

**Convention on  
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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

Ninth meeting

Item 4 of the provisional agenda

Montreal, Canada, 4-7 November 2015

**COMPILATION OF VIEWS AND INFORMATION RECEIVED ON SUB-TASKS (i), (ii), (iii)  
AND (iv) CONCERNING HOW TASKS 7, 10 AND 12 COULD BEST CONTRIBUTE TO WORK  
UNDER THE CONVENTION AND TO THE NAGOYA PROTOCOL**

*Note by the Executive Secretary*

**INTRODUCTION**

1. As requested by the Conference of the Parties in paragraphs 4 and 5 of decision XII/12 D, the Executive Secretary is circulating herewith, for the information of participants in the ninth meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions, a compilation of views and comments submitted to the Secretariat regarding how tasks 7, 10 and 12 could best contribute to work under the Convention and the Nagoya Protocol, including information on community protocols, model clauses, best practices, experiences and practical examples for the prior informed consent or approval and involvement processes for access to the knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity and for the sharing of benefits, to assist the Working Group in its discussions.

2. Submissions have been reproduced in the form and languages in which they were provided to the Secretariat. Submissions were received from: Australia; Bolivia; Brazil; Canada; Ecuador; Finland; Honduras; India; New Zealand; Norway; Peru; Sweden; Natural Justice and the Sami Parliament.

## SUBMISSIONS

### A. Submission from Parties

#### Australia

##### SUBMISSION

Australia supports the implementation of tasks 7, 10 and 12 in an integrated manner that is mutually supportive of the Nagoya Protocol and is not inconsistent or duplicative.

Within current Working on Country and Indigenous Protected Area projects, informed consent to access and use the knowledge, innovations and practices of Indigenous communities relevant to the conservation and sustainable use of biological diversity is occurring as part of project planning and implementation. This includes the development of 'two-way' (Indigenous and western scientific) approaches to land management, the exchange of ideas and practices within cultural burning forums such as 'Firesticks', and potentially through improved engagement with the National Environment Science Program on topics including Indigenous livelihoods monitoring and evaluation.

#### Bolivia

##### SUBMISSION

Las acciones desarrolladas en el marco del CDB y con relación al Protocolo de Nagoya, se viene avanzando con el registro de los conocimientos y saberes ancestrales, contando con el consentimiento de las comunidades sobre su información, sin embargo aun se deberá ajustar procesos para el consentimiento informado previo, cuando se trate del recursos genéticos per se.

Asimismo, se ha desarrollado el Mecanismo de Gestión de los Recursos Genéticos como una propuesta de Bolivia, para evitar la mercantilización de los recursos genéticos, dicho mecanismo está enmarcado en la Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien –ley 300 de 15 de Octubre de 2012, el mecanismo cuenta con tres pilares que son:

- Participación y control social para transparentar la gestión de los Recursos Genéticos.
- Inventario, registro y protección pública de los recursos genéticos y conocimientos tradicionales asociados.
- Modalidad de acceso y distribución de beneficios basada en la no mercantilización y en la solidaridad y complementariedad entre Estados y Pueblos

#### Brazil

##### SUBMISSION

Brazil recognizes the importance of the development of community plans and protocols. In Brazil, three communities' protocols were recently concluded: the "Biocultural Community Protocol for Cerrado Raizeiras"; the "Biocultural Community Protocol of Extractive Reserve Riozinho do Afrísio"; and the community protocol of the Bailique communities. While the first one promotes participatory methodologies and has a great focus on the value of traditional knowledge of "raizeiras", the second one focus on ethical biotrade on the existing management tools in Riozinho do Afrísio community aligned with public policies. The third protocol includes 36 communities of Bailique Archipelago, and is focused on fish and forest resources, and was developed with the support of the Ministry of the Environment. The three protocols aim to protect the traditional knowledge of the respective communities. In Brazil, there are also community protocol initiatives by Wajãpi and Munduruku indigenous people to meet the prior consultations required by the ILO 169.

Brazil believes that community protocols are an efficient mechanism to attest the prior informed consent that empowers the owners of such knowledge. For this reason, the promotion of the use of this tool should be encouraged by Parties to the CDB and its Nagoya Protocol, including through bilateral and regional cooperation, capacity building initiatives and the realization of regional workshops. Parties should also be encouraged to share their information on this issue through appropriate mechanisms.

Based on the Brazilian experience on prior informed consent (PIC) and on the development of community protocols, model clauses should include the following topics:

- i. Community identity;
- ii. Community history;
- iii. Community territoriality;
- iv. Resources used (may include seasonality and management practices);
- v. Social organization;
- vi. Relations with other institutions;
- vii. Relationship, level of knowledge and accessibility to public policies.

The adoption of these clauses should be voluntary, each indigenous and local communities should assess whether they are relevant to their reality.

**Canada**

## **SUBMISSION**

### **1. Co-Management Committees under the Inuit Impact and Benefit Agreement for National Wildlife Areas and Migratory Bird Sanctuaries**

Environment Canada maintains a national network of conservation areas which includes National Wildlife Areas and Migratory Bird Sanctuaries. A total of 13 of these conservation areas are in the Nunavut Settlement Area. Nunavut covers a large portion of northern Canada: almost 1.88 million km<sup>2</sup> of land and 161,000 km<sup>2</sup> of water. In 2007, Environment Canada, Nunavut Tunngavik Incorporated, and four Designated Inuit Organizations completed negotiations on the first umbrella Inuit Impact and Benefit Agreement associated with all of Environment Canada's existing and proposed National Wildlife Areas and Migratory Bird Sanctuaries in the Nunavut Settlement Area, concluding nine years of negotiations under the Nunavut Land Claim Agreement.

One of Environment Canada's core activities under the Inuit Impact and Benefit Agreement is the administration and coordination of nine Area Co-Management Committees associated with its 13 conservation areas. The Area Co-Management Committees are based in the communities closest to the protected areas. The Area Co-Management Committees consist of six members, three of whom are appointed by the relevant Regional Inuit Association and three by Environment Canada. All Area Co-Management Committee members but one are beneficiaries of the Nunavut Land Claim Agreement that are appointed from the relevant adjacent community; the Vice-Chair of the Area Co-Management Committee is an employee of Environment Canada's Canadian Wildlife Service. Each Area Co-Management Committee is tasked with the development of a management plan for their protected area, providing advice to the Minister of the Environment on a variety of matters, including permitting, and other functions set out in the Inuit Impact and Benefit Agreement. The committees meet in person at least once per year.

The unique relationship between the Inuit of Nunavut and the ecosystems of the Nunavut Settlement Area is ecological, spiritual and social in nature and is recognized as the first principle of the Inuit Impact and Benefit Agreement, which states that « Inuit Qaujimaqatungit is a related

body of knowledge, which is necessary to and which Inuit shall bring to responsible decision-making regarding the lands, waters and marine areas of the Nunavut Settlement Area ».

The Inuit Impact and Benefit Agreement further set as a co-management objective that « decision-making for Migratory Bird Sanctuaries and National Wildlife Areas that is substantially informed and influenced by *Inuit Qaujimajatuqangit* ». The Inuit Impact and Benefit Agreement also indicates that, “in formulating their advice to the Minister, Area CoM Committees shall carefully consider Inuit Qaujimajatuqangit brought forward by any member” and that “In all significant policy decisions [affecting National Wildlife Areas or Migratory Bird Sanctuaries] the Minister shall carefully consider Inuit Qaujimajatuqangit documented and presented to the Minister by an Area Co-Management Committees ».

## **2. Wildlife Management Boards – Polar Bear Harvest**

Canada is home to approximately 16 000 polar bears -- about two-thirds of the global population. Thirteen of nineteen polar bear subpopulations across the circumpolar Arctic are managed by Canada. One unit is shared with the United States and three are shared with Greenland. The polar bear population in Canada has been stable over the past 10 years. Some subpopulations have increased over this period, while others have declined. Canada’s responsive management and monitoring system ensures that signals of decline are observed and addressed.

Canada’s federal government collaborates with other governments in Canada, wildlife management boards and Inuit organizations, in the co-management of polar bears. Wildlife Management Boards, established under Land Claims Agreements, in the Canadian North are the primary institutions for wildlife management. For example, the Wildlife Management Boards make decisions at the sub-population level on harvest quotas following the consideration of both science and Aboriginal Traditional Knowledge sources.

