

# Implementation of the Nagoya Protocol within Canada

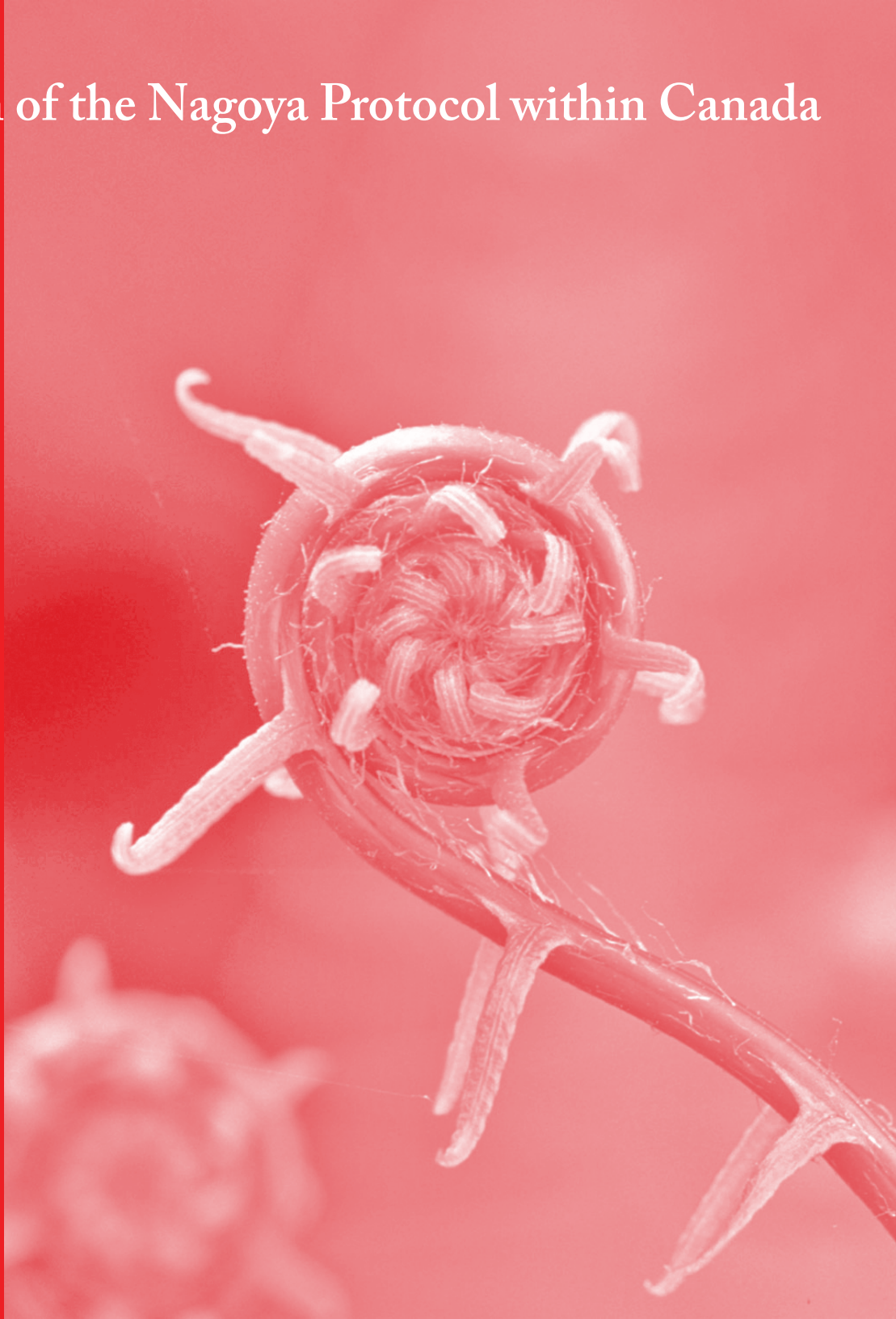
Views and Relevant  
Information from an  
Aboriginal Peoples  
perspective;  
Submitted to the  
First Meeting of the  
Open-ended Ad Hoc  
Intergovernmental  
Committee for the Nagoya  
Protocol – Montreal, Canada  
6-10 June, 2011.

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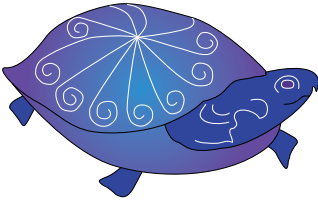


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# Implementation of the Nagoya Protocol within Canada

Views and Relevant Information from an Aboriginal Peoples perspective; Submitted to the First Meeting of the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol – Montreal, Canada 6-10 June, 2011.

Convention on Biological Diversity, Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.

