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WORKING GROUP ON ARTICLE 8(j) AND  
RELATED PROVISIONS OF THE CONVENTION  
ON BIOLOGICAL DIVERSITY

Ninth meeting

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Item 4 of the provisional agenda\*\*

**PROPOSED GUIDELINES FOR THE DEVELOPMENT OF MECHANISMS, LEGISLATION  
OR OTHER APPROPRIATE INITIATIVES TO ENSURE THE 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 AND FOR REPORTING AND  
PREVENTING UNAUTHORIZED ACCESS TO SUCH  
KNOWLEDGE, INNOVATIONS AND PRACTICES**

*Note by the Executive Secretary*

### INTRODUCTION

1. In its decision V/16, the Conference of the Parties to the Convention on Biological Diversity adopted the programme of work on Article 8(j) and related provisions. In its decision X/43, the Conference of the Parties revised the programme of work and decided to maintain a number of ongoing tasks, including tasks 7, 10 and 12 which are as follows:

(a) Task 7: the Working Group is “to develop guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure: (i) 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; (ii) that private and public institutions interested in using such knowledge, practices and innovations obtain the prior informed approval of the indigenous and local communities; (iii) advancement of the identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices and the associated genetic resources are used”;

(b) Task 10: the Working Group is “to develop standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge and related genetic resources”;

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\*\* UNEP/CBD/WG8J/9/1.

(c) Task 12: the Working Group is “to develop guidelines that will assist Parties and Governments in the development of legislation or other mechanisms, as appropriate, to implement Article 8(j) and its related provisions (which could include *sui generis* systems), and definitions of relevant key terms and concepts in Article 8(j) and related provisions at international, regional and national levels, that recognize, safeguard and fully guarantee the rights of indigenous and local communities over their traditional knowledge, innovations and practices, within the context of the Convention.

2. In decision XII/12 D, on how tasks 7, 10 and 12 could best contribute to work under the Convention and to the Nagoya Protocol, the Conference of the Parties decided to implement tasks 7, 10 and 12 in an integrated manner (para. 1). It also divided the work into five sub-tasks and two phases. Under Phase I, it identified four sub-tasks to tasks 7, 10 and 12 of the programme of work and agreed on a phased approach to their consideration. Sub-tasks (i), (ii) and (iii) mandate the Working Group to: (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 indigenous and local communities;<sup>1</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; and (iii) develop standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge.<sup>2</sup> A fourth sub-task under Phase I, development of a glossary of relevant key terms and concepts, is complementary to the current sub-tasks and is taken up in UNEP/CBD/WG8J/9/2/Add.1.

3. In paragraph 3 of its decision XII/12 D, the Conference of the Parties decided that, at its thirteenth meeting, it would consider for adoption the guidelines being developed under the different sub-tasks as stand-alone but complementary elements of the overarching task 12. In preparing draft guidelines on these sub-tasks,<sup>3</sup> it was found that the elements of prior informed consent or approval and involvement, mutually agreed terms for benefit-sharing and unlawful appropriation were closely interrelated and efforts to separate them into distinct sets of guidelines resulted in considerable overlap and duplication. Accordingly, the present note addresses the three sub-tasks together. This approach is in line with the complementary nature of the issues and the way in which they have been addressed in the relevant provisions of the Convention and the Nagoya Protocol, the structure of the views and information submitted in response to paragraph 4 of decision XII/12 D, and the decision of the Conference of the Parties to implement tasks 7, 10 and 12 in an integrated manner.

4. In paragraph 4 of its decision XII/12 D, the Conference of the Parties invited Parties, Governments, relevant international organizations and indigenous and local communities to submit their views, 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 arising from the use of this knowledge with those communities, and their complementarity with the Nagoya Protocol. The Executive Secretary was requested to compile and analyse these views taking into account the relevant work in related international processes and to prepare a draft of the guidelines (para. 5).

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<sup>1</sup> Sub-task (i) slightly revises task 7(ii) of the original programme of work by changing “prior informed approval” to “prior informed consent or approval and involvement”, in line with the Nagoya Protocol.

<sup>2</sup> Sub-task (iii) slightly revises task 10 of the original programme of work by only referring to “unlawful appropriation of traditional knowledge” rather than “unlawful appropriation of traditional knowledge and related genetic resources” as the issue of genetic resources is now addressed by the Nagoya Protocol.

<sup>3</sup> As requested in paragraph 5 of decision XII/12 D.

5. In order to assist the Working Group, a compilation of views<sup>4</sup> has been issued (UNEP/CBD/WG8J/9/INF/1). An analysis of the submissions received has also been issued (UNEP/CBD/WG8J/9/INF/1/Add.1).

6. Also with a view to assisting the Working Group with tasks 7, 10 and 12, the Conference of the Parties, in its decisions XII/12 D, paragraph 6 and XII/12 E, paragraph 3, recognized the relevance of the possible elements of *sui generis* systems for the protection, preservation and promotion of traditional knowledge, innovations and practices of indigenous and local communities<sup>5</sup> as contained in UNEP/CBD/WG8J/8/6/Add.1, and invited the Working Group to use the possible elements, as appropriate, in its work on those tasks.

7. The development of guidance can contribute to achieving a number of the Aichi biodiversity targets. This includes Target 18, which provides that “by 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.”

8. It can also assist with implementation of the Nagoya Protocol and thus Aichi Target 16: “by 2015, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is in force and operational, consistent with national legislation.” The guidelines may also potentially contribute to other Aichi Biodiversity Targets, such as Target 11.

9. Section I provides an overview of relevant work within the context of the Convention on Biological Diversity and the Nagoya Protocol. Section II identifies other relevant international processes. Section III identifies possible elements for guidelines with proposed draft guidelines attached as an annex to the present document. Finally, section IV contains a draft recommendation for the consideration of the Working Group.

## **I. OVERVIEW OF RELEVANT WORK IN THE CONTEXT OF THE CONVENTION ON BIOLOGICAL DIVERSITY AND THE NAGOYA PROTOCOL CONCERNING PRIOR INFORMED CONSENT OR APPROVAL AND INVOLVEMENT, EQUITABLE SHARING OF BENEFITS AND UNAUTHORIZED ACCESS**

10. This section summarizes a number of different areas of work under the Convention and the Nagoya Protocol related to the issue of prior informed consent and approval and involvement, equitable sharing of benefits, mutually agreed terms and access to and use of traditional knowledge.

11. The programme of work on Article 8(j) and related provisions, which was adopted by the Conference of the Parties in its decision V/16, states under general principle 5, that access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices.

12. In the context of Article 8(j), the Conference of the Parties has adopted two documents that address aspects of prior informed consent or approval and involvement, the equitable sharing of benefits, and unauthorized access and invited Parties, Governments and others to make use of them:

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<sup>4</sup> In response to notification SCBD/MPO/AF/JS/VF/84296 (2015-012), dated 5 February 2015.

<sup>5</sup> See the note by the Executive Secretary on possible elements of *sui generis* systems for the protection of traditional knowledge, innovations and practices of indigenous and local communities (UNEP/CBD/WG8J/8/6/Add.1), available at <https://www.cbd.int/doc/?meeting=WG8J-08>.