In Canada, the polar bear harvest is very important socially, culturally and economically for many northern people; a successful hunt brings food and a source of income to households. Aboriginal people are given harvest rights under land claims. Public/written hearings are held in which information is presented from a variety of sources, including Inuit organizations, Hunters and Trappers Organizations, Regional Wildlife Offices and community members. All sources of information are considered by the Wildlife Management Boards in their deliberation process. The harvest of polar bears is strictly controlled, monitored, and adjusted as needed for sustainable use. Once a decision has been made, it is forward to the responsible Minister for approval and implementation. Once a quota has been established, the Regional Wildlife Offices allocate the harvest tags to Hunters and Trappers Organizations who in turn distribute them to hunters in the communities. The involvement of Aboriginal communities, and consideration of their Traditional Knowledge, leads to better decisions that are well-respected by community members.

## **3. Management of the Porcupine Caribou Herd**

The Porcupine Caribou Herd is managed internationally (Canada-US) by the International Porcupine Caribou Board signed in 1987. Within Canada, the Porcupine Caribou Herd is managed under the Porcupine Caribou Management Agreement signed in 1985, and which played a role in establishing the International Porcupine Caribou Board. The objectives of the Parties to the International Porcupine Caribou Board are:

- a. To conserve the Porcupine Caribou Herd and its habitat through international co-operation and coordination so that the risk of irreversible damage or long-term adverse effects as a result of use of caribou or their habitat is minimized;
- b. To ensure opportunities for customary and traditional uses of the Porcupine Caribou Herd:
  - 1) in Alaska, by rural Alaska residents; and

- 2) in Yukon and the Northwest Territories, by Native and other users as defined by Porcupine Caribou Management Agreement;
- c. To enable users of Porcupine Caribou to participate in the international co-ordination of the conservation of the Porcupine Caribou Herd and its habitat;
- d. To encourage co-operation and communication among governments, users of Porcupine Caribou and others to achieve these objectives.

In Canada, the Porcupine Caribou Management Board is a co-management board, responsible for setting recommendations to governments concerning the conservation and sustainable use of the Porcupine Caribou Herd. Due to the natural high variability of barren-ground caribou herds, the low productivity of the Porcupine Caribou Herd, and in response to concerns in the late 2000's about the size of the herd, the Porcupine Caribou Management Board developed a Harvest Management Plan for the Porcupine Caribou Herd in Canada in 2010. The Harvest Management Plan is a lengthy document that speaks to the commitment of the parties to cooperatively manage the resource. The Harvest Management Plan uses a set of annually updated indicators (based on both scientific and Aboriginal Traditional Knowledge) to track the condition of the herd to ensure harvest is sustainable. Further subcomponents of the Harvest Management Plan, such as the implementation plan, speaks to cooperative collection and analysis of science and traditional information.

#### **4. Parks Canada**

Parks Canada recently produced a Resource Guide entitled *Promising Pathways: Strengthening Engagement and Relationships with Aboriginal Peoples in Parks Canada Heritage Places*. This guide was developed to help support and strengthen engagement and relationship building with Aboriginal peoples in national parks, national historic sites, and national marine conservation areas across Canada. This guide is fundamental to all Parks Canada future work moving forward.

#### **5. Canada's 2020 Biodiversity Target on Aboriginal Traditional Knowledge**

On February 9, 2015, Canada announced national biodiversity goals and targets for 2020. One of Canada's targets, Target 15 reads: "By 2020, Aboriginal traditional knowledge is respected, promoted and, where made available by Aboriginal peoples, regularly, meaningfully and effectively informing biodiversity conservation and management decision-making."

The preamble of the 2020 Biodiversity Goals and Targets for Canada highlights that:

*Implementation of the goals and targets will rely on meaningful, full and effective participation of Aboriginal peoples, including First Nations, Inuit and Métis peoples. In this respect, while Aboriginal traditional knowledge and customary use of biological resources are specifically highlighted under targets 12 and 15, the traditional knowledge, innovations and practices of Aboriginal communities are relevant for implementing all of Canada's biodiversity goals and targets, as is protecting and encouraging customary use of biological resources compatible with their conservation and sustainable use.*

<i>Ecuador</i>
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#### **SUBMISSION**

El IEPI, a través de su Unidad de Conocimientos tradicionales, inició un proyecto piloto sobre un sistema de registro de los conocimientos tradicionales y recursos genéticos asociados, y como parte de este proceso, se han celebrado varios talleres relacionados al consentimiento fundamentado previo, condiciones mutuamente acordadas y sobre la distribución justa y equitativa de beneficios. Complementariamente, se ha iniciado el registro de los conocimientos tradicionales y recursos genéticos

asociados. En relación al consentimiento para el acceso a estos registros se estructuró una carta, mediante la cual se solicitó a la máxima autoridad la consulta en Asamblea Comunitaria y su posterior firma. Como proyecto institucional, el MAE dispone de un sistema informático de registro que a futuro permitirá levantar la información de campo de forma directa. Un ejemplo de ello, es la nacionalidad Tsáchila, quienes trabajan en un proceso de levantamiento de un proyecto sobre las plantas medicinales de su comunidad en conjunto con una de las universidades del país, para lo cual han elaborado una hoja de ruta sobre varias actividades relacionadas a los conocimientos tradicionales y recursos genéticos asociados de la Nacionalidad Cofán. En torno a este particular, se podría mencionar que la SENECHYT estaría desarrollando un sistema *sui generis* para la conservación y protección legal de los conocimientos tradicionales relacionados con los recursos genéticos y las expresiones culturales tradicionales dentro del Código Orgánico de la Economía Social de los Conocimientos (COESC), en el cual se reconocen los derechos colectivos de los pueblos indígenas y nacionalidades sobre sus conocimientos tradicionales, el establecimiento de registros comunitarios y públicos sobre los conocimientos tradicionales, los usos consuetudinarios sobre tales conocimientos (protocolos bioculturales), el consentimiento libre, previo e informado, incluyendo aquellos conocimientos tradicionales que se encuentran en el dominio público, la distribución justa y equitativa de beneficios, los conocimientos tradicionales transfronterizos y las medidas de observancia. Por otro lado, cabe destacar que nos encontramos en proceso de expedición de un instructivo/decisión sobre un Protocolo para la Investigación sobre los conocimientos tradicionales, que brindará orientaciones e incentivos para la investigación sobre los conocimientos tradicionales, así como el respeto y cumplimiento de los derechos colectivos de los pueblos y nacionalidades sobre tales conocimientos.

### *Finland*

#### **SUBMISSION**

The working group discussed the preparatory process related to the ratification of the Nagoya Protocol. The government proposal to ratify the Nagoya Protocol will be discussed by the Finnish Government and Parliament during 2015.

### *Honduras*

#### **SUBMISSION**

a) *Sobre la obtención al consentimiento fundamentado previo o la aprobación y participación al acceso y de los beneficios, El Director de Pueblos Indígenas y Afro hondureños, Maylo Wood, expone que:*

“Un ejemplo de modelo a nivel nacional y de iniciativa indígena es el Protocolo Biocultural Miskitu. Además expresa que actualmente existe una iniciativa de promulgar un proyecto de ley de Consulta y Consentimiento Previo Libre e Informado, en el Marco del Proyecto REDD+”

El protocolo Biocultural del Pueblo Miskitu, fue presentado por MASTA, como organización representante del pueblo Miskitu, con el apoyo de la UICN, Natural Justice y la Cooperación Alemana. Este protocolo biocultural consta de 7 pasos: Primer contacto; acuerdo sobre el proceso; Discusión de información relevante; Toma de Decisión; Negociación entre comunidades y actores relevantes; Acuerdos sobre consentimiento, Implementación y monitoreo. El Proyecto de Ley de CPLI se menciona en el inciso b y d del informe previamente descrito.

b) *Sobre la obtención al consentimiento fundamentado previo o la aprobación y participación al acceso y de los beneficios, el Departamento de Áreas Protegidas de ICF, 2015, expone lo siguiente:*

“La legislación ambiental reciente empieza a reconocer la importancia de incluir la participación de las poblaciones residentes dentro y en el área de influencia de las áreas protegidas (Ley General del Ambiente de 1993, Decreto Ley 104-93 y el Reglamento General de la Ley del Ambiente, Acuerdo 109-93) y la Ley Forestal Áreas Protegidas y Vida Silvestre y su respectivo reglamento.