## INDEX

<i>Forward</i> .....	iii
<i>Introduction</i> .....	1
<i>ISSUE 1: The Modalities of Operation of the Access and Benefit Sharing Clearing-House</i> .....	7
<i>ISSUE 2: Measures to Assist in the Capacity-Building, Capacity Development and Strengthening of Human Resources and Institutional Capacities in Developing Countries</i> ...	12
<i>ISSUE 3: Measures to Raise Awareness of the Importance of Genetic Resources and Associated Traditional Knowledge, and Related Access and Benefit Sharing Issues</i> .....	16
<i>ISSUE 4: Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Protocol and to Address Cases of Non-Compliance, including Procedures and Mechanisms to Offer Advice or Assistance</i> .....	20
<i>Conclusion</i> .....	23

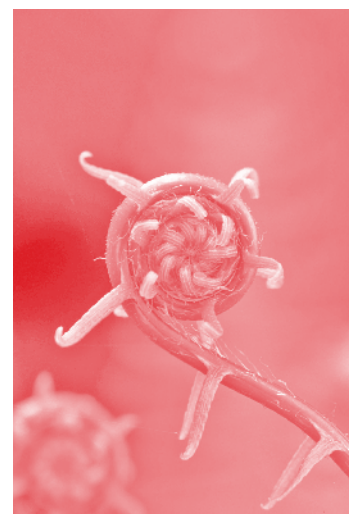
## FORWARD

The access, use, fair, and equitable sharing of benefits arising from natural resources and their genetic components (ABS) are a part of Indigenous Peoples' manifestation of sustainable development.

Indigenous Peoples' knowledge, practices, and innovations for thousands of years about natural resources grandfather contemporary bio-technology. The human condition to search, understand, test, and work with terrestrial, aerial, and aquatic biodiversity is in response to an appetite to explore and change natural biodiversity resources, which could lead to life-serving and life-saving discoveries.

The views and relevant information on the four issues requested by the Executive Secretary of the Secretariate to the *Convention on Biological Diversity* (CBD), preparatory to the first meeting, are discussed in a manner where each issue is tied-in with the other. As is the Indigenous Peoples' holistic worldview, we cannot look at “*modalities of the operation of an Access and Benefit Sharing Clearing-House*” without addressing the issues of “*Indigenous Peoples' capacity-building*”, “*Indigenous Peoples' capacity development*”, “*strengthening Indigenous Peoples' human resources and institutional capacities*”, “*measures to raise awareness*”, or “*cooperative measures to promote compliance and/or offer advice or assistance*” without each issue being interconnected with the other and affirming the significance of these fundamental issues:

1. In their implementation of the *Nagoya Protocol*, the Parties, must have the effective participation of the Indigenous Peoples and local communities concerned, and shall establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations, including measures as made available through the Access and Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the utilization of such knowledge. (*Nagoya Protocol* Article 12.2)
2. Canada's assertion to complete authority to determine access to genetic resources is qualified and limited by the provisions of Sections 25 and 35 of the supreme national domestic law - the *Constitution Act, 1982*.
3. Aboriginal Peoples within the Federation of the Peoples of Canada have survived the derogation of our *complete liberty* (Treaty of 1752) of access to lands and natural resources and resisted forced dislocation from traditional ancestral homeland territories, denial of birthright identity, and transgressions of international compacts of peace, friendship, and trade by our tenacity and persistence as Aboriginal Peoples.
4. For the ABS user, the abuse of knowledge and theft of resources, or the use of knowledge and resources without the equitable sharing of benefits is over.
5. The centuries of dislocating Aboriginal Peoples from our natural resources and their



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genetic properties, disinheriting Aboriginal Peoples from our natural resources and their genetic properties, denying Aboriginal Peoples our legal *complete liberty* of access and use of natural resources and their genetic properties for our sustainable development and continuum as Aboriginal Peoples, is over.

6. Indigenous Peoples around the world assert fundamental rights of complete control over cultural heritage, traditional knowledge, traditional cultural expressions, sciences, technologies, cultures, 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, including complete control over our intellectual properties, as articulated in several international conventions, protocols, statements, and declarations, including the *United Nations Declaration on the Rights of Indigenous Peoples, 2007* (UNDRIP).
7. Aboriginal Peoples within the Federation of Canada must be allowed the responsibility to effectively demonstrate our vital role in conservation, sustainable development, and benefit-sharing under fair and equitable terms, as members of the *family of humanity* on Mother Earth.
8. Aboriginal Peoples cannot and will not allow Canada to twist the *Nagoya Protocol* to accommodate some perverse economic incentive alone, or to slip the *Nagoya Protocol* away, unnoticed from the public. The *Nagoya Protocol* blurs the line over which States must not trespass on Indigenous Peoples' development, access, use, and sharing of benefits from natural resources and their genetic properties and knowledge thereof.