(a) *The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities*<sup>6</sup> provides that any activities/interactions related to traditional knowledge associated with the conservation and sustainable use of biological diversity, occurring on or likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities and impacting upon specific groups, should be carried out with the prior informed consent and/or approval and involvement of indigenous and local communities. Additionally, the Tkarihwaié:ri Code of Ethical Conduct provides guidance to Parties, Governments, researchers and others interacting with indigenous and local community on procedures and principles to consider when working with indigenous and local communities. The issue of fair and equitable sharing of benefits is taken up as an ethical principle in section 2 (para. 14): “Indigenous and local communities ought to receive fair and equitable benefits for their contribution to activities/interactions related to biodiversity and associated traditional knowledge proposed to take place on, or which are likely to impact on, sacred sites and lands and waters traditionally occupied or used by indigenous and local communities. Benefit-sharing should be regarded as a way of strengthening indigenous and local communities and promoting the objectives of the Convention on Biological Diversity and ought to be equitable within and among relevant groups, taking into account relevant community level procedures.” The Tkarihwaié:ri Code of Ethical Conduct also contains several principles that, if applied, can prevent traditional knowledge from being accessed without authorization. This includes the principle that “[t]he right of indigenous and local communities to safeguard, collectively or otherwise, their cultural and intellectual heritage, tangible and intangible, should be respected” (para. 13).

(b) *Akwé:Kon 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*<sup>7</sup> provide a collaborative framework to support the full involvement of indigenous and local communities in the assessment of cultural, environmental and social impact of proposed developments on sacred sites and on lands and waters they have traditionally occupied. The Guidelines provide for prior informed consent concerning developments proposed on traditional territories. The Akwé:Kon Guidelines, in section C on social impact assessments, provide that “Proposed developments should be evaluated in relation to tangible benefits to such communities, such as non-hazardous job creation, viable revenue from the levying of appropriate fees from beneficiaries of such developments, access to markets and diversification of income opportunities. Evaluation of changes to traditional economies could involve economic valuation of negative social impacts” (para. 40). In addition, the guidelines establish that: “proposed developments on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities should ensure that tangible benefits accrue to such communities, such as payment for environmental services, job creation within safe and hazard-free working environments, viable revenue from the levying of appropriate fees, access to markets and diversification of income-generating (economic) opportunities for small and medium-sized businesses. In accordance with national legislation or relevant national regulations, indigenous and local communities should be involved in the financial auditing processes of the developments in which they participate to ensure that the resources invested are used effectively” (para. 46).

13. Furthermore, as noted in the introduction above, the Conference of the Parties, in decision XII/12 D, paragraph 6, recognized the relevance of work on *sui generis* systems for the protection, preservation and promotion of traditional knowledge. In that regard, the note by the Executive Secretary on possible elements of *sui generis* systems for the protection of traditional knowledge, innovations and practices of indigenous and local communities (UNEP/CBD/WG8J/8/6/Add.1)<sup>8</sup> which was prepared for the previous meeting of the Working Group, may be relevant for the discussions on guidelines.

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<sup>6</sup> See decision X/42.

<sup>7</sup> See decision VII/16 F.

<sup>8</sup> UNEP/CBD/WG8J/8/6/Add.1 is made available under “other documents” for ease of reference.

14. In the context of access and benefit-sharing, the Conference of the Parties adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising from their Utilization at its sixth meeting, in 2002.<sup>9</sup> One of the key features of the Bonn Guidelines is that they “may serve as inputs when developing and drafting legislative, administrative or policy measures on access and benefit-sharing with particular reference to provisions under Articles 8(j), 10(c), 15, 16 and 19; and contracts and other arrangements under mutually agreed terms for access and benefit-sharing” (para. 1). The Bonn Guidelines include provisions outlining principles, elements and processes regarding prior informed consent and the equitable sharing of benefits. While these primarily address genetic resources, they may also be relevant for traditional knowledge covered by the Convention.

15. In 2004, the Conference of the Parties agreed to launch negotiations on an international regime on access and benefit-sharing.<sup>10</sup> As part of these negotiations, a Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing was convened in 2009. The Group considered the issue of prior informed consent for access to traditional knowledge of indigenous and local communities, as well as the equitable sharing of benefits. Relevant elements of their report are considered in section III below.<sup>11</sup>

16. The negotiations concluded in 2010 with the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.<sup>12</sup> The Nagoya Protocol entered into force on 12 October 2014. In addition to addressing genetic resources, the Protocol applies to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge (Article 3). It contains a number of provisions that may also be relevant to traditional knowledge not associated with genetic resources.

17. The Nagoya Protocol, in its preamble, acknowledges the linkages between traditional knowledge and benefit-sharing (recalling the relevance of Article 8(j) of the Convention as it relates to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising from the utilization of such knowledge).

18. Paragraph 2 of Article 5 on fair and equitable benefit-sharing establishes 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.”

19. Paragraph 5 of the same article establishes that “Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.”

20. Paragraph 4 of same article establishes that “Benefits may include monetary and non-monetary benefits, including but not limited to those listed in the Annex”.

21. Article 7 of the Protocol provides that, “[i]n accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.”

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<sup>9</sup> See decision VI/24.

<sup>10</sup> See decision VII/19.

<sup>11</sup> The report is available as document UNEP/CBD/WG-ABS/8/2 at <https://www.cbd.int/doc/?meeting=ABSWG-08>.

<sup>12</sup> See decision X/2.

22. Article 12, paragraph 3 on traditional knowledge associated with genetic resources establishes that “Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of:

(a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge;

(b) Minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources;

(c) Model contractual clauses for benefit-sharing arising from the utilization of traditional knowledge associated with genetic resources.”

23. In the Article 13, paragraph 1, on National Focal Points and Competent National Authorities, the Nagoya Protocol requires that “Each Party shall designate a national focal point on access and benefit-sharing. The national focal point shall make information available as follows: ... (b) For applicants seeking access to traditional knowledge associated with genetic resources, where possible, information on procedures for obtaining prior informed consent or approval and involvement, as appropriate, of indigenous and local communities and establishing mutually agreed terms including benefit-sharing; and (c) Information on competent national authorities, relevant indigenous and local communities and relevant stakeholders.”

24. Article 14, paragraph 3 provides that information on relevant competent authorities of indigenous and local communities may also be included in the Access and Benefit-sharing Clearing-House.

25. Article 10 of the Nagoya Protocol, on a global multilateral benefit-sharing mechanism, states that “Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally.” Additionally, Article 11 of the Nagoya Protocol, in paragraph 2, provides that, “where the same traditional knowledge associated with genetic resources is shared by one or more indigenous and local communities in several Parties, those Parties shall endeavour to cooperate, as appropriate, with the involvement of the indigenous and local communities concerned...”.

26. Other relevant provisions include Article 16 on compliance with domestic legislation or regulatory requirements on access and benefit-sharing for traditional knowledge associated with genetic resources and Article 18 on compliance with mutually agreed terms. Furthermore, the procedures and mechanisms on compliance adopted by the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol also contain relevant elements. These will be explored further in section III below.