Existe además el interés de pueblos indígenas de querer estar directamente involucrados, en conjunto con las instituciones estatales y organismos no gubernamentales, en el manejo de las áreas protegidas que se establezcan en sus territorios por lo que son involucrados en los diferentes procesos tanto de manejo como para la planificación incluyendo a los líderes de las federaciones indígenas y organizaciones no gubernamentales, al igual que los representantes de las iglesias y otras organizaciones de base importantes para los procesos. Actualmente las federaciones indígenas, recién formadas, desarrollan una posición unificada demandando al gobierno involucrarlos en el manejo de áreas protegidas establecidas en sus tierras

Institucionalmente han existido vínculos con los pueblos indígenas relacionados al uso de los recursos naturales, específicamente en áreas protegidas, sin embargo no existen líneas claras sobre el abordaje de los mismos, solo iniciativas en proceso, como ser las estrategias propuestas a través del Proyecto de Ordenamiento Territorial comunal y protección del medio ambiente en Río Plátano PROTEP, específicamente para la ejecución del componente 1 dirigido a la regularización de la tenencia de la tierra en los municipios de Iruya, Colón y Dulce Nombre de Culmí, Olancho, y la legalización de las tierras indígenas y afro descendientes dentro de la zona cultural de la Reserva del Hombre y la Biosfera Río Plátano, para tal fin se elaboró un procedimiento especial para la titulación de los pueblos indígenas, respetando el protocolo biocultural del pueblo indígena Miskitu se ha establecido un convenio con MASTA que es una organización indígena con personalidad jurídica que representa al pueblo indígena Miskitu de Honduras y un plan de trabajo orientado al logro de la titulación de los territorios ancestralmente.

Además de lo anterior, el ICF a través de un proyecto en ejecución a través de la cooperación SUR-SUR, elaborará la Estrategia para la participación de Pueblos indígenas en el Manejo de Áreas Protegidas, que con la misma se busca de manera integral promover la participación activa de los pueblos indígenas dentro de las áreas protegidas en el manejo de las mismas y en consideración de los protocolos establecidos por los mismos.

Cabe resaltar también el involucramiento de la organización indígena en el manejo de un área protegida asumiendo compromisos claros en relación a su gestión, como ser el caso de la Federación Hondureña De Indígenas Lencas (FHONDIL) quienes recientemente han firmado convenio de Co-manejo con el ICF, municipalidades y otras organizaciones para el área protegida Zona Productora de Agua Reserva el Jilguero”

*c) Sobre la obtención al consentimiento fundamentado previo o la aprobación y participación al acceso y de los beneficios, la Dirección de Biodiversidad de MIAMBIENTE, 2015, expone:*

Un claro ejemplo de los procesos de este proceso es la conformación de la MNIACC, así como la puesta en marcha del Proyecto “Fomento de la Participación de los Pueblos Indígenas y afro hondureños en el marco del plan de acción AVA-FLEGT en Honduras discutidos anteriormente en el informe previo.

**India**

**SUBMISSION**

India enacted comprehensive legislation, the Biological Diversity Act in 2002 to give effect to the provisions of the Convention on Biological Diversity, including those relating to access and benefit sharing. The Act is being implemented through a three-tier institutional mechanism at the national, State (province) and local levels: the National Biodiversity Authority (NBA) located at Chennai, the State Biodiversity Boards (SBBs) constituted by the State Governments, and the Biodiversity Management Committees (BMCs) set up by the institutions of self-government in their respective areas.

The NBA and SBBs are required to consult the concerned BMCs on matters relating to use of biological resources and associated knowledge within their respective jurisdictions. This mandatory consultation of BMCs by NBA and SBBs ensures formalization of prior informed consent by the communities through involvement of BMCs in decision making process.

The three-tiered institutional mechanism provided for in the Act is in line with the decentralised governance structure provided for the Indian Constitution.

One of the main functions of the BMCs is to prepare People's Biodiversity Registers (PBRs) in consultation with the local people in their jurisdiction. PBR is a comprehensive database recording people's traditional knowledge associated with biological resources of that area. In India, about 1900 PBRs have been documented so far in different States (provinces) by involving local people, tribal community, academics, research institutes, NGOs etc.

The process being followed for granting approvals on requests for access under the provisions of the BD Act is briefly described below.

Requests for access to biological resources and/or associated knowledge received by NBA/SBB are examined in consultation with the concerned BMC. Upon receipt of the consultation form from NBA/SBB, the BMC interacts with the concerned communities, individuals or groups who hold the TK to obtain their consent or otherwise on the access requests made, and communicate the same to the NBA/SBB. If the knowledge holders or communities are not identifiable, the BMC provides the consent or otherwise *suomoto* based on the facts/ information available with them. Thus, by way of involving the local level functionaries in the process of consultation, NBA facilitates the communities to exercise their collective rights in the approval process. Wherever, the BMCs are not yet formed, the consultation process is being undertaken by the SBB with the communities concerned.

An Expert Committee on Access and Benefit Sharing evaluates the request for access on case-by-case basis, taking into consideration the views/inputs received from BMCs. The Expert Committee's recommendations are then considered by the Authority for taking a decision.

Upon approval by the Authority, a written agreement including Mutually Agreed Terms is then executed between NBA and the applicant. The agreement consists of obligations of the user/provider, details of the biological resources to be accessed, benefit sharing component to be paid by the users, conditions to transfer the biological resources and obtaining IP Rights, monetary and/ or non-monetary modes of benefit sharing etc.

So far, over 950 applications have been received from different stakeholders such as academia, individuals, corporates, MNCs, industries etc., for accessing biological resources and/ or associated knowledge for undertaking various activities. The NBA after following the due process has accorded approval in the form of agreements (MATs) to 170 applications so far.

Further information may be accessed on NBA's website ([www.nbaindia.org](http://www.nbaindia.org)).

*New Zealand*

**SUBMISSION**

1. Through various Treaty of Waitangi settlement processes, as well as legislative processes, issues relevant to access to knowledge, innovations, and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity have been addressed. The illustrative examples below provide a snapshot of how these matters are approached in New Zealand.
2. *Te Urewera*: Te Urewera was a national park managed by the New Zealand Government. On 27 July 2014, through a treaty settlement process, Te Urewera was recognised as the homeland of Tūhoe, and became a legal entity with “all the rights, powers, duties, and liabilities of a legal person”. The Te Urewera Act makes clear that Te Urewera ceases to be vested in the Crown, ceases to be Crown land, and ceases to be a national park. Te Urewera will be managed by its Board, which is directed to reflect customary values and law. The Act states that the Board may “consider and give expression to “Tūhoetanga” and “Tūhoe concepts of management such as rāhui, tapu me noa, mana me mauri, and tohu”. Following from this, the Te Urewera Act stipulates what activities are permitted in Te Urewera. The Act lists activities that require an activity permit, including: taking any plant; disturbing or hunting any animal (other than sports fish); possessing dead protected wildlife for any cultural or other purpose; entering specially protected areas; making a road; establishing accommodation; farming; and recreational hunting.<sup>1</sup>
3. *Waikato-Tainui*: Through the Treaty Settlement process between Waikato-Tainui and the Crown, a new era of Crown-iwi co-management of the Waikato River catchment was initiated. Co-management provides iwi with mechanisms to manage the river in partnership with central and local government. For example, the Guardians Establishment Committee was formed with the support of other Waikato River iwi. In 2009, the Guardians Establishment Committee finalised its Vision and Strategy for the Waikato River, i.e. to restore and protect the health and wellbeing of the Waikato River. This reflects the interests of Waikato River iwi and of all New Zealanders.<sup>2</sup>
4. *Ngāi Tahu Kereme (Ngāi Tahu settlement)*: In the Ngāi Tahu settlement, it was recognised that the iwi has a strong cultural and spiritual relationship with the natural environment. Tikanga (customs) relating to the use and management of natural resources are an essential part of the unique culture and identity which define them as an iwi. The Cultural Redress elements of the settlement were aimed at restoring the ability to give practical effect to Ngāi Tahu’s kaitiaki (stewardship) responsibilities. As a part of the settlement offer, Ngāi Tahu was also offered ownership and/or control of various resources and areas of land significant to the tribe. Moreover, settlement included recognition of the concept of Tōpuni which derives from the traditional Ngāi Tahu custom of rangatira (chiefs) extending their mana (power and authority) over areas or people by placing their cloaks over them. Tōpuni status therefore confirms the overlay of Ngāi Tahu values on these public conservation areas. The Tōpuni does not override or alter the existing status of the land, but ensures that Ngāi Tahu values are recognised, acknowledged, and provided for.<sup>3</sup>
5. Marine and Coastal Area [Takutai Moana] Act 2011: This bill was passed in March 2011, representing a significant change in the legal regime for the ownership and management of the coastal area around New Zealand. The assumption of Crown ownership of the coastal marine area was overturned; the common coastal and marine area is deemed to be owned by no one. The Act recognises protected customary rights. Although holders of protected customary rights do not have title over the land, they can delegate or transfer such rights in accordance with tikanga, and derive commercial benefits from such rights, including in commercial aquaculture. Holders of customary

