

BRIEFING NOTE

August 2016

Regional Joint Preparatory Meetings for CITES CoP 17 and CBD COP 13, COP/MOP 8 and COP/MOP 2

Briefing Note on matters to be addressed at the

Thirteenth meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 13)

Section IV of the agenda: Other items resulting from the programme of work of the Convention

Item 14. Article 8(j) and related provisions: guidelines for the development of legislation or other mechanisms, including adoption of a glossary; guidelines for the repatriation of traditional knowledge; and recommendations from the United Nations Permanent Forum on Indigenous Issues

Relevant documents

UNEP/CBD/COP/13/3	Report of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions on the work of its ninth meeting
UNEP/CBD/COP/13/17	A glossary of relevant key terms and concepts to be used within the context of Article 8(j) and related provisions

Background

The Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity held its ninth meeting in Montreal, Canada, from 4 to 7 November 2015. It adopted five recommendations, each of which includes a draft decision for consideration by the Conference of the Parties to the Convention on Biological Diversity at its thirteenth meeting.

The 5 recommendations address:

(a) Recommendation 5/1: voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the [free,] prior informed consent [or approval and involvement] of indigenous peoples and local communities for accessing their knowledge, innovations and practices, the fair and equitable sharing of benefits arising from the use and application of such knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge;

(b) Recommendation 5/2: task 15 of the multi-year programme of work on the implementation of Article 8(j) and related provisions: best-practice guidelines for the repatriation of indigenous and traditional knowledge;

(c) Recommendation 5/3: a glossary of relevant key terms and concepts to be used within the context of Article 8(j) and related provisions;

(d) Recommendation 5/4: recommendations from the United Nations Permanent Forum on Indigenous Issues to the Convention on Biological Diversity;

(e) Recommendation 5/5: in-depth dialogue on thematic areas and other cross-cutting issues.

Key aspects for consideration at COP

In the draft decisions arising from the 9th meeting of the Working Group on Article 8(j) there are **three (3) draft decisions** that would particularly benefit from discussions at the regional preparatory meetings.

They are:

9/1. Voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the [free,] prior informed consent [or approval and involvement] of indigenous peoples and local communities for accessing their knowledge, innovations and practices, the fair and equitable sharing of benefits arising from the use and application of such knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge

- The voluntary guidelines contain only two square brackets. Square brackets remain around the word “free” in the context of “free, prior and informed consent” and around the concept of “approval and involvement” as part of the term “prior informed consent or approval and involvement”. The CBD is familiar with the concept of “prior informed consent” concerning access to genetic resources and associated traditional knowledge, which is embedded in both the Convention and the Nagoya Protocol. However the introduction of the word “free” is new to the CBD. The concept of “free, prior and informed consent” is the full terminology used in many UN entities and implies that consent is giving “freely” without coercion or influence. In the context of the Convention, Parties may have already assumed that “prior informed consent” implies that it was freely given and hence previously, there has been no need to state this overtly. Therefore, addition of the word “free” will simply bring the concept of “prior informed consent” in line with the full terminology (free, prior and informed consent or FPIC) used in other UN bodies.

9/3. A glossary of relevant key terms and concepts to be used within the context of Article 8(j) and related provisions

- In recommendation 9/3, the Parties requested the Executive Secretary to revise the glossary of key terms and concepts to be used within the context of Article 8(j) and related provisions contained in the annex to document UNEP/CBD/WG8J/9/2/Add.1, and to develop a comprehensive glossary, taking into account the comments made at the ninth meeting of the

Working Group, as well as relevant terms used in other agreements and by other international organizations, and to submit the revised glossary to COP-13 for its consideration.

- Discussions on a possible glossary for Article 8(j) and related provisions have gone on for more than a decade. Routinely, long lists have been collated that have never been negotiated.
- The revised glossary to be presented to COP-13 builds on previously adopted terms and concepts under the Convention and its Protocols or adopted under other relevant international processes while also aiming to limit the number of new terms proposed.
- Terms suggested in UNEP/CBD/WG8J/8/6/Add.1 on *Possible Elements of Sui Generis Systems for the Protection of Traditional Knowledge, Innovations and Practices of Indigenous and Local Communities* (see section II of the annex), are also considered for inclusion if they are in common use in the official documentation of the WG8j.
- Parties should focus on agreeing to new terms and on whether terms and concepts adopted under other agreements and by other international organizations are applicable in the context of Article 8(j) and related provisions.

9/4. Recommendations from the United Nations Permanent Forum on Indigenous Issues to the Convention on Biological Diversity

- The tenth session of the United Nations Permanent Forum on Indigenous Issues called on Parties to the CBD and particularly the Nagoya Protocol, to adopt the terminology “indigenous peoples and local communities”.
 - The use of the terminology “indigenous peoples and local communities” was already addressed in the context of the Convention in decision XII/12 F adopted at COP-12 in 2014.
 - Given that each treaty is distinct and the Parties to each have their own decision-making powers, the COP-12 decision does not apply to the Nagoya Protocol and so for the terminology “indigenous peoples and local communities” to be used in the context of the Nagoya Protocol, the COP-MOP of the Protocol must adopt its own decision in this respect.
 - Accordingly, the draft decision to COP contained in recommendation 9/4 provides for COP to invite the Nagoya Protocol COP-MOP to consider taking a decision to apply, *mutatis mutandis*, decision XII/12 F of the COP.
 - The COP-MOP of the Biosafety Protocol would also need to take a similar decision in order for the terminology “indigenous peoples and local communities” to be used in the context of the Biosafety Protocol. The Subsidiary Body on Implementation has recommended a draft decision to this effect to the Biosafety COP-MOP.
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