#### *Programme of work on protected areas*

27. The programme of work on protected areas includes 16 goals, divided across four programme elements, and was adopted by decision VII/28 in 2004 and updated with additional elements in 2010. Within the programme of work is Element 2 on governance, participation, equity and benefit-sharing, including goal 2.1: to promote equity and benefit-sharing. The target for this goal is to establish “...mechanisms for the equitable sharing of both costs and benefits arising from the establishment and management of protected areas”.

28. Some suggested activities of the Parties are:

2.1.1. Assess the economic and socio-cultural costs, benefits and impacts arising from the establishment and maintenance of protected areas, particularly for indigenous and local communities, and adjust policies to avoid and mitigate negative impacts, and where

appropriate compensate costs and equitably share benefits in accordance with the national legislation.

2.1.4. Use social and economic benefits generated by protected areas for poverty reduction, consistent with protected-area management objectives.

2.1.5. Engage indigenous and local communities and relevant stakeholders in participatory planning and governance, recalling the principles of the ecosystem approach.

29. In addition, in paragraph 30(b) of decision X/31 on protected areas, the Conference of the Parties encouraged Parties to promote integration of the provisions of access and benefit sharing in regard to the third objective of the Convention in the governance of protected areas and support initiatives on the role of protected areas in poverty alleviation as well as for indigenous and local community livelihoods. In addition, in paragraph 31(a), the Conference of the Parties invited Parties to establish clear mechanisms and processes for equitable cost and benefit-sharing and for full and effective participation of indigenous and local communities, related to protected areas, in accordance with national laws and applicable international obligations.

## **II. OVERVIEW OF RELEVANT WORK IN RELATED INTERNATIONAL PROCESSES**

30. The concepts of prior informed consent or approval and involvement, and benefit-sharing are not new to the international system. In recent years, many international agencies, programmes and development banks have been working to address these issues. Many United Nations agencies and programmes have adopted internal guidance which they apply in practical ways, including to project work with indigenous peoples and local communities. Relevant work in this area includes the following:

- (a) The United Nations Permanent Forum on Indigenous Issues;
- (b) The International Labour Organization and Convention 169 (Convention concerning Indigenous and Tribal Peoples in Independent Countries);
- (c) Reducing Emissions from Deforestation and Forest Degradation Programme (UN-REDD);
- (d) The European Bank for Reconstruction and Development (EBRD) and its “Indigenous Peoples Guidance Note”;
- (e) The United Nations Human Rights Council;
- (f) The Food and Agriculture Organization of the United Nations and its “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security”;
- (g) The United Nations Development Programme and its guidance on “Social and Environmental Standards”;
- (h) The United Nations Environment Programme and its “Toolkit to Support Conservation by Indigenous Peoples and Local Communities: Building Capacity and Sharing Knowledge for Indigenous Peoples’ and Community Conserved Territories and Areas (ICCAs)”;
- (i) The International Treaty on Plant Genetic Resources for Food and Agriculture;
- (j) The United Nations Declaration on the Rights of Indigenous Peoples;
- (k) The World Intellectual Property Organization’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC).

31. Information on the different approaches considered in these documents is included in the outline of possible elements for guidelines set out in section III below.

### III. POSSIBLE ELEMENTS OF GUIDELINES

32. The relevant work undertaken in the context of the Convention on Biological Diversity, the submissions received from Parties and organizations, and the relevant work from other international processes and organizations suggests a number of common elements to prior informed consent or approval and involvement, mutually agreed terms for benefit-sharing and unlawful appropriation. Different approaches to these elements are summarized below for consideration by the Working Group. They have also informed the development of the draft guidelines contained in the annex to the present document.

#### A. General principles

33. The guidelines are being developed in the context of the programme of work on Article 8(j) and related provisions. The Working Group may wish to consider including General Principle 5 from the programme of work as a general principle of the guidelines:

Decision V/16, annex, programme of work on the implementation of Art. 8(j) and related provisions:	General principle 5: "Access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices."
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#### B. Understanding of prior informed consent or approval and involvement

34. The Working Group may wish to consider the different understandings of prior informed consent or approval and involvement and whether descriptions of these terms, in the context of the Convention on Biological Diversity, should be included in the guidelines.

35. A number of documents include statements that explain the meaning of prior informed consent. These include:

EBRD Guidance Note	<i>FPIC refers to the process whereby Indigenous Peoples are informed about development activities in a timely manner and provided with an opportunity to approve (or reject) a project without any form of manipulation or coercion prior to the commencement of operations. The consent needs to be informed; that is, obtained through a process of meaningful participation and consultation based on the full disclosure of relevant information about the proposed project in a form and manner that are understandable and accessible to the indigenous communities.</i>
United Nations Declaration on the Rights of Indigenous Peoples  (United Nations General Assembly resolution 61/295, 13 September 2007)	Article 19. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
United Nations Human Rights Council	Prior informed consent or approval and involvement more generally refers to the rights of local communities, particularly indigenous peoples, to participate in decision-making about issues that may directly affect them. <sup>13</sup>  In his commentary of indigenous peoples right to prior and informed consent, the Special Rapporteur on the situation of human rights and

<sup>13</sup> See Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples and Commission on Human Rights, legal commentary on the concept of free, prior and informed consent (E/CN.4/Sub.2/AC.4/2005/WP.1), dated 14 July 2005 and, additionally, [http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20Paper\\_Participation%20-%20rev1.pdf](http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20Paper_Participation%20-%20rev1.pdf)

	<p>fundamental freedoms of indigenous peoples, James Anaya in A/HRC/12/34 15 July (2009) in his report on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, noted that: “The character of the consultation procedure and its object are also shaped by the nature of the right or interest at stake for the indigenous peoples concerned and the anticipated impact of the proposed measure. The Declaration [on the Rights of Indigenous Peoples] establishes that, in general, consultations with indigenous peoples are to be carried out in “good faith ... in order to obtain their free, prior and informed consent” (art. 19). This provision of the Declaration <u>should not be regarded as according indigenous peoples a general “veto power” over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples”.</u></p>
<p>“Final report of the study on indigenous peoples and the right to participate in decision-making”</p> <p>The Expert Mechanism on the Rights of Indigenous Peoples, Office of the High Commissioner for Human Rights</p>	<p>“... the right to free, prior and informed consent is embedded in the right to self-determination. The procedural requirements for consultations and free, prior and informed consent respectively are similar. Nevertheless, the right of free, prior and informed consent needs to be understood in the context of indigenous peoples’ right to self-determination because it is an integral element of that right. The duty of the State to obtain indigenous peoples’ free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes. Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples’ rights.” (paras. 20-21)</p>
<p>FAO and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security</p>	<p>“States and other parties should hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for particular positions and understandings of individual States consultation and decision-making processes should be organized without intimidation and be conducted in a climate of trust.</p> <p>The principles of consultation and participation, as set out in paragraph 3B.6, of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, should be applied in the case of other communities described in this section.</p>
<p>UN REDD Programme</p> <p>Guidelines on Free, Prior and Informed Consent</p>	<p><i>Prior</i> implies that consent is to be sought sufficiently in advance of any authorization to access traditional knowledge respecting the cultural processes and time requirements of indigenous peoples and local communities, in order to obtain consensus.</p> <p><i>Informed</i> implies that information is provided that covers a full range of aspects, including the intended purpose of the access, its duration and scope; a preliminary assessment of the likely economic, social, cultural</p>