<sup>1</sup> See <http://www.ngaituhoe.iwi.nz/te-urewera> and [http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH\\_BILL12374\\_1/te-urewera-tuhoe-bill](http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL12374_1/te-urewera-tuhoe-bill).

<sup>2</sup> See <http://www.waikatoriver.org.nz/key-documents/> for documentation.

<sup>3</sup> See <http://ngaitahu.iwi.nz/ngai-tahu/the-settlement/>.

marine title can also exclude the public from wāhi tapu (e.g., areas such as sacred burial grounds or battle sites).<sup>4</sup>

*Norway*

**SUBMISSION**

Norwegian – Sámi experiences

In order to meet the provisions of ILO Convention No. 169 which Norway has ratified, the Norwegian Government and the Sami Parliament reached agreement on the “Procedures for Consultations between the State Authorities and the Sami Parliament of 11 May 2005” (PCSSP).

The PCSSP has several objectives. First of all, the procedures are intended to contribute to the practical implementation of the State’s obligations to consult indigenous peoples under international law. Secondly, agreement shall be sought between the State authorities and the Sami Parliament whenever consideration is being given to legislative and administrative measures that may directly affect Sami interests. The third objective is to facilitate the development of a partnership perspective between State authorities and the Sami Parliament that contributes to the strengthening of Sami culture and society. Finally, the intention is to develop a common understanding of the situation and of the developmental needs of Sami society.

The scope of the agreement is extensive. The consultation procedures laid down in the PCSSP apply to the Government and its ministries, directorates and other subordinate state agencies or activities. Furthermore, they apply in matters that may affect Sami interests directly. The substantive scope of the consultations may include various issues, such as legislation, regulations, specific or individual administrative decisions, guidelines, measures and decisions. The obligation to consult the Sami Parliament may include all material and immaterial forms of Sami culture, including music, theatre, literature, art, media, language, religion, cultural heritage, immaterial property rights and **traditional knowledge** research, land ownership, rights to use lands, matters concerning land administration, biodiversity and nature conservation etc.

The PCSSP also contains general provisions concerning the consultation procedures. The consultations shall be undertaken in good faith, with the objective of achieving agreement to the proposed measures. Furthermore, the state authorities shall as early as possible inform the Sami Parliament about the commencement of relevant matters that may directly affect the Sami, and identify those Sami interests and conditions that may be affected. After the Sami Parliament has been informed on relevant matters, the Parliament shall notify the state authority as soon as possible as to whether or not further consultations are required. The Sami Parliament may also independently identify matters which in its view should be subject to consultation. In cases where the state authorities and the Sami Parliament agree that further consultations are to be held, they shall seek to agree on a plan for such consultations. Sufficient time shall be allocated to enable the parties to carry out genuine and effective consultations and political consideration of all relevant proposals

For the procedure for Consultations between the state authorities and the Sami Parliament see annex 1.

In the development of the Norwegian legislation on biodiversity (the nature management act) which was presented to the Parliament in April 2009 extensive consultations with the Sámediggi (Sami Parliament) on matters of their interest were performed. The Sámediggi unanimously approved the draft provisions.

The purpose of the Nature Diversity Act is to protect biological, geological and landscape diversity and ecological processes through conservation and sustainable use, and in such a way that the environment provides a basis for human activity, culture, health and well-being, now and in the future, including a

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<sup>4</sup> See <http://www.justice.govt.nz/treaty-settlements/office-of-treaty-settlements/marine-and-coastal-area-takutai-moana>.

basis for Sami culture. The Act requires due importance to be attached to the natural resource base for Sami culture when decisions that directly affect Sami interests are made under the Act.

The Nature Diversity Act has principles set out in sections 8 to 12. They shall serve as guidelines for the exercise of public authority, including when an administrative agency allocates grants, and for the management of real property. According to section 8 public institutions shall attach importance to knowledge that is based on many generations of experience acquired through the use of and interaction with the natural environment, including traditional Sami use, and that can promote the conservation and sustainable use of biological, geological and landscape diversity. The Government and other public authorities have a duty to see too that traditional knowledge is taken into account when dealing with submissions for example by consulting organizations with recognized competence in the area. In cases concerning areas with traditional Sami use this will typically be the Sami Parliament and research institutions with particular competence. In the context of the Nature Diversity Act it is important that the decision makers themselves can decide to what extent traditional knowledge is to be made known and how it is used. In the case of Sami traditional knowledge it may also be cultural and lingual barriers that makes gathering of such knowledge difficult. Such challenges have to be addressed in the best possible way in the decision-making process.

An amendment to the Nature Diversity Act on Traditional Knowledge associated with genetic resources was adopted by Parliament in June 2013 in order to be able to ratify the Nagoya Protocol.

Nature Diversity Act § 61 a – Unofficial translation into English

*“Authorities shall facilitate respect and safeguarding of the interests of indigenous peoples and local communities when traditional knowledge associated with genetic resources that is developed and preserved by indigenous and local communities is accessed and utilized.*

*The King may issue a regulation stipulating that access to and utilization of traditional knowledge associated with genetic resources requires prior informed consent from the indigenous peoples or local community, including rules on sanctions and remedies against misappropriation of such traditional knowledge associated with genetic resources. This could also be applied to traditional knowledge associated with genetic resources that is developed, transferred and preserved by indigenous peoples and local communities in another state, provided that the national legislation of that state requires prior informed consent for access to or utilization of traditional knowledge associated with genetic resources”.*

The Government is developing TK-regulations under the section 61(a) of the Nature Diversity Act as a follow-up of the obligations in the Nagoya-protocol art 5 nr 5, 7 and 16. The aim is to put a proposal on a public hearing in August 2015. An official English translation will be made after the regulations are adopted. An inter-ministerial working group is established to develop the regulations. The Ministry of Climate and the Environment chairs the group. An expert-group advises the working group in the process. The expert group consists of stakeholder organizations such as the Sami Parliament. The regulations fall under the scope of the consultative procedures agreement with the Sami Parliament. The work benefits from knowledge developed under international processes such as CBD art 8j and WIPO.

*Peru*

## **SUBMISSION**

El Perú ha desarrollado sistemas y prácticas importantes en la protección de conocimientos tradicionales, que contribuyen a generar mejores condiciones para la negociación de beneficios en el acceso a conocimientos tradicionales y en la vigilancia de utilización de conocimientos tradicionales accedidos de manera indebida:

1) La Dirección de Invenciones y Nuevas Tecnologías del INDECOPI (DIN-INDECOPI), como autoridad competente de la protección de los conocimientos colectivos vinculados a los recursos biológicos, en el marco de la Ley N° 27811, continúa avanzando en el registro de conocimientos

tradicionales de comunidades campesinas y nativas del país. Este registro de conocimientos tradicionales constituye un sistema *sui generis* de protección intelectual de conocimientos tradicionales, uno de los pocos que existe en el mundo.