From the perspective of Aboriginal Peoples within the Federation of the Peoples of Canada, the views shared on the four issues to move the *Nagoya Protocol* ahead, challenges Canada and the Open-ended Ad-hoc Intergovernmental Committee to note the following:

1. All of us must remain informed that, for Indigenous Peoples, natural resources and the biodiversity of natural resources includes genetic resources. The conciliation term of “genetic resources”, adopted by the CBD in Article 15.1, is a limited understanding of natural resources, which unfortunately has carried itself into the *Nagoya Protocol*.
2. The restricted term “genetic resources” is troublesome and its introduction into the *Nagoya Protocol* appears to upstage or put on hold many other concurrent works by several agencies of the UN family on the subject of access, use, and benefit-sharing of natural resources.
3. Aboriginal Peoples, nested in a developed colonial federation, like Canada, take issue with the restriction on capacity-building limited only to “developing countries”. This is an extreme example of unwittingly carrying forward in 2010 the *doctrine of dominance* to discount Aboriginal Peoples and our continuum over thousands of years as Aboriginal Nations of Aboriginal Peoples. Almost every report by UN special rapporteurs on Canada confirm that the social and economic conditions, capacities,

and human and institutional resources of Aboriginal Peoples within Canada are in many cases far below that of many developing “third world” countries.

4. No two countries share identical political and legal experiences, especially on the subjects of Indigenous knowledge, biodiversity, and ABS. For example, in Canada, the structure and operational framework of any ABS Clearing-House must be negotiated with the full and effective participation of Aboriginal Peoples in the context of Canada’s unique reality as a federation of Peoples, formed by a tapestry of royal proclamations, pre-Confederation treaties, numbered treaties, modern land-claims, and modern day agreements, recognized and affirmed by the *Constitution Act, 1982*.
5. A National ABS Clearing-House must aspire to create a model of operations, attuned to constantly balance the interest of *providers and users*, or those who seek access to genetic resources and associated Indigenous knowledge.
6. For basic transparency and representative governance in Canada, Aboriginal Peoples must be a part of the decision-makers or oversight council for any National ABS Clearing-House.
7. A National ABS Clearing-House, as the National ABS Focal Point in Canada, must comply with the constitutional provisions of Section 25 and 35 of the *Constitution Act, 1982* and must honour jurisprudence on the subject of “dealings with Aboriginal Peoples”. Dealings with Aboriginal Peoples must not appear to be sharp; the *Honour of the Crown* is at stake.
8. Activities which may affect Aboriginal Peoples’ resources, access, and use rights require consultation and accommodation. If no accommodation can be achieved, then compensation must be made to the affected Aboriginal People.
9. Indigenous Peoples throughout the world hold holistic approaches to natural resources. Discussions on a narrow construct of resources disrespects the worldviews of Indigenous Peoples, many of whom continue on traditional ancestral homeland territories which predate the modern States in which they are nested.
10. In Canada, a federated State, the authorities and jurisdictions for natural resources is a matter of shared responsibilities between the federal government, provincial governments, territorial governments, and Aboriginal Peoples, through our Treaty Rights, Aboriginal Rights, and other rights relationships affirmed by the *Constitution Act, 1982*, and justiciated to be the common law of Canada.

[It is this federal reality which required the federal Government of Canada to establish a national accord with provincial jurisdictions before Canada could enact a *Species at Risk Act (SARA)*.] SARA involves and accommodates the authorities of federal, provincial, territorial, land-claims governments, and Aboriginal Peoples in the implementation of Canada’s species conservation commitments under the CBD.



**A National ABS**

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***Constitution Act, 1982***





## INTRODUCTION

A series of stated international commitments for Indigenous Peoples to realize control over developments affecting their person, their lands, their territories, their resources, 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, and the right to maintain, control, protect, and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions, has changed the attitudes of many States. Many States now accept the proposition of different worldviews between different Peoples (e.g., the philosophies of Johann Wolfgang von Goethe and Heinz Kohut) and find it easier to respect Indigenous Peoples' worldviews or cosmos about biodiversity and the concept that *all life is interdependent and interconnected with all that is life on Mother Earth*.

The United Nations *World Summit on Sustainable Development* in Johannesburg, South Africa (26 August – 4 September, 2002), for the first time in UN history adopted the unqualified term “Indigenous Peoples” in its official declaration and “reaffirmed the vital role of Indigenous Peoples in sustainable development”.

The CBD, adopted in 1992 has been accepted by 193 States. The CBD inspired the international community's growing commitment to “sustainable development”. This convention represents a dramatic step to recognize the role of Indigenous Peoples and local communities to respect, preserve, and maintain knowledge, innovations, and practices in the conservation of biological diversity, the sustainable use of its components, and to expect the fair and equitable sharing of benefits arising from the use of natural and genetic resources who's *Source of Origin* is from Indigenous Peoples and their traditional ancestral homeland territories.