	<p>and environmental impacts, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and effective participation are crucial components of a consent or approval process.</p> <p><i>Consent or Approval</i> refers to a freely given decision from the rights-holders based on full, prior and objective information; a decision made by the people or community in question, through their designated representatives and in accordance with their traditions, customs and norms.</p> <p><i>Prior Informed Consent or Approval and Involvement</i> may be required at different levels depending on national circumstances<sup>14</sup> and the diverse internal organization of various IPLCs.<sup>15</sup></p> <p><i>Consent</i> shall be obtained in good faith with no coercion, intimidation or manipulation.</p>
UNDP	Project-Level Standard (Para 6, p. 36) ensures that UNDP Projects that may impact indigenous peoples are designed in a spirit of partnership with them, with their full and effective participation, with the objective of securing their free, prior, and informed consent where their rights, lands, resources, territories, traditional livelihoods may be affected.
UNEP	Prior informed consent is a “continual process”, and if any changes in a project are proposed, consent needs to be renegotiated.

### C. Structures and processes for prior informed consent or approval and involvement, and benefit-sharing

36. Many of the documents listed below suggest processes for obtaining prior informed consent or approval and involvement. This includes the possible role of national focal points and competent national authorities, the process for requesting and considering requests for prior informed consent or approval and involvement and the role of community protocols and customary law in this process.

#### 1. *National focal points and competent national authorities*

Nagoya Protocol	<p>Art. 13(1): Each Party shall designate a national focal point on access and benefit-sharing. The national focal point shall make information available as follows: ...</p> <p>(b) For applicants seeking access to traditional knowledge associated with genetic resources, where possible, information on procedures for obtaining prior informed consent or approval and involvement, as appropriate, of indigenous and local communities and establishing mutually agreed terms including benefit-sharing;</p> <p>(c) Information on competent national authorities, relevant indigenous and local communities and relevant stakeholders.</p> <p>Art. 13(2): Each Party shall designate one or more competent national authorities on access and benefit-sharing. Competent national authorities shall, in accordance with applicable national legislative, administrative or policy measures, be responsible for granting access or, as applicable, issuing written evidence that access requirements have</p>
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<sup>14</sup> i.e. from the Government at the federal, provincial, or departmental level or from agencies and organizations to which this authority is delegated or with which it is shared.

<sup>15</sup> Which may be traditional.

	been met and be responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms.
Conference of the Parties, decision X/40 B	Para. 7: The Conference of the Parties invited Parties to consider designating national focal points for Article 8(j) and related provisions <i>to facilitate communications with indigenous and local community organizations and to promote the effective development and implementation of the programme of work on Article 8(j) and related provisions.</i>
Report of the Meeting of the Group of Technical And Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing	At minimum, a competent national authority is needed to promote certainty over the domestic process governing prior informed consent of indigenous peoples and local communities when access to associated traditional knowledge is sought. In this regard, the competent national authority will be guided by the customary laws, community procedures or community protocols where they exist.
Submission from Peru	Peru has developed systems and practices in protecting traditional knowledge, which contribute to better conditions for negotiating equitable sharing of benefits arising from access and use of traditional knowledge, as well for monitoring of the misappropriation of traditional knowledge. The Directorate of Inventions and New Technologies of INDECOPI (DIN-INDECOPI), is the competent authority in Peru, for the protection of collective knowledge related to biological resources.

37. The Working Group may wish to consider whether national focal points and competent national authorities on access and benefit-sharing established under the Nagoya Protocol could also assume responsibilities for traditional knowledge that is not associated with genetic resources but is still within the scope of the Convention. These responsibilities could build on the existing responsibilities outlined in the Nagoya Protocol. Alternatively, the Working Group may wish to consider whether national focal points for Article 8(j) and related provisions, as suggested by decision X/40 B, could undertake the tasks emerging under the guidelines.

2. *Process for requesting and considering requests for prior informed consent or approval and involvement*

Report of the Meeting of the Group of Technical And Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing	<p>The experts elaborated on existing examples and best practices related to prior informed consent of associated traditional knowledge. The experts identified the following as desirable elements for the prior informed consent of holders of associated traditional knowledge:</p> <ul style="list-style-type: none"> <li>(a) Competent national authority;</li> <li>(b) Competent authority at the level of indigenous and local communities with a statutory authorization/mandate as competent authorities of indigenous and local communities. It was pointed out that there is a need for legal recognition of indigenous and local communities' competent authorities and recognition of customary law without such recognition there is an inherent risk that customary law is being replaced by local government regulations;</li> </ul>
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	<p>(c) Elements of the process should include:</p> <ul style="list-style-type: none"> <li>(i) Written application;</li> <li>(ii) Wide notification of applications sought;</li> <li>(iii) Applications to be widely accessible;</li> <li>(iv) Legitimate process;</li> <li>(v) Adequate timing and deadlines;</li> <li>(vi) Specification of use with clause to address change of use and transfer to third parties.</li> </ul> <p>(d) Prior informed consent granted on the basis of mutually agreed terms;</p> <p>(e) Consultation process with indigenous and local communities;</p> <p>(f) Procedures consistent with customary practices.</p> <p>There was general agreement that legal certainty and consultative mechanisms were both desirable. However, conflicts could arise regarding the timing of procedures and deadlines as well as confidentiality. On the one hand, sufficient time is necessary for legitimate prior informed consent processes to be carried out and on the other hand, potential users, such as scientists and the business community, require speedy procedures. In addition, the information requirements requested under prior informed consent and mutually agreed terms may conflict with the need for confidentiality.</p>
United Nations Permanent Forum on Indigenous Issues	<p>Some of the main findings of the report include that concerning prior informed consent processes, consultation requires time and an effective system for communicating among interest-holders and that indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The report further concludes that <i>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.</i></p>
Submission from Norway	<p>The “Procedures for Consultations between the State Authorities and the Sami Parliament of 11 May 2005” (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</p>

	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.
Submission from Natural Justice	Natural Justice emphasized that processes for obtaining prior informed consent should identify and respect the appropriate representatives and customary institutions of indigenous peoples and local communities, and should take into account indigenous peoples' and local communities' own decision-making processes, customary laws and procedures.

38. The Working Group may wish to consider different processes for obtaining prior informed consent from or approval and involvement of indigenous peoples and local communities for access to traditional knowledge and how this could be reflected in guidelines.