Entre el año 2006 y el año 2013, la DIN-INDECOPI alcanzó los 1634 registros de conocimientos tradicionales de cerca de 40 comunidades campesinas y nativas del Perú. Para el año 2015, la DIN-INDECOPI, a manera de innovación, viene realizando el registro *in situ*, a fin de lograr 685 registros de conocimientos en un año. Los trabajos de registro *in situ* dependen de los recursos propios del INDECOPI y de las alianzas estratégicas y compromisos que se acuerden con otras instituciones (por ejemplo, el Instituto de Investigación de la Amazonía Peruana – IIAP, el cual también aporta recursos monetarios).

2) La Comisión Nacional contra la Biopiratería, creada a través de la Ley N° 28216, el año 2004, continúa con su labor de vigilancia de utilización indebida de recursos genéticos y conocimientos tradicionales asociados, a través de búsquedas de posibles casos en las bases de datos de más de 90 oficinas de patentes en el mundo. Ha priorizado 69 recursos de origen peruano y, a la fecha, ha identificado 20 casos de biopiratería relacionados con recursos genéticos de origen peruano y conocimientos tradicionales de los pueblos indígenas, de los cuales 16 han sido resueltos favorablemente al estado peruano. La mayoría de los casos de biopiratería corresponden a acceso indebido de conocimientos tradicionales asociados a los recursos genéticos de las siguientes especies:

- MACA (*Lepidium meyenii*)
- YACÓN (*Smallanthus sonchifolius*)
- SACHA INCHI (*Plukenetia volubilis*)
- CAMU CAMU (*Myrciaria dubia*)
- PASUCHACA (*Geranium dielsianum*)

## Sweden

### SUBMISSION

In 2014, the EU-regulation for the implementation of the Nagoya protocol (EU reg. 511/2014) entered in to force and it is focusing on user obligations. To date no national action has been taken in Sweden regarding access and benefit sharing measures related to traditional knowledge hold by national IPLCs.

The Swedish Sami Parliament and Naptek have collaborated regarding a Sami policy concerning árbediehtu (Sami traditional knowledge), yet to be finalized.

In 2014 the Swedish Sami Parliament and Naptek co-published a booklet in traditional Sami self-determination aiming at contributing to revitalization of the Sami way of thinking related to governance of traditional knowledge and biodiversity, which is of relevance since it is a part of the process to re-establish a customary practice of for instance knowledge exchange.

When expressing its view, the Swedish Sami Parliament stresses that one of the most important aspect for accessing traditional knowledge is FPIC (free prior informed consent). The documentation and research on the Sami's relationship to nature is extensive, but few observers, scientists, and writers have conveyed a holistic perspective. Furthermore, the Sami parliament believes that those who want to use traditional knowledge must have the approval of the indigenous people. Study and development of traditional Sami systems for knowledge transfer between generations is needed, as well as study of traditional views of knowledge, and traditional systems of access to knowledge. The extensive documentation available on the Sami is complex and would need to be collected and systematized. It should be part of every project to have clear rules for ownership of material and on what conditions the material can be made available to others. The basic principle should be that the author, the informant has the sovereign right to decide if and when the material to be published. The right to the material should be handled at different levels: individuals' petitions, the project owner compilations and materials that the project owner shares with authorities and other stakeholders.

The Sami parliament also lists a number of examples on how to work with the protection of traditional knowledge and cultural expressions: Duodjibrand is an authenticity mark indicating that the object is genuine Sami handicrafts (duodji). Sami artisans may apply for the brand, which they can use if they meet the requirements to hold Duodjibrand. The mark is personal and the craftsman decides whether he or she wants to mark the object. The brand's purpose is to:

- Protect Sami handicraft products against plagiarism and unfair competition
- Provide guidance and inform the buyer of products manufactured by Sami craftsmen
- Help to enhance the quality of Sami handicraft products
- the hallmark of the Sami handicraft is a living tradition
- Products that are designated as mere souvenirs are not accepted

Renlycka is a quality seal that denotes Sami origin, credibility, care for animals and nature, and taste experience. There are quality reindeer products from Sami villages in Sweden.

*Other views and work:*

Benefit-sharing can be both monetary and nonmonetary. When it comes to access and benefit-sharing in the academia it is likely that a benefit-sharing is a scientific understanding to share with the local communities involved. Several different activities have been tested regarding reporting research results back to the communities as one way of benefit sharing.

In 2010 Naptek organized an academic symposium concerning power imbalance in research and policy vis-à-vis IPLCs reflecting on issues concerning equitable sharing and giving back results to the studied community in order to increase the awareness of these aspects in the academia.

Ájddo – a joint-project between the Swedish Sami Parliament and Naptek, is a pilot study in which scientific data on the impact of reindeer herding on biodiversity is viewed in parallel with local and traditional knowledge of reindeer herders regarding the reindeer's need of biodiversity, providing a comprehensive picture. The main purposes of the project were to show the value of co-production of knowledge regarding the relationship between traditional use and biodiversity conservation and to develop methodologies on equitable use of local, traditional and scientific knowledge.

Naptek has also translated the Akwé: Kon-guidelines, Tkarihwaié:ri ethical code of conduct, as well as paragraphs of the Nagoya protocol of direct relevance to IPLCs into Swedish in order to make them more readily available. However, a deeper interpretation of how they will work in the national context will have to be defined.

## **B. Submission from relevant organizations**

### *Natural Justice*

#### **SUBMISSION**

We would like to bring to your attention the following information and suggestions with the objective to facilitate the drafting of guidelines mainly for sub-tasks (i)<sup>5</sup> and (ii).<sup>6</sup> This information is based on local-level experiences with the development of Biocultural Community Protocols (BCPs) and their use as a

<sup>5</sup> (i) Develop guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure that private and public institutions interested in using such knowledge, practices and innovations obtain the prior informed consent or approval and involvement of the indigenous and local communities;

<sup>6</sup> (ii) Develop guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure that indigenous and local communities obtain a fair and equitable share of benefits arising from the use and application of their knowledge, innovations and practices;

tool for the protection of traditional knowledge (TK), negotiation with potential users, and for articulating and implementing benefit sharing.

## 1. Introduction

Since 2011, Natural Justice and its partners, including the COMPAS Network, CIKOD, the League for Pastoral Peoples / LIFE Network, Institute of Ayurveda and Integrative Medicine, UNU – Institute for Advanced Studies, the Union for Ethical Biotrading, IUCN, and the GEF Small Grants Programme, have been implementing a global initiative on Biocultural Community Protocols. The BCP Initiative has been supported by the ABS Capacity Development Initiative, the Shuttleworth Foundation, The Christensen Fund, Heinrich Böll Foundation, GIZ, CDT Foundation and OSI South Africa. The Initiative supports networks of Indigenous peoples and community-based organizations with:

- Participatory documentation and development of BCPs
- Using BCPs as the basis for constructive engagement with external actors
- Building legal capacity of in-country lawyers and advocates
- Peer learning, analysis and exchange of experiences
- Development and dissemination of good practice guidance and lessons

The range of objectives of the BCPs supported by the Initiative is as broad as the local realities facing the communities involved, and not all are centrally concerned with TK and benefit sharing. However the wealth of experiences and lessons learned through the various processes can significantly inform best practice in the development and use of BCPs as a basis for obtaining the prior informed consent (PIC) of indigenous peoples and local communities (IPLCs) for the use of their knowledge, practices and innovations, and for the fair and equitable sharing of benefits.

## 2. Appropriate mechanisms for PIC and Benefit Sharing

The “International Workshop on Methodologies regarding Free, Prior and Informed Consent (FPIC) and Indigenous Peoples”<sup>7</sup> of the UN Permanent Forum on Indigenous Issues set out a number of elements for the implementation of FPIC, which can be applied to PIC processes for the use of the knowledge, practices and innovations of indigenous and local communities. Among others, participants stated “consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions.” The report further concludes that “FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples’ own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project. Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities.”

Further, Article 12.1 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization reads, “in implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable, with respect to TK associated with genetic resources.”

In conclusion, processes for obtaining PIC should identify and respect the appropriate representatives and customary institutions of IPLCs, and should take into account IPLC’s own decision-making processes, customary laws and procedures. The same hold true for the development of appropriate Benefit Sharing mechanisms. IPLCs should be able to decide which institutions are mandated to negotiate and receive benefits, and how these benefits will be distributed.