Articles 8(j) and 10(c) of the CBD calls upon contracting parties to respect, preserve, and maintain knowledge, innovations, and practices of Indigenous Peoples and their communities and; furthermore, to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

It is important to note that Article 15.1 of the CBD sets out a condition to the “sovereign rights” of States over natural resources and qualifies the authority of States to determine access to genetic resources to be “subject to national legislation”.

Article 16 of the CBD defines the basic obligations of each Contracting Party regarding access to and transfer of technology. The basis of transfer to developing countries, and what measures are to be taken to institute the transfers contemplated. Transfers are to be provided or facilitated under fair and most favourable terms, including concessional and preferential terms where mutually agreed and where necessary in accordance with financial mechanisms established by Articles 20 and 21. Glowka et. al, raised that Article 16, together with Article 19 (the



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handling of biotechnology and the distribution of its benefits), Article 20 (financial resources), and Article 21 (financial mechanisms), is probably the most controversial article of the CBD.

*“It reflects the years of north-south debate in other fora over the issue of technology transfer; and, regarding some of the technology at stake, the related sub-issue of intellectual property rights.”<sup>1</sup>*

Against this backdrop of support and the growing recognition of the vital role and knowledge of Indigenous Peoples, there remains the controversy as to disclosure of *Source of Origin* (SoO) and the best approach to deal with the matter of access, use, and benefits-sharing of genetic resources. As a result of past and continued practices of theft, greed, denial, and harbouring bio-piracy, any meaningful progress to realize Article 17.2 and Article 18.3 of the CBD has been denied to Indigenous Peoples, as well as all humankind.

*Article 17.2: Such exchange of information shall include exchange of results of technical, scientific, and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, Indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1. It shall also, where feasible, include repatriation of information.*

*Article 18.3: The Conference of the Parties, at its first meeting, shall determine how to establish a clearing-house mechanism to promote and facilitate technical and scientific cooperation.*

The 2010 *Nagoya Protocol* is significant to Indigenous Peoples, as is the work of the Open-ended Ad Hoc Intergovernmental Committee to tackle the issue of:

*“determining the modalities of the operation of the Access and Benefit Sharing Clearing-House, including reports on its activities”, including the exchange of information, which includes the exchange of results of technical, scientific, and socio-economic research, as well as information on training and surveying programs, specialized knowledge, Indigenous and traditional knowledge as such and in combination with technologies, and where feasible including repatriation of information.*

Article 5 of the *Nagoya Protocol* brings hope and an opportunity for Indigenous Peoples to realize benefits.

- 1. In accordance with Article 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources that is the country of origin of such resources of a Party that has*

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<sup>1</sup> Glowka, Lyle, Françoise Burhenne-Guilmin, and Hugh Synge, 1994, *A Guide to the Convention on Biological Diversity*, with Jeffery A. McNeely and Lothar Gündling, 3<sup>rd</sup> Printing, International Union for the Conservation of Nature, Environmental Policy and Law Paper No. 30, Gland, Switzerland and Cambridge, UK, p. 84.

*acquired the genetic resources in accordance with the Convention. Such sharing shall be upon mutually agreed terms.*

2. *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.*
3. *To implement paragraph 1, each Party shall take legislative, administrative, or policy measures, as appropriate.*
4. *Benefits may include monetary or non-monetary benefits, including but not limited to those listed in the Annex.*
5. *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.*

Also Article 12.2 of the *Nagoya Protocol* creates a path to turn hope into language of partnerships:

- 12.2 *Parties, with the effective participation of the Indigenous and local communities concerned, shall establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations, including measures as made available through the Access and Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the utilization of such knowledge.*

To place these articles into context and their meaning to Indigenous Peoples' access, use, and fair and equitable sharing of the benefits arising from natural genetic resources, practices, innovation, and knowledge, we must also keep under review Article 4.2 of the *Nagoya Protocol* "Relationship with International Agreements and Instruments":

- 4.2 *Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.*

Of particular relevance to our views and presentation of relevant information, the preambular statements of *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, of September 2007 are notable:

*Affirming further that all doctrines, policies and practise based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious,*

*ethnic, or cultural differences are racist, scientifically false, legally invalid, morally condemnable, and socially unjust.*

*Concerned that Indigenous Peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories, and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.*

*Recognizing the urgent need to respect and promote the inherent rights of Indigenous Peoples which derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories, and philosophies, especially their rights to their lands, territories, and resources.*

*Recognizing also the urgent need to respect and promote the rights of Indigenous Peoples affirmed in treaties, agreements, and other constructive arrangements with States.*

*Convinced that control by Indigenous Peoples over development affecting them and their lands, territories, and resources will enable them to maintain and strengthen their institutions, cultures, and traditions, and to promote their development in accordance with their aspirations and needs.*

With these statements, conventions, declarations, and specific articles, we should also keep under constant review the evolutionary statements, protocols, conventions, and declarations, like the *ILO Convention 107 – The Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries*, *The International Covenants on Human Rights* and the *Optional Protocol*, *ILO Convention 169 – The Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, and the *United Nations Declaration on the Rights of Indigenous Peoples*.