3. *Mutually agreed terms and benefit-sharing*

39. The Working Group may wish to consider a number of sources which emphasize the right of indigenous peoples and local communities to share in benefits:

ILO Convention No. 169	Art. 15(1): "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."
International Treaty on Plant Genetic Resources for Food and Agriculture	<p>Preamble: "Affirms also that the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in the <b>fair and equitable sharing of the benefits arising from</b>, the use of plant genetic resources for food and agriculture, are fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels;..."</p> <p>Art. 9.2: "The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:</p> <ul style="list-style-type: none"> <li>a) Protection of traditional knowledge relevant to plant genetic resources for food and agriculture;</li> <li>b) The right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and</li> <li>c) The right to participate in making decisions, at the national level, on</li> </ul>

	matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.”
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#### 4. *Mechanisms for mutually agreed terms and benefit-sharing*

40. The Working Group may wish to consider mechanisms for benefit-sharing with indigenous peoples and local communities, developed by various Parties.

Australia	“...a benefit-sharing agreement must provide reasonable benefit-sharing arrangements, including protection for recognition of and value of any indigenous people’s knowledge to be used, and must include...” among other issues “...(I) a statement regarding benefits to be provided or any agreed commitments given in return for the use of the indigenous peoples knowledge; (j) if any indigenous peoples knowledge of the access provider, or other group of indigenous persons, is to be used, a copy of the agreement regarding use of the knowledge (if there is a written document), or the terms of any oral agreement, regarding the use of the knowledge...” <sup>16</sup>
Peru	Peru has established the Fondo para el Desarrollo de los Pueblos Indígenas, established by Law 27.811 which allows the indigenous peoples to access benefits arising from the use of their knowledge considering that traditional knowledge is shared with many communities. <sup>17</sup> The indigenous peoples can access resources presenting a project through their representative organizations. <sup>18</sup>  The resources of the fund come from the public budget, international technical cooperation, donations and the percentages of the value of the sales from products developed from collective knowledge. If the product is from collective knowledge of public domain that law does not say the amount that should go to the Fund, however, for those developed from confidential knowledge the percentage going to the Fund cannot be less than 10%. <sup>19</sup> The administration of the Fund is in charge of a Committee of seven members, and five of them represent indigenous organizations, and two represent the National Institute of Development of Andean, Amazonian and Afrodescendant peoples (NDEPA). <sup>20</sup> The evaluation and approval of the projects present by the indigenous organizations is done by the Committee. <sup>21</sup> An advantage of this mechanism is that the problems associated with direct cash payments to communities are avoided. These two systems above are used more for sharing monetary benefits.

#### 5. *Community protocols and customary law*

41. Another approach to establishing processes for obtaining prior informed consent or approval and involvement could be through the development of community protocols whereby communities themselves identify the necessary steps.

<sup>16</sup> Environment Protection and Biodiversity Conservation Amendment Regulations 2005 (No. 2), Division 8A2 Access to biological resources for commercial purposes or potential commercial purposes, 8A.08 Benefit-sharing agreements.

<sup>17</sup> See <http://servicios.indecopi.gob.pe/portaltcpi/DetPreguntasFrecuentes.jsp?pId=143&pIdCat=24&pIdTc=4&pAnio=2005&lng=1>

<sup>18</sup> <http://servicios.indecopi.gob.pe/portaltcpi/DetPreguntasFrecuentes.jsp?pId=144&pIdCat=24&pIdTc=4&pAnio=2005&lng=1>

<sup>19</sup> <http://servicios.indecopi.gob.pe/portaltcpi/DetPreguntasFrecuentes.jsp?pId=145&pIdCat=24&pIdTc=4&pAnio=2005&lng=1>

<sup>20</sup> <http://servicios.indecopi.gob.pe/portaltcpi/DetPreguntasFrecuentes.jsp?pId=147&pIdCat=24&pIdTc=4&pAnio=2005&lng=1>

<sup>21</sup> <http://servicios.indecopi.gob.pe/portaltcpi/DetPreguntasFrecuentes.jsp?pId=148&pIdCat=24&pIdTc=4&pAnio=2005&lng=1>

42. Prior to the popularization of the concept of community protocols through the Nagoya Protocol, many indigenous peoples and local communities have identified, based on their customary laws and procedures, community processes for obtaining prior informed consent for a variety of activities, including for access to their traditional knowledge.

43. As summarized below, a number of documents have considered the role of community protocols in access to traditional knowledge.

Nagoya Protocol	<p>Art. 12: “1. 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 traditional knowledge associated with genetic resources.</p> <p>...</p> <p>3. Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of:</p> <p>(a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge;</p> <p>...”</p>
UNEP	<p>The United Nations Environmental Programme describes <i>community protocols</i><sup>22</sup> as a term that covers a broad array of documents generated by communities to set out how they expect other stakeholders to engage with them. They may reference customary as well as national or international laws to affirm their rights to be approached according to a certain set of standards. Articulating information, relevant factors, and details of customary laws and traditional authorities helps other stakeholders<sup>23</sup> to better understand the community’s values and customary laws. Community protocols provide communities an opportunity to focus on their development aspirations vis-à-vis their rights and to articulate for themselves and for users their understanding of their bio-cultural heritage and therefore on what basis they will engage with a variety of stakeholders. By considering the interconnections of their land rights, current socio-economic situation, environmental concerns, customary laws and traditional knowledge, communities are better placed to determine for themselves how to negotiate with a variety of actors.</p>

<sup>22</sup> Refer to <http://www.unep.org/communityprotocols/protocol.asp> and [http://www.unep.org/delc/Portals/119/publications/Community\\_Protocols\\_Guide\\_Policymakers.pdf](http://www.unep.org/delc/Portals/119/publications/Community_Protocols_Guide_Policymakers.pdf)

<sup>23</sup> Such as potential traditional knowledge users.

<p>Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing</p>	<p>It was recognized that community level procedures are in constant evolution and may not be well known to non-members. Therefore, although customary laws and practices may not provide specific procedures for access to genetic resources at this time, these may evolve in response to the development of the International Regime and national legislation. It was also stressed that due to the diversity of community level procedures there is no one-size-fits-all approach to address access to genetic resources and associated traditional knowledge at the community level.</p> <p>National law should not arbitrarily prescribe the process for obtaining prior informed consent. The process should be a flexible one recognizing that customary laws and local practices will vary between different groups and locations. No one size will fit all.</p>
<p>Submission from Natural Justice</p>	<p>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 traditional knowledge, there might be customary norms about how this knowledge is kept, to whom it may be transferred, and under which conditions. Certain forms of traditional knowledge 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 such 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.</p>

44. Building on this information, the Working Group may wish to take into consideration in the development of guidelines the usefulness of community protocols for Governments, potential users of traditional knowledge and provider communities, as a means to ensure legal certainty, transparency, predictability concerning processes for obtaining prior and informed consent or approval and involvement of indigenous peoples and local communities for access to their traditional knowledge.