Determining how to properly obtain prior informed consent from specific IPLCs and how to negotiate benefits will therefore depend upon the customary practices of each particular community. Especially in the case of TK, there might be customary norms about how this knowledge is kept, to whom it may be

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<sup>7</sup> See E/C.19/2005/3

transferred, and under which conditions. Certain forms of TK have spiritual significance and might even be considered secret, in which case the appropriate traditional authorities should be able to withhold the consent for access to said knowledge. At the same time, it is desirable to involve a broad range of sectors within the community in PIC processes and the sharing of benefits, including women, youth and marginalized groups.

While the above-mentioned elements of good process for PIC and Benefit Sharing are widely accepted and recognized, including through the Nagoya Protocol, the operationalization often remains a challenge. Government agencies, researchers and private companies are not always aware of the existing customary rules and norms of communities, and don't know who is entitled to give PIC, or who should negotiate and receive benefits. The cultural and spiritual values of the community regarding their resources and TK are also often misunderstood or ignored. At the same time, many IPLCs are not aware of their rights to PIC and Benefit Sharing under international and national law, and/or lack the capacity to assert these rights.

### 3. Biocultural Community Protocols as tools for PIC and Benefit Sharing

In this sense, BCPs can function as instruments of dialogue and of interface between customary systems of IPLCs and "external" legal and policy frameworks and facilitate dialogue. They can clarify who in the community (which local institution) can give PIC for the access to resources and TK, and under which conditions. They can also convey to external stakeholders the traditional values, systems and decision-making process that the community respects and follows in relation to their resources and knowledge. BCPs can therefore serve as the starting point for negotiations between communities and researchers or private companies, and as a tool for mutual understanding with government agencies. They can facilitate a greater degree of certainty, both for the users and providers of TK.<sup>8</sup>

Community protocols, referred to in this document as BCPs, gained their first formal recognition through Article 12 of the Nagoya Protocol on Access and Benefit Sharing. The potential of BCPs to provide certainty for external actors, discussed above, is a major strength for ABS processes. A further strength is the capacity development of community members. In BCP processes, community-level trainings on ABS are integrated with discussions of values and practices that are supported by this framework. This increases awareness of but also grounds communities to participate as empowered and informed actors in ABS negotiations.

However, while the concept of BCPs first emerged from ABS discussions, their application has since been broadened significantly to address issues such as the protection of TK, rights to land and natural resources, interactions of communities with protected areas, or threats posed by large-scale development projects.

#### 3.1. What are BCPs?

BCPs articulate community-determined values, procedures, and priorities. They set out rights and responsibilities under customary, state and international law as the basis for engaging with external actors such as governments, companies, academics and NGOs. They can be used as catalysts for constructive and proactive responses to threats and opportunities posed by land and resource development, conservation, research and other legal and policy frameworks.

BCPs are instruments that facilitate culturally rooted, participatory decision-making processes within communities with the aim of asserting rights over their communally managed lands and TK. BCPs are based on communities' customary norms, values, and laws and set out clear terms and conditions to governments and the private, research, and non-profit sectors for engaging with communities and accessing their local resources. BCPs are flexible instruments and each will be unique and tailored to the local context.

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<sup>8</sup> GIZ 2012: Biocultural Community Protocols, bridging the gap between communities, governments and the private sector (Factsheet)

Every community protocol is distinct due to the unique biological and cultural diversity of the people that develop them. However, they tend to contain a variety of issues and themes, including details about:

- A definition of the group and its leadership and decision-making processes;
- Community-based natural resource management systems, knowledge, innovations, and practices (i.e. in situ conservation and sustainable use) of indigenous flora and fauna, and details of those natural resources;
- Ways of life, including the links between culture, spirituality, and customary laws and values;
- Interactions with other communities regarding the management of natural resources and sharing of TK, innovations, and practices;
- Procedures relating to free, prior and informed consent to any intended activities on their territories;
- Local challenges and how they are addressing or would like to address them;
- Aspirations and endogenous development plans;
- Rights, responsibilities, and duties according to customary, national, and international law; and
- Calls to various stakeholders to engage in constructive dialogue with them according to their respective rights, responsibilities, and duties.<sup>9</sup>

#### 4. Examples of BCPs in the context of TK and ABS

##### 4.1. India:

##### **Camel Pastoralists of Kachchh**<sup>10</sup>

The BCP was developed by *unt maldharis* (camel pastoralists) of Kachchh district of Gujarat in India through the Kachchh Camel Breeders Association. The BCP articulates the importance of their breeds of camels and other animals, including sheep, buffaloes and goats to their culture and to the world.

The BCP includes information on the pastoralists' traditional way of life, decision-making processes, animals, grazing routes, TK about camel rearing and the challenges that the community faces. In an attempt to address some of the challenges, the BCP calls upon the national regulatory authority to: legally recognise their local breeds and associated TK; recognise traditional or institutional structures that will ensure conservation and sustainable use of breed diversity and associated TK; strengthen in-situ conservation; ensure prior informed consent of the designated body before taking any decision that may affect the community, their animals and their practices. The BCP also calls on the Conference of Parties to the UN Convention on Biodiversity, to recognise, specifically under Article 8(j), their contribution to conservation and sustainable use of biodiversity in Kachchh.

The BCP process was lead and facilitated by a local non-governmental organization (NGO), Sahjeevan. A wide diversity of community members, including elders, women and leaders were involved in the process through focus group discussions, independent interviews, household surveys and participatory mapping for ecological surveys.

##### **Raika**<sup>11</sup>

The Raika is an indigenous pastoral community who live in Rajasthan, North West India. They are about one Million in number with the Maru Raika living across the State and the Godwad Raika living in Pali, Jalore and Sirohi.

Their BCP explains how the Raika's expanding traditional knowledge has shaped the development and preservation of unique breeds of livestock and played a major role in the conservation and sustainable use

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<sup>9</sup> Natural Justice, 2010: Briefing Note on Biocultural Community Protocols [http://naturaljustice.org/wp-content/uploads/pdf/briefing\\_note\\_on\\_BCPs.pdf](http://naturaljustice.org/wp-content/uploads/pdf/briefing_note_on_BCPs.pdf)

<sup>10</sup> [http://issuu.com/kuums/docs/camel\\_pastoralists\\_bcp](http://issuu.com/kuums/docs/camel_pastoralists_bcp)

<sup>11</sup> [http://www.pastoralpeoples.org/docs/Raika\\_Biocultural\\_Protocol.pdf](http://www.pastoralpeoples.org/docs/Raika_Biocultural_Protocol.pdf)

of Rajasthan's forests. It details their customary decision making process to provide PIC on actions relating to access to animal genetic resources and associated TK. It illustrates the disastrous impacts that their exclusion from previously communal grazing areas and forests is having on their lives, livestock, genetic resources, TK and the forest ecosystem itself. The BCP also calls upon the national authorities to recognise their rights over resources and knowledge in order to promote community conservation, sustainable use and the protection of culture.

### **Gunis and Medicinal Plant Conservation Farmers of Mewar**<sup>12</sup>

The BCP was developed by *Gunis* (traditional healers) and medicinal plant conservation farmers of the Mewar region of Rajasthan in India. *Gunis* use their TK to heal people in accordance with the virtues that underscore selfless service and caring for the environment. They also include in the group small farmers or forest dwellers and tribals who make an important contribution by conserving and growing medicinal plants, often focusing on endangered species that have been over-harvested in the wild.

The BCP emphasises the bio-cultural relationship of *Gunis* with nature. It sets out the community values, norms and clear terms and conditions to governments, research, and non-profit sectors for engaging with communities and accessing their local resources. It discusses the ways in which *Gunis* and medicinal plant conservation farmers contribute to their communities' health, cultural and social development. The BCP includes a clear and detailed protocol on third party access to their TK, which includes respecting their cultural, environmental and spiritual values. It also explains the traditional systems of conservation and sustainable use of biological diversity through *Dharam Bageechi* (gardens of service), home herbal gardens and conservation farming. It outlines the challenges they face especially from commercial, unsustainable harvests.

