially including the Nagoya Protocol, to adopt the terminology “indigenous peoples and local communities” as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention almost 20 years ago.

~~33-37.~~ This matter is a repeat of the recommendation made at its ninth meeting and is taken up in paragraph 31.

III POSSIBLE DRAFT RECOMMENDATIONS FOR THE CONSIDERATION OF THE WORKING GROUP

The Working Group on Article 8(j) and Related Provisions may wish to recommend that the Conference of the Parties, at its eleventh meeting, adopt a decision along the following lines:

The Conference of the Parties,

Notes the recommendations arising from the ninth and tenth sessions of the UNPFII and *requests* the Secretariat to continue to inform the UNPFII on developments of mutual interest, including the revised programme of work on Article 8(j), and in particular the work on customary sustainable use (Article 10(c)), the implementation of the Nagoya Protocol and related capacity-building efforts, the joint programme of work on biological and cultural diversity, as well as the Tkarihwaié:ri⁶ Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity and the Akwé:Kon⁷ Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to take place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

⁶ Pronounced {Tga-ree-wa-yie-ree}, a Mohawk term meaning “the proper way”.

⁷ Pronounced (agway-goo). A holistic Mohawk term meaning “everything in creation” provided by the Kahnawake community located near Montreal, where the guidelines were negotiated.