#### **D. Compliance and unlawful appropriation or unauthorized access**

45. Measures to support compliance with requirements to obtain prior informed consent or approval and involvement for access to traditional knowledge are considered in a number of the documents:

<p>Nagoya Protocol</p>	<p>Article 16:  “1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.  2. Each Party shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above.  3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above.”</p> <p>Article 18:  “1. In the implementation of Article 6, paragraph 3 (g) (i) and Article 7</p>
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	<p>[access to traditional knowledge associated with genetic resources], each Party shall encourage providers and users of genetic resources and/or traditional knowledge associated with genetic resources to include provisions in mutually agreed terms to cover, where appropriate, dispute resolution including:</p> <p>(a) The jurisdiction to which they will subject any dispute resolution processes;</p> <p>(b) The applicable law; and/or</p> <p>(c) Options for alternative dispute resolution, such as mediation or arbitration.</p> <p>2. Each Party shall ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes arising from mutually agreed terms.</p> <p>3. Each Party shall take effective measures, as appropriate, regarding:</p> <p>(a) Access to justice; and</p> <p>(b) The utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards.”</p>
<p>Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol, decision NP-1/4</p> <p>“Cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol and to address cases of non-compliance”</p>	<p>Annex, section D, para. 9:</p> <p>“The Committee may examine a situation where a Party fails to submit its national report pursuant to Article 29, or where information indicates that the Party concerned is faced with difficulties complying with its obligations under the Protocol. Such information may be received:</p> <p>(a) Through a national report or from the Access and Benefit-sharing Clearing-House;</p> <p>(b) From the Secretariat based on:</p> <p>(i) Information on the completeness or accuracy of a Party’s national report;</p> <p>(ii) Information on the completeness or accuracy of the information submitted by a Party to the Access and Benefit-sharing Clearing-House; or</p> <p>(iii) Other information related to compliance with Article 12(1) of the Protocol;</p> <p>provided by a directly affected indigenous or local community, related to provisions of the Protocol.</p> <p>The Secretariat shall review information received from indigenous and local communities against the information received from the Party concerned. It will only transmit issues to the Committee that have not been resolved. The Committee shall proceed in accordance with paragraphs 4 to 7 above.”</p>
<p>Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing</p>	<p>60. National laws should provide for respecting customary laws and community protocols – whether codified or not – to regulate the process to obtain prior informed consent, and for best practice codes of conduct to be observed by applicants for access. Protocols and codes of conduct should fully reflect the rights/decisions of indigenous peoples and local communities concerned.</p> <p>61. A competent national authority would significantly contribute to promoting compliance and to ensure that prior informed consent of indigenous peoples and local communities was freely and properly given.</p> <p>62. Compliance measures that also support the prior informed consent and approval and involvement of indigenous peoples and local communities for the use of their associated traditional knowledge could include:</p> <p>(a) Capacity-building, awareness-raising and information-sharing</p>

	<p>within indigenous and local communities;</p> <p>(b) Codes of conduct and best practice codes of users;</p> <p>(c) Sectoral model clauses for material transfer agreements to promote equity between the negotiating positions of the parties;</p> <p>(d) Minimum standards for access and benefit-sharing agreements;<sup>24</sup> and</p> <p>(e) Disclosure requirements concerning the origin or source of genetic resources and associated traditional knowledge to which access is granted.</p>
United Nations Declaration on the Rights of Indigenous Peoples	<p>Article 11.2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.</p> <p>Article 31. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.</p>
WIPO IGC	<p><b>[Misappropriation</b> means</p> <p>Option 1</p> <p>any access or use of the [subject matter]/[traditional knowledge] without prior informed consent or approval and involvement and, where applicable, without mutual agreed terms, for whatever purpose (commercial, research, academic and technology transfer).</p> <p>Option 2</p> <p>is the use of protected traditional knowledge of another where the [subject matter]/[traditional knowledge] has been acquired by the user from the holder through improper means or a breach of confidence and which results in a violation of national law in the provider country, recognizing that acquisition of traditional knowledge through lawful means such as independent discovery or creation, reading books, receiving from sources outside of intact traditional communities, reverse engineering, and inadvertent disclosure resulting from the holders' failure to take reasonable protection measures is not [misappropriation/misuse/unauthorized use/unfair and inequitable uses.]</p> <p><b>[Unauthorized use</b> is use of protected traditional knowledge without the permission of the right holder.]</p>
Submission from Canada	<p>Canada attaches importance to co-management committees<sup>25</sup> which ensure that traditional knowledge is respected, valued and applied correctly.</p>

<sup>24</sup> As recommended in paragraph 69 (a)-(h) of the study on compliance in relation to customary law of indigenous and local communities UNEP/CBD/ABS/GTLE/3/INF/1.

Submission from Peru	Peru has <i>sui generis</i> legislation, which among other goals, addresses the misappropriation of traditional knowledge.
Submissions from India and Malaysia	Submissions from these two Parties mentioned that they have advanced registration systems for traditional knowledge (traditional knowledge digital database and Peoples Biodiversity Registers) and have made the secure database available to patent offices in order to stop misappropriation of traditional knowledge.
Submissions from Bolivia and Ecuador	Submissions from these two Parties mentioned that they are exploring registration systems for traditional knowledge as part of efforts to stop misappropriation of traditional knowledge.
Submissions from Brazil and Honduras	Submissions from these two Parties indicated that they are recognizing and promoting the development bio-cultural community protocols, as local <i>sui generis</i> systems, which amongst other goals, can assist in stopping the misappropriation of traditional knowledge.
Submission from Norway	<p>Norway mentions that it is important for indigenous decision makers themselves to decide what extent traditional knowledge is to be made known and how it is used.</p> <p>Under Norway's Nature Diversity Act § 61 a, 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.</p>
Submission from Sami Parliament	This submission emphasizes that guaranteeing prior informed consent for access and use of their knowledge is the most important tool against misappropriation.

46. The Working Group may wish to consider how the guidelines may address compliance with requirements for obtaining prior informed consent or approval and involvement of indigenous peoples and local communities for access to traditional knowledge, and establishing mutually agreed terms for sharing benefits arising from the use of such knowledge.

#### **E. Other elements**

47. The Working Group may also wish to consider whether there are elements beyond those identified above that should be included in the guidelines.

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<sup>25</sup> Area Co-Management Committees consist of six members, three of whom are appointed by the relevant Regional Inuit Association and three by Environment Canada.

#### IV. ELEMENTS FOR A DRAFT RECOMMENDATION

In the context of the information provided in the previous sections, the Working Group may wish to recommend that the Conference of the Parties at its thirteenth meeting adopt a decision along the following lines:

*The Conference of the Parties,*

*Recalling* the programme of work on the implementation of Article 8(j) and related provisions, as endorsed in decision V/16, as well as subsequent relevant decisions, including decision XII/12 D,

*Noting* the relevance of the *Tkarihwaï:ri Code of Ethical Conduct* and the *Akwe:Kon Guidelines*,

*Recalling* Aichi Target 18, which calls for traditional knowledge to be respected at all relevant levels by 2020,

*Recognizing* the contribution that guidance can make to the implementation of the Nagoya Protocol,