The relevance of these documents to the views expressed about the four issues before the Open-ended Ad-hoc Intergovernmental Committee traces a modern forty year struggle for the step-by-step recognition, respect, and belief in the Indigenous Peoples of the world as members of the international family of Peoples continuing on Mother Earth has been achieved.

The *Nagoya Protocol* represents a new point-of-departure for States and Indigenous Peoples as we reclaim our rightful place among the councils of government, and, with States, promote that access and use of genetic resources must apply fair and equitable sharing of benefits, accrued to Indigenous Peoples who are the *Source of Origin* of the knowledge or on who's traditional ancestral homelands territories the resources occur.

We must all also be conscious of the:

*“importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere” and that “the conservation of biological diversity is a common concern of humankind.”*

Our views are also guided by the purposes and principles of the *Charter of the United Nations*, where “members shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”

Canada, as a Federation of Peoples, to date, post-Nagoya, does not have a publicly vetted “ABS strategy”, nor an “ABS policy”. Canada, post-Nagoya, has not announced an “ABS process”, for the meaningful, effective, and respectful direct involvement of Aboriginal Peoples within the Federation of the Peoples of Canada in the development of an ABS strategy. Until such time as Canada begins a formal process, with meaningful support to Aboriginal Peoples for our effective participation, we find it necessary to respond to the four issues at hand and provide our views with relevant information directly to the Open-ended Ad-hoc Intergovernmental Committee, and fellow brother and sister Indigenous Peoples around the world and member States of the United Nations.

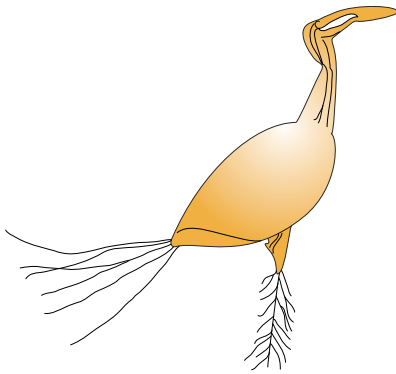
We draw extensively on the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* and, most particularly as Aboriginal Peoples within the Federation of the Peoples of Canada, we share our views with the guarantee pronounced by the highest national law of Canada, the *Constitution Act, 1982*, particularly Section 25 of the Charter and Part II Section 35 of the Constitution, which guarantees Aboriginal Peoples within the Federation of the Peoples of Canada the following:

25. *The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, Treaty, or other rights or freedoms that pertain to the Aboriginal Peoples of Canada, including*
  - (a) *any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and*
  - (b) *any rights or freedoms that now exist by way of land claims agreements or may be so acquired.*

Part II of the *Constitution Act, 1982*, the Aboriginal Rights of Aboriginal Peoples within the Federation of the Peoples of Canada:

35.
  - (1) *The existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed.*
  - (2) *In this Act, “Aboriginal Peoples of Canada” includes the Indian, Inuit, and Métis Peoples of Canada.*
  - (3) *For greater certainty, in subsection (1) “Treaty Rights” includes rights that now exist by way of land claims agreements or may be so acquired.*
  - (4) *Notwithstanding any other provision of this Act, the Aboriginal and Treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.*

We raise these two sections about the supreme national law in Canada, because it provides



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of Canada

clarity on the application of Article 15.1 of the CBD in Canada. Notably, the Supreme Court of Canada has, in numerous decisions since 1985, affirmed, as the common law of Canada, that actions or perceived actions that affect Aboriginal, Treaty, or other rights of Aboriginal Peoples, which the Crown (i.e., Government of Canada) ought to know about, automatically triggers a process for consultation, accommodation, and compensation. The process is fluid, dependent on the level or extent of affects, and must not be one which has *sharp dealings* or violates the *Honour of the Crown* to Aboriginal Peoples.

Natural resources and their genetic properties are the property of Aboriginal Peoples within the Federation of the Peoples of Canada, based on our traditional ancestral homeland territories, and protected by Treaty Rights, Aboriginal Rights, and other rights. Treaty Rights (*complete liberties*) have been agreed to in many pre-Confederation Treaties between the Crown and the particular Aboriginal Nation of an Aboriginal People and form nation-to-nation relationships, recognized in international law.

The Supreme Court of Canada recognizes Treaty Rights, Aboriginal Rights, and other rights, as integral to the relationships fabric forming the Federation of the Peoples of Canada. When addressing the four fundamental issues under review by this Intergovernmental Committee, we must be mindful of previous work completed on the subject of traditional knowledge and access and use of genetic resources, as promulgated in many discussionals, publications, acts, and protocols. ABS continues to be a significant issue for all States and particularly Indigenous Peoples, and is a living, evolving subject acknowledging our life and our continuum of thousands of years as unique Indigenous Peoples on traditional ancestral homeland territories.