## 4.2. Africa

### **Kukula Association of traditional healers, Bushbuckridge, South Africa**<sup>13 14</sup>

Traditional health practitioners from two different ethnic groups in Bushbuckridge, South Africa developed a BCP to address unauthorized use of TK, lack of access to and overharvesting of medicinal plants. Empowered by new rights under South Africa's 2004 Biodiversity Act and Bioprospecting, Access and Benefit Sharing Regulations and with the support of the Kruger to Canyons Biosphere (K2C) Committee, the health practitioners used their BCP to engage proactively with a local cosmetic company interested in their TK, to negotiate access conditions to medicinal plants in the protected area, and to obtain land to establish a medicinal plants nursery.

The process began with small meetings between traditional healers to discuss the abovementioned concerns. This process fostered a sense of identity as traditional healers that had not previously existed among them, given the large geographical distances between them and their two separate cultures and language groups.

Through the K2C Committee, the healers were introduced to BCPs. Though the healers had already begun discussions on addressing their challenges the BCP process provided strategic and legal guidance.

It is notable that in this case, the "community" developing the BCP is actually a community of practice, with traditional healers from two different ethnic groups. The common challenges and the very clear scope of the BCP enabled the members to come together and carry the momentum forward.

The process of BCP development, since 2009, has included: the development of strong linkages with other community groups, NGOs and government agencies; the formation of the Kukula Traditional Health Practitioners Association, a registered organization; capacity development on relevant national and

<sup>12</sup> [http://www.unep.org/communityprotocols/PDF/GuniMedical\\_BCP.pdf](http://www.unep.org/communityprotocols/PDF/GuniMedical_BCP.pdf)

<sup>13</sup> [http://community-protocols.org/wp-content/uploads/documents/South\\_Africa-Bushbuckridge\\_Biocultural\\_Protocol.pdf](http://community-protocols.org/wp-content/uploads/documents/South_Africa-Bushbuckridge_Biocultural_Protocol.pdf)

<sup>14</sup> See Sibuye, Rodney, Marie-Tinka Uys, Gino Cocchiario and Johan Lorenzen 2012, *The Bushbuckridge BCP: traditional healers organise for ABS in South Africa*, in: Biodiversity and culture: exploring community protocols, rights and consent. IIED, Participatory Learning and Action 65

international legislation; consensus on PIC and MAT procedures; clear procedures for researchers to follow when wanting to access TK; formation of internal policies, based on customary and more recent norms, in relation to harvesting of medicinal plants; and disciplinary procedures for members not fulfilling their social and environmental responsibilities.

Through these processes of organization the healers were able to:

- Approach a local cosmetics company regarding the possible development of products from their TK. Members of the healers association decided to pool their knowledge to share with the cosmetics company for possible research and development. The provision was under the explicit legal agreement that the use of TK be under particular conditions enunciated in their BCP;
- Dialogue and negotiate with private and state owned protected areas regarding access to certain medicinal plants. Currently one protected area has granted access to the healers on the basis of the procedures set out in their BCP and supporting documents, such as the code of conduct.

#### National Khoisan Council, South Africa

The National Khoisan Council (NKC) is an ad hoc negotiating forum made up of 30 Khoi-San leaders representing the variety of Khoi and San communities in South Africa. The NKC is the government appointed body responsible for representing Khoi and San interests in the process towards formal recognition of their traditional leadership structures. It is also the body negotiating, in partnership with the San council, benefit sharing agreements for the Khoi and San communities.

In partnership with Natural Justice, the NKC began its BCP process in 2013. The development of the community protocol is an enormous undertaking, given the fragmentation of the communities, their geographical dispersion and the resources that are required to facilitate meaningful, culturally sensitive community-based participation. The process is still on-going. However, based on this partnership and community protocol consultations the NKC was able to organize itself sufficiently to negotiate two benefit sharing agreements for the access to and use of their TK and genetic resources:

In a landmark intellectual property case, the NKC and the South African San Council (SASC) were able to successfully assert their status as the knowledge holders in relation to Rooibos and Honeybush, despite the efforts of a French multinational to trademark the terms “South African Rooibos” and “Rooibos.” In January 2014, Nestlé South Africa entered into a benefit-sharing agreement with the NKC and SASC concerning the development and commercialisation of a tea product based on Rooibos. Nestlé will make bi-annual payments to the Bioprospecting Trust Fund managed by Department of Environmental Affairs. The Khoi and San will share the benefits equally.

On 19 August 2013, *Cape Kingdom*, a private pharmaceutical company based in Paarl, South Africa, entered into a benefit-sharing agreement with the SASC and the NKC, in order to acquire, process, market and sell derived products derived from the Buchu plant. Buchu is traditionally used by the Khoi and San for its medicinal properties

The community protocol process has provided a framework to assist the NKC with the understanding and then engagement with ABS on its own terms. The NKC is also using the process to discuss, amongst the community, the process of sharing and utilising any benefits derived from the ABS agreements.

#### Sheka Forest, Ethiopia

The Sheka Forest is southwest Ethiopia’s last remaining forest. As populations, large-scale economic development and agriculture increase there are ever continuing pressures upon this resource. While local communities, guided by clan leaders, traditionally preserved the forest, the government now leads conservation efforts. The undermining of social structures has led to the deterioration of traditional stewardship practices, and increased pressures upon the forest’s resources.

MELCA Ethiopia, an Ethiopian non-profit NGO, has been working for several years to revive traditional forest governance structures to preserve cultural practices and the region’s biodiversity. MELCA is now

working with the local communities to draft a BCP to assert their rights over Sheka Forest and associated TK relating to the forest and to assert the effectiveness of traditional conservation practices.

Together with the Shekaro community, MELCA prepared a first draft of the BCP in Amharic, the local language. The draft includes GPS-mapped community sacred sites in the forest to further substantiate the links between the community and the forest. They have mapped 321 sacred sites so far including 35 worship sites, 60 locations where mineral water can be drawn, 50 cultural houses associated with worship sites, and 33 trees where religious ceremonies can be conducted. MELCA presented this draft to more than 60 clan leaders from the Masha and Anderacha districts in the Sheka zone for a line-by-line review of the text and then to over 50 local government officials for review. MELCA has incorporated this feedback in the draft and is in the process of seeking the final endorsement of the local government. The document will be submitted to the Federal Institute of Biodiversity Conservation for official recognition.

If this is successful, this will be the first case in Africa where a BCP becomes an enforceable by-law. The BCP is making direct use of the national ABS law in Ethiopia to assert the community's right over their TK and resources. Capacity building for the community on ABS and the CBD was also part of the BCP process, and an independent lawyer was brought in to facilitate the links to national and international law. The government was involved from the very beginning in the BCP process, partly due to specificities in the Ethiopian policy environment. This has ensured a high buy-in from government institutions at local and national level. The BCP process was initiated originally with the majority clan with ties to the Sheka Forest. However there are two more clans present in the area, and after discussions with them and local government they are now also being involved in the process.

## 5. Lessons learned<sup>15</sup>

Through the support for the development of the BCPs mentioned above and several others, Natural Justice and its partners were able to learn valuable lessons about good process in developing BCPs. The following conclusions emerged from the field experience and from several regional workshops bringing together community representatives and local facilitating organizations.

### 5.1. Entry Points

Identifying a clear objective for the BCP to address is a vital element in developing a successful BCP. Communities often face an array of challenges, but narrowing the focus of a BCP process to a specific issue or goal – such as, for instance, the protection of TK and procedures for prior informed consent - has been found helpful and even necessary. This objective will vary from context to context. Identifying the objective through a community-led engagement should be done before the BCP process is initiated. In addition, marrying the BCP process with existing goals, projects and community engagements ensures greater momentum in BCP development.

As BCPs seek to represent a holistic set of community values and practices, articulating a clear point of focus was not always emphasised from the beginning. In cases where it was, community size and diversity had less impact on BCP processes. It was also noted that while the entry point must be defined, it need not be fixed. As the context shifts, community objectives may shift. As this happens, it is important that the BCP process be flexible to these developments and reflect the objectives of the community.