1. *Adopts* the Guidelines as contained in the annex to the present decision;
2. *Urges* Parties and *invites* other Governments to use the guidelines to develop mechanisms, legislation or other appropriate initiatives to ensure that private and public institutions interested in using traditional knowledge, innovations and practices obtain prior informed consent or approval and involvement of indigenous peoples and local communities that hold such knowledge, innovations and practices; to ensure the fair and equitable sharing of benefits arising from the use and application of such knowledge, innovations and practices; and for reporting and preventing unauthorized access of such knowledge;
3. *Invites* Parties, other Governments and relevant international organizations to promote the guidelines through appropriate education and awareness-raising activities;
4. *Also invites* Parties, other Governments, relevant organizations and organizations of indigenous peoples and local communities to make available through the Access and Benefit-sharing Clearing-House, where appropriate, good practices and good examples of community protocols relevant to access and benefit-sharing arising from the use of traditional knowledge;
5. *Further invites* Parties to consider mechanisms that could assist in monitoring access and use of traditional knowledge and possible compliance mechanisms or disincentives for unauthorized access, as appropriate and in accordance with the national circumstances, and to report on such arrangements through the national reports and through submissions to progress reports for Article 8(j) and related provisions; for consideration by the Subsidiary Body on Implementation;
6. *Invites* Parties, other Governments, relevant organizations and organizations of indigenous peoples and local communities to share measures, where they exist, and to send their views concerning measures to address publically available traditional knowledge, as well as cross-border measures for traditional knowledge shared across borders and requests the Executive Secretary to compile and analyse the measures and views received and make the results available for the consideration of the Working Group on Article 8(j) and related provisions at its tenth meeting, in order to contribute to and inform the further development and finalization of Tasks 7 and 12 of the revised multi-year programme of work on Article 8(j) and related provisions, as appropriate.
7. *Invites* the governing bodies of relevant international agreements and arrangements, agencies, and organizations to take into consideration the guidance contained in the annex to this decision in the implementation of their work;

8. *Invites* the Global Environment Facility, international funding institutions and development agencies and relevant non-governmental organizations, to consider, in accordance with their mandates, providing financial and technical assistance to indigenous peoples and local communities, particularly women within these communities, to raise their awareness and to build their capacity relevant to the implementation of the guidelines, and to develop, as appropriate, community protocols or processes for prior informed consent and fair and equitable benefit-sharing.

### *Annex*

## **DRAFT GUIDELINES FOR THE DEVELOPMENT OF MECHANISMS, LEGISLATION OR OTHER APPROPRIATE INITIATIVES TO ENSURE THE PRIOR INFORMED CONSENT OR APPROVAL AND INVOLVEMENT OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES FOR ACCESSING THEIR KNOWLEDGE, INNOVATIONS AND PRACTICES, FOR FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THE USE OF THEIR KNOWLEDGE, INNOVATIONS AND PRACTICES, AND FOR REPORTING AND PREVENTING UNAUTHORIZED ACCESS OF SUCH KNOWLEDGE**

### **I. OBJECTIVE**

1. To provide guidance for the development of mechanisms, legislation or other appropriate initiative to ensure that potential users of traditional knowledge obtain the prior informed consent or approval and involvement of the relevant indigenous peoples and local communities, that indigenous peoples and local communities obtain a fair and equitable share of benefits arising from the use and application of their knowledge, innovations and practices, and for reporting on and preventing unauthorized access of traditional knowledge.

### **II. GENERAL PRINCIPLES**

#### **A. Prior informed consent and approval and involvement**

2. Access to traditional knowledge, innovations and practices of indigenous peoples and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices.<sup>26</sup>

3. Prior informed consent and approval and involvement should be understood as a continual process building mutually beneficial, ongoing arrangements between users of traditional knowledge and indigenous peoples and local communities, in order to build trust, good relations, mutual understanding, inter-cultural spaces, knowledge exchanges, create new knowledge and reconciliation.

4. It is not practical to propose a “one-size-fits-all” approach for prior informed consent or approval and involvement of indigenous peoples and local communities as regards access to their knowledge, innovations and practices; and therefore these guidelines are intended to be used taking into account national and local circumstances.

#### **B. Fair and equitable sharing of benefits**

5. Indigenous peoples and local communities should receive fair and equitable benefits for the use of their traditional knowledge.

6. Benefit-sharing should be regarded as a way of recognizing and strengthening the contribution of indigenous peoples and local communities to the conservation and sustainable use

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<sup>26</sup> General Principle 5 of the programme of work on Article 8(j) and related provisions.

of biological diversity, including by supporting the intergenerational transmission of traditional knowledge.

7. Benefit-sharing should to be equitable within and among relevant groups, taking into account relevant community level procedures, and gender and age/intergenerational considerations.

### **C. Compliance and unauthorized access**

8. Implementing measures for prior informed consent or approval and involvement for access to traditional knowledge and mutually agreed terms for sharing benefits arising from its use is the most important tool against unauthorized access.

## **III. UNDERSTANDING OF PRIOR INFORMED CONSENT OR APPROVAL AND INVOLVEMENT**

9. *Prior* implies that consent is to be sought sufficiently in advance of any authorization to access traditional knowledge respecting the cultural processes and time requirements of indigenous peoples and local communities, in order to obtain consensus.

10. *Informed* implies that information is provided that covers a full range of aspects, including the intended purpose of the access, its duration and scope; a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and effective participation are crucial components of a consent or approval process.

11. *Consent* or *Approval* is the agreement of the knowledge holders to provide a potential user with access to the traditional knowledge in question. Consent or approval shall be obtained in good faith with no coercion, intimidation or manipulation.

12. *Involvement* refers to the effective participation of indigenous peoples and local communities, as knowledge holders or providers, in decision-making processes in order to grant approval as well as the desirability for the development of ongoing mutually beneficial arrangement between traditional knowledge providers or holders and users.

13. *Prior Informed Consent or Approval and Involvement* may be required at different levels depending on national circumstances<sup>27</sup> and the diverse internal organization of various indigenous peoples and local communities.<sup>28</sup>

## **IV. PROCEDURAL CONSIDERATIONS FOR PRIOR INFORMED CONSENT OR APPROVAL AND INVOLVEMENT, AND MUTUALLY AGREED TERMS FOR BENEFIT-SHARING**

### **A. Relevant authorities**

14. *Desirable* elements of consent or approval processes and establishment of mutually agreed terms may include:

(a) A competent authority at the level of indigenous peoples and local communities with official recognition by the relevant Government, as competent authorities of indigenous and local communities;

(b) Elements of a consent or approval process including:

(i) Written application in a manner and language comprehensible to the traditional knowledge holder;

<sup>27</sup> i.e. from the Government at the federal, provincial, or departmental level or from agencies and organizations to which this authority is delegated or with which it is shared.

<sup>28</sup> Which may be traditional.

- (ii) Legitimate and culturally appropriate process and decision-making including possible social, cultural and economic impacts;
- (iii) Adequate information, timing and deadlines;
- (iv) Specification of use with clause to address change of use and transfer to third parties;
- (v) Implementation and monitoring;
- (c) A template for applicants taking into account the possible actions required by potential users of traditional knowledge;
- (d) Prior informed consent or approval and involvement granted/established on the basis of mutually agreed terms ensuring the equitable sharing of benefits;
- (e) Consultation process with indigenous and local communities;
- (f) Procedures consistent with customary practices.