Aboriginal Peoples cannot be discounted nor have our rights and achievements reversed. We cannot allow the intent of the *Nagoya Protocol*, which advances access to resources and fair and equitable sharing of benefits, to be subverted by narrow interpretations and unscrupulous accommodations.

Indigenous Peoples' continuum and the growing recognition of our roles and contributions to humanity must translate into tangible results. The fair and equitable sharing of benefits arising from access and use of genetic resources located or sourced on traditional ancestral homelands of Indigenous Peoples is one way to realize the ideal of our role in sustainable development and in the progress of humankind on Mother Earth.

Canada is the second largest country in the world, nested within the traditional ancestral homeland territories of Aboriginal Peoples. Aboriginal Peoples formed treaty relationships with the Crown before Canada formed a federation, which treaties and proclamations are recognized in the *Constitution Act, 1982*. Canada has a large and unique natural diversity of fifteen terrestrial eco-zones and thirteen aquatic bio-regions. This vastness of terrestrial and aquatic eco-zones and bio-regions holds untold terrestrial and aquatic natural resources with their genetic properties – resources of particular importance and substantial value to Aboriginal Peoples, Canadians, and humankind.



When we think of this rich genetic resource reservoir, it is not hard to understand why Canada asserts complete authority over the access to these resources. It is also not hard to understand why the over 1.6 million Aboriginal persons belonging to Aboriginal Nations within the Federation of the Peoples of Canada, many of whom hold pre-Confederation treaties with the Crown, assert, with the force of the supreme national law of Canada (i.e, the *Constitution Act, 1982*), authority and proprietary rights over natural resources, their genetic properties, and the knowledge thereto.

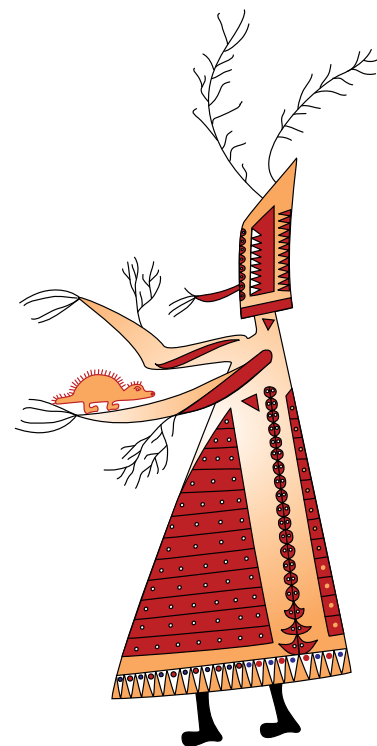
**ISSUE 1:**      **The Modalities of Operation of the Access and Benefit Sharing Clearing-House, including reports on its activities, shall be considered and decided upon by the Conference of the Parties serving as the meeting of the Parties to this Protocol at its first meeting, and kept under review thereafter.**

At the national level, no two countries share identical political and legal experiences, especially on the subject of Indigenous knowledge, biodiversity governance, and ABS. The structure and operational framework of any ABS Clearing-House should be negotiated in the context of a country's particular reality. For instance, in Canada, Aboriginal Peoples have been tending sources and carrying forward Aboriginal knowledge about genetic diversity and genetic practices for several millennia. Aboriginal knowledge about the access, use, and conservation of a vast diversity of genetic material has sustained and advanced the continuum of Aboriginal Peoples, in some cases for over 10,000 years. Through transfer of Aboriginal knowledge to other Canadians, in some instances willingly and in many more instances through unscrupulous exploitation of Aboriginal Peoples, the reality exists that Aboriginal Peoples' knowledge is the grandfather or forerunner of what we term today "bio-technology".

As a first step, taking into consideration the objectives of Article 1 of the CBD and that of Article 1 of the *Nagoya Protocol*, Parties to both the CBD and the *Nagoya Protocol* have an obligation to liaise with their constituent Indigenous Peoples and various other stakeholders to establish a "National Focal Point" or a "Competent National Authority" on the subject of ABS; to act in liaison with the "*Global ABS Clearing-House*" pursuant to Article 14 of the *Nagoya Protocol*.

As its primary objective, a National ABS Focal Point should serve as a "*National ABS Clearing-House*". In the context of ABS, the National ABS Focal Point does not need to re-invent the wheel. Rather, it should build upon and give effect to the general principles such as, disclosure of *Source of Origin* (SoO), obtaining *Free, Prior, and Informed Consent* (FPIC), and developing *Mutually Agreed Terms* (MAT), established first pursuant to the *Bonn Guidelines*, most of which is now affirmed in the text of the *Nagoya Protocol*.