### 5.2. Representation

The input of the broadest sample of community members is the essence of a BCP process. As much as possible within the local culture and situation, the protocol should strive to include the full spectrum of perspectives, especially those of women, youth, the elderly and others who are often excluded from decision-making processes. Ensuring community ownership requires a balance of direct engagement through large-scale meetings and workshops and the selection and direct involvement of community

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<sup>15</sup> See Shrumm, Holly and Harry Jonas 2012: Understanding and facilitating a biocultural community protocol process. In: Biodiversity and culture: exploring community protocols, rights and consent. IIED, Participatory Learning and Action 65

members able to represent community values and concerns. Whether facilitating the BCP process directly or in partnership with an outside organisation, the representatives' ability to understand, articulate and contextualise community inputs is essential in guaranteeing the integrity of the BCP. In some cases, these representatives were selected directly by communities as part of the BCP process, in others 'traditional' leadership served this role. In all cases, it is crucial to involve the customary or other community decision-making institutions.

Ensuring clarity about who and what comprise the community is also integral to the protocol process. Above all, the community must define itself and determine how to address external issues. Various examples have also shown that the definition of "community" may vary, depending on the objective of the BCP – in some cases BCPs were developed by groups with a specific role, such as traditional healers; in others several distinct communities came together to face a common threat.

Culture plays a critical role in the protocol process and should help define the approach and tools. The protocol process should not be used as a means to create divisions or to advance the political power of certain groups within the community. Above all, it should instil a sense of unity and common vision. A comprehensive discussion about governance structures should feature strongly in the protocol process itself.

### 5.3. Facilitation

NGOs or CBOs have an important role in facilitating BCP processes as they can and have worked to ensure the contribution of a broad, representative group of community members. The degree of detachment from direct community dynamics and ability to observe them can be an asset in targeting a broader segment of the community and in being sensitive to exclusions and holdouts. Organisations are often better able than community members to translate community values and practices into a form understandable by external actors, an essential function of an effective BCP. For an organisation to effectively facilitate a BCP process, it is essential that it has meaningful experiences and connections with the community. The trust derived from these connections enables community members to feel comfortable in sharing their values, practices, aspirations and concerns. It also increases the likelihood that the organisation can identify and be guided by representative community leadership. The experience is also a prerequisite to understanding the broader context within which community values and practices are located and thus to better understand the values and practices themselves.

Overall, the process of documenting, developing and using a community protocol should:

- Be defined and controlled by the community
- Be empowering and rooted within the community's values and procedures
- Create a space for trust, respect, sharing, reflection and learning-by-doing
- Include the full and effective participation of as many community members as possible
- Encourage dialogue and learning between generations, between different groups in the community, and with other communities with shared heritage, resources or knowledge
- Value and build on the diversity of knowledge, skills and capacities in the community
- Emphasize the inter-linkages between sociocultural, material and spiritual well-being
- Increase awareness of relevant legal frameworks and clarity on how the community would like to engage with them
- Inspire community mobilization around key issues
- Lead to tangible change in accordance with community plans and priorities

There is no set rule or formula for how long it takes to develop a biocultural community protocol. The timeframe for the whole process of documenting, developing, using and reflecting upon a protocol will vary widely depending on the local context. As far as possible, the timeframe should be determined by the local situation and by the community's priorities and capacities. Although practical considerations such as available funds and human resources must be taken into account, timeframes should not be determined primarily by external interests or donor requirements.

#### 5.4. Process vs. Product

A recurring discussion has been whether BCPs are primarily useful for the empowering process of developing them or for the end product (the BCP itself). Robust BCP processes strengthen community confidence through their focus on identifying traditional values and practices that have and continue to positively ground and guide decisions. Encouraging communities to articulate these values and practices, and their significance, underscores their positive aspects and can reaffirm their value against the pressure to adopt external practices. This endogenous development approach contrasts with empowerment approaches that merely teach community members ‘skills’ rather than illustrating to communities the immense capacity they already have. Through these strengths of empowerment and self-discovery, the process can even be valuable in grounding and strengthening community members or representatives in engaging with external actors before a BCP has been drafted and released.

The value of the end product – the BCP document - can be seen in two aspects. Firstly, it concretises the positive aspects identified above by physically embodying the empowering aspects of a community’s culture and practices identified in the BCP process. Secondly, a community adopted BCP is a powerful tool for engaging with external actors. While these engagements have traditionally occurred on the terms of external actors, a BCP provides a platform with which community values are emphasised as the basis of any engagement. The BCP not only resituates power dynamics, it also provides increased certainty for external actors. Especially in access and benefit sharing but across a variety of contexts, external actors have often struggled to determine how to engage and partner with communities. At a minimum, a BCP offers an external actor an understanding of community values that must be respected in any engagement.

Importantly, the process to develop and use a BCP should be flexible, dynamic and adaptive. The community might decide to update or broaden their BCP further down the line as new opportunities and challenges emerge, which is why it is useful to periodically review the document.

#### 5.5. Legal Support

While the core value of a BCP process is in community mobilisation and empowerment, locating community values within the body of rights that give legal meaning to those values is an important element of a meaningful BCP. The legal support is important in two areas: direct legal empowerment and legal assistance in drafting and using BCPs. On legal empowerment, the BCP method of presenting legal frameworks through engaging processes that directly link practices and values to the protections of these frameworks continues to be a strength of BCPs. In each context, however, formal support will likely be required in identifying relevant legal instruments, translating them into easily understood language, and training facilitators in the instruments before they lead the training process. Supporting communities to identify local, national and international laws and policies that affirm their rights will require formal legal support in each context. Leveraging the law in engagements with corporations or governments will also often require formal legal support. While Natural Justice has often played this role, the need to connect communities with national legal counsel has emerged as a key lesson. Capacity in understanding and using emerging legal frameworks is still limited so providing capacity development for national lawyers, directly and through establishing networks of like-minded practitioners, was identified as a priority.

#### 5.6. Involvement of government authorities

A core feature of a BCP is that it is a document developed by the community itself, according to its own priorities and processes. As governments start recognizing community protocols as a basis for PIC processes and benefit sharing, it is important that this local ownership and flexibility is maintained to avoid “blueprint” models that do not correspond to local realities. At the same time, experience has shown that informing and involving key government institutions early on can add strength to a BCP process, ensure buy-in, and facilitate its official recognition. Explicit links to national laws and policy processes, for example emerging ABS frameworks, are also key in this process.

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The most important is FPIC.

The Sami view of nature as an animated living being stands in strong contrast to the Western view of nature. Our view of nature has characterized our values, customs, social structures and relationships. Our view of life builds our common core value that is reflected in the Sami language. Sápmi is our home. If we – or someone else – destroy its nature, our culture is destroyed as well. We rely on a living relationship to Sápmi, our home. If we – or someone else – destroy nature, it will also harm our culture. The environment in Sápmi is delicate. A resilient nature requires that we use it very carefully. The documentation and research on Sami's relationship to nature is extensive, but few observers, scientists, and writers have conveyed a holistic perspective. Those who want to use traditional knowledge must have the approval of the indigenous people. It required study and development of traditional Sami systems for knowledge transfer between generations and the view of knowledge, and traditional systems of access to knowledge. The extensive documentation available on the Sami are complex and would need to be collected and systematized.

It should be in every project to be clear rules for whose materials are and on what conditions the material can be prepared and made available to others. The basic principle should be that the author, the informant has the sovereign right to decide if and when the material to be published. The right to the material should be handled at different levels: individuals' petitions, the project owner compilations and materials that the project owner share with authorities and other stakeholders.

Examples of how to work with to protect traditional knowledge:

- Duodjibrand is an authenticity mark indicating that the object is genuine Sami handicrafts. Sami artisan applying for the brand and will then mark if they meet the requirements to hold Duodjibrand. The mark is personal and craftsman decide whether he or she want to mark the subject. The brand's purpose:
    - Protect Sami handicraft products against plagiarism and unfair competition
    - Provide guidance and inform the buyer of products manufactured by Sami craftsmen
    - Help to enhance the quality of Sámi handicraft products
    - be the hallmark of the Sámi handicraft is a living tradition
    - Products that are designated as mere souvenirs and do not use the function is not accepted
  - Renlycka is a quality seal that stands for Sami origin, credibility, care for animals and nature, taste experience. There are quality reindeer products from Sami villages in Sweden.
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