15. These elements should complement requirements in the Nagoya Protocol, particularly those in Articles 12 and 13.

**B. Process for requesting and considering requests for prior informed consent or approval and involvement, and establishing mutually agreed terms for benefit-sharing**

*Community protocols and customary law*

16. In line with Article 12 of the Nagoya Protocol, community protocols and customary law can play a role in processes for access to traditional knowledge and the fair and equitable sharing of benefits arising from the use of such knowledge. They can contribute to legal certainty, transparency and predictability concerning processes for obtaining prior informed consent or approval and involvement of indigenous peoples and local communities and for establishing mutually agreed terms for benefit-sharing.

17. *Community protocols* is a term that covers a broad array of documents generated by communities to set out how they expect other stakeholders to engage with them. They may reference customary as well as national or international laws to affirm their rights to be approached according to a certain set of standards. Articulating information, relevant factors, and details of customary laws and traditional authorities helps other stakeholders to better understand the community's values and customary laws. Community protocols provide communities an opportunity to focus on their development aspirations vis-a-vis their rights and to articulate for themselves and for users their understanding of their bio-cultural heritage and therefore on what basis they will engage with a variety of stakeholders. By considering the interconnections of their land rights, current socio-economic situation, environmental concerns, customary laws and traditional knowledge, communities are better placed to determine for themselves how to negotiate with a variety of actors.<sup>29</sup>

18. Community protocols can be produced in a range of formats including through documentation or other media such as video, and may contain but are not limited to information about:

- (a) Community identity;
- (b) Community history;
- (c) Community territoriality;

<sup>29</sup> Refer to <http://www.unep.org/communityprotocols/protocol.asp> and [http://www.unep.org/delc/Portals/119/publications/Community\\_Protocols\\_Guide\\_Policymakers.pdf](http://www.unep.org/delc/Portals/119/publications/Community_Protocols_Guide_Policymakers.pdf)

- (d) Resources used (mainly biological and may include seasonality and management practices);
- (e) Information about their traditional knowledge (but not the traditional knowledge itself);
- (f) Social organization and decision making processes (which are often collective decision-making procedures at community level);
- (g) Relations with other institutions relevant to the agreement.

19. Community protocols can address any number of community issues. In addition to regulating the actions of researchers, they can also articulate a number of concerns important to communities, relevant to biological diversity, such as how they intend to:

- (a) Conserve biodiversity;
- (b) Sustainably use plants and animal genetic resources;
- (c) Manage and benefit from local biodiversity;
- (d) Use, protect and benefit from traditional knowledge;
- (e) Provide prior informed consent or approval and involvement to access lands, natural resources or traditional knowledge for any number of reasons including commercial and non-commercial research and by the media;
- (f) Ensure environmental and other laws are implemented according to customary laws;
- (g) Oppose unsustainable development on their lands;
- (h) Engage with governmental or other support.

20. Indigenous peoples and local communities may wish to include special measures in their community protocols or other procedures for encouraging non-commercial research, participatory research and joint research for conservation and sustainable use of biological diversity.

## **V. EQUITABLE SHARING OF BENEFITS**

21. In order to achieve an equitable sharing of benefits, Parties and users of traditional knowledge should take into account:

- (a) Partnership and cooperation should guide the process regarding mutually agreed terms to ensure the equitable sharing of the benefits arising from the utilization of traditional knowledge, innovations and practices, with and among the relevant communities or traditional knowledge holders/providers;
- (b) Community protocols, which may provide guidance from the community perspective on the equitable sharing of benefits;
- (c) The benefits obtained from the use of traditional knowledge, innovations and practices, including results of research, should be shared with the relevant indigenous peoples and local communities in understandable and culturally appropriate formats, with a view to building enduring relationships, promoting intercultural exchanges, knowledge and technology transfer, synergies, complementarity and respect;
- (d) In developing mutually agreed terms, Parties, other Governments, and applicants seeking access to traditional knowledge should make efforts to ensure that indigenous peoples and local communities can negotiate on a fair and equal basis and are fully informed about any proposals including potential opportunities and challenges in order to make informed decisions.

### **A. Possible mechanisms for benefit-sharing**

22. Mechanisms for benefit-sharing may vary depending upon the type of benefits, the specific conditions in the country and the stakeholders involved. The benefit-sharing mechanism should be flexible as it should be determined by the partners involved in benefit-sharing and will vary on a case-by-case basis.<sup>30</sup>

23. Benefits to be shared may be influenced by numerous factors including to what extent traditional knowledge is used in final product development.

24. Parties, other Governments and relevant regional organizations may wish to consider, taking into account regional arrangements and models laws, the establishment of regional trust funds or other forms of transboundary cooperation, as appropriate, for traditional knowledge held across borders, for traditional knowledge held in several countries or where the traditional knowledge is unattributed<sup>31</sup> or publically available.

### **B. Types of benefits**

25. Benefits may include monetary and non-monetary benefits, including but not limited to those listed in the annex to the Nagoya Protocol.

## **VI. COMPLIANCE AND UNAUTHORIZED ACCESS**

26. These guidelines are voluntary by their nature; however, Parties and other Governments who wish to use the guidelines in the development of mechanisms, legislation or other appropriate initiatives to ensure that private and public institutions, interested in using traditional knowledge obtain the prior informed consent or approval and involvement of indigenous peoples and local communities and establish mutually agreed terms for benefit-sharing may wish to consider incentives or compliance mechanisms. These should complement requirements in the Nagoya Protocol, particularly Articles 16 and 18, as well as the cooperative procedures and institutional mechanisms to promote compliance with the provisions of the Nagoya Protocol and to address cases of non-compliance adopted by the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol (decision NP-1/4).

27. Compliance measures that also support the prior informed consent or approval and involvement of indigenous peoples and local communities for access to their traditional knowledge and benefit-sharing with indigenous peoples and local communities for use of their traditional knowledge could include:

- (a) Capacity-building, awareness-raising and information-sharing within indigenous and local communities;
- (b) Codes of conduct and best practice codes of users;
- (c) Model contractual clauses for mutually agreed terms to promote equity between the negotiating positions of the parties;
- (d) Minimum standards for access and benefit-sharing agreements;
- (e) Disclosure requirements concerning the origin or source of traditional knowledge to which access is granted.

28. Parties and other Governments may wish to consider:

- (a) The complex nature of traditional knowledge and evidentiary issues in customary legal traditions mean that conventional national legal systems may not be appropriate to settle disputes arising over traditional knowledge;

<sup>30</sup> Adapted from paragraph 49 of the Bonn Guidelines.

<sup>31</sup> The knowledge holders are no longer identifiable.

(b) That a competent national authority should engage users and providers of traditional knowledge early in the access process, and may need to revisit its approval of an application upon the complaint by an affected community;

(c) In cases such as disputes about ownership of traditional knowledge, indigenous peoples and local communities should be encouraged to resolve difference internally according to customary law or alternate dispute resolution processes as agreed to by the entities in dispute. The results of the customary or alternative dispute settlement may then ultimately approved by the competent authority. Additionally, the competent authority could play a facilitating role in alternative dispute resolution.

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