For Aboriginal Peoples within Canada, Articles 6 and 8(j) of the CBD, requires Canada to not only respect, preserve, and maintain knowledge, innovations, and practices of the Indigenous Peoples, but also to develop national strategies, plans, and programmes, which promote the widest application of such knowledge, innovations, and practices, with the approval and involvement of the holders of such knowledge, innovations, and practices.



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For greater certainty, Article 8(j) also requires Canada to encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices. It would require in some cases an adjustment or calibration of existing or emerging national bureaucracy on the governance of Indigenous knowledge and biodiversity, in order to realise some of the new dynamics and orientation on ABS introduced by the *Nagoya Protocol*.

The operational imperatives for the Competent National Authority, as a National ABS Clearing-House, include the need to prioritize transparency, accountability, ensure certainty and efficacy, and to eschew burdensome formality.

A National ABS Focal Point or National ABS Clearing-House from our perspective requires a broad approach. Canada has recognized that the founding Peoples of Canada include the French, the English, and in 1982, finally recognized “the Aboriginal Peoples of Canada” within the Federation of the Peoples of Canada. This supreme recognition in effect includes the seventy-three remaining Aboriginal Nations of Aboriginal Peoples continuing throughout traditional ancestral homeland territories nested within the present borders of the Federation of the Peoples of Canada.

In Canada, a National ABS Focal Point or National ABS Clearing-House would require a multi-government accord between the federal government, provincial governments, territorial governments, and Aboriginal Peoples (who hold Treaty Rights, Aboriginal Rights, and other rights protected under Section 25 and 35 of the *Constitution Act, 1982* and the force of common law).

The reality of a multi-Peoples, multi-diverse, multi-lingual, multi-cultural, multi-mosaic character, and multi-relationship history between Aboriginal Peoples within Canada and the French and English pre-Confederation sovereign powers requires that a National ABS Focal Point or National ABS Clearing-House foremost recognize, respect, and accommodate the different worldviews and approaches of the different Aboriginal Peoples to our natural resources, genetic resources, knowledge, uses, and benefits arising therefrom. In other words, the clearing-house concept, nationally and globally, must take into account the “homo-centric worldview” of dominating developed States and the “eco-centric worldview” of Indigenous Peoples of the world whose knowledge, innovations, and concepts of benefit-sharing are integral, interconnected, and integrated with the land, water, air, and all natural life itself.

A National ABS Clearing-House must reflect a national strategy and be accredited or accepted by an international body to confirm that it is compliant with the *Nagoya Protocol*, is transparent, is approachable with clearly defined operational procedures, and is independent of national self-interest. It is imperative that Indigenous Peoples be full participating members of any national decision-making council or oversight council for any national or global ABS Clearing-House or National ABS Focal Point.

Operational procedures should be subject to testing and challenge at the national level and at the international level for final determination. Operational procedures should espouse the principles



and purposes of the UN Charter, to be in good faith. In Canada, operations must be subject to the paramountcy of the *Constitution Act, 1982*, uphold the *Honour of the Crown*, without sharp dealings, and the common law on Aboriginal, Treaty, and other rights of Aboriginal Peoples.

The expropriation of a genetic resource without disclosure of its *Source of Origin*, or reluctance to disclose the *Source of Origin* proprietary to an Indigenous People within a traditional ancestral homeland territory, or reluctance to recognize an Indigenous People's traditional ancestral homeland territory by a State's federal or provincial government power would require more than a criminal arm of an existing judiciary or civil arm of a domestic judiciary to examine and render a decision on the matter of proper disclosure of *Source of Origin*. This same principle applies to disputes for ownership, access, use, *Free, Prior, and Informed Consent*, *Mutually Agreed Terms*, and allegations of bio-piracy.

In light of the international global scope of Indigenous knowledge and ABS, an international tribunal or court should be given the responsibility to justiciate on vital matters such as disclosure of *Source of Origin*, ownership, *Free, Prior, and Informed Consent*, *Mutually Agreed Terms*, fairness of equitable benefit-sharing agreements, and claims of bio-piracy.

In establishing National ABS Clearing-Houses or National ABS Focal Points, States must accommodate Article 17 for "exchange of information", Article 18 for "technical and scientific cooperation", and Article 19 for "handling of biotechnology and distribution of its benefits".

Within a modality of a National ABS Clearing-House, there is required to be established an investigatory branch, which could be associated with university research centres and other fora of international experts who could render or conduct unbiased investigations and provide guidance on best practices or *bona fides* of and to both providers and users.

Indigenous Peoples need to have the opportunity themselves to turn to a National ABS Focal Point to ascertain questions of *bona fides* of a biotechnical company. Conversely, a biotechnical company should have the ability to contact a National ABS Focal Point and be supplied with contacts for all the Indigenous Peoples within a State, who have or may have any interest, knowledge, stake, say, or who should provide or enter into a *Free, Prior, and Informed Consent* agreement or be a party to *Mutually Agreed Terms* for access, use, and fair and equitable benefits-sharing.

Article 6.3(a) of the *Nagoya Protocol* requires a National ABS Clearing-House to have in place all necessary legislative, administrative, or policy measures, as appropriate, to provide "legal certainty, clarity, and transparency of their domestic access and benefit sharing legislation or regulatory requirements". This provision must be provided equally to both provider and user to create a playing field where well informed decisions can be made by both the provider and user. Sharp dealings will not be tolerated on the matter of access, use, and fair and equitable benefits-sharing arising from the knowledge, innovations, or practices of Indigenous Peoples about a genetic resource or traditional knowledge sourced from Indigenous Peoples on their traditional ancestral homeland territories.

National and Global ABS Clearing-House operations must be effective and must be subject to all form of scrutiny by all levels of interests, including the different levels and forms of Indigenous Peoples governments and Indigenous Peoples representative, advocacy, and technical organizations and institutions. As an example in Canada, if a genetic resource user wanted to negotiate *Free, Prior, and Informed Consent* or *Mutually Agreed Terms* with the Mi'kmaq People, the user would first be required to make contact with the Mi'kmaq Grand Council, then the five Native/Aboriginal Councils, which represent Mi'kmaq persons continuing on their traditional ancestral homelands (i.e., not living on a reserve), and then the thirty-two Mi'kmaq federal reserve communities in the five provinces of Eastern Canada. Together these contacts constitute a minimum first approach.

In Canada, with the *Nagoya Protocol*, it is not acceptable to simply contact a federal government Department of Indian and Northern Affairs, who's role is restricted to the administration of *Indian Act* reserve lands and communities. Such a limited contact would leave out the vast majority of Aboriginal Peoples, their Native/Aboriginal Councils, their traditional Grand Councils, and other Aboriginal technical, social, and economic advocacy organizations or entities.

Measures of the machinery of governments must be laid out and examined to integrate or implement into the operations of a transparent National ABS Focal Point and National ABS Clearing-House. States need to provide legal certainty to both provider and user. In addition, a National ABS Clearing-House should aspire to create a model of operation attuned to constantly balance the interest of providers and users or those who seek access to genetic resources and associated knowledge.

A National ABS Clearing-House must reach out and involve representative organizations of Indigenous Peoples if it is to meet the intent of Article 13.1 of the *Nagoya Protocol*. Where the State itself cannot, or is not trusted to, validate the transparent, neutral operations of a National ABS Focal Point, there needs to be a mechanism for international oversight, such as a Global ABS Clearing-House.

The *Nagoya Protocol* establishes a Global ABS Clearing-House in Article 14. Taking into consideration the existing clearing-house mechanism of the CBD established pursuant to Article 18.3 thereof, the new Global ABS Clearing-House can primarily advance the objectives of the *Nagoya Protocol*. Consequently, the Global ABS Clearing-House does not need to re-invent the wheel; however, it can be positioned to build and improve on the existing CBD Clearing-House through promotion of information exchange relevant to ABS among stakeholders within States. To that extent the clearing-house becomes the hub for advancing other measures such as capacity building, promotion of awareness, and enforcement/compliance with the *Nagoya Protocol*.

In addition, a Global ABS Clearing-House would provide clarity in regard to acceptable international standards on ABS and advance the aspirations and rights of Indigenous Peoples, articulated in international conventions, protocols, statements, and declarations, notably

UNDRIP. From this understanding and these best practices, the Global ABS Clearing-House should guide the activities of the Competent National Authorities, with the effective participation of Indigenous Peoples, on the design and implementation of their National ABS Focal Points and National ABS Clearing-Houses.

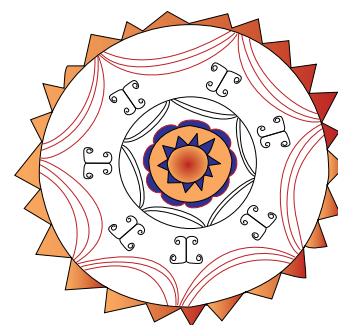
As a matter of utmost importance, one of the modalities for the operation of the Global ABS Clearing-House is to position it to truly serve as a “clearing-house” to illuminate overlapping inter-regime dynamics on the subject of ABS beyond the *Nagoya Protocol*. In this regard, Article 4 of the *Nagoya Protocol* recognizes that by itself it only addresses ABS in the context of the CBD.

- 4.2 *Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.*

Consequently, given ongoing deliberations relevant to ABS at diverse international and multi-lateral forums, including the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore of the *World Intellectual Property Organization* (WIPO), the *Nagoya Protocol* is not an exclusive instrument on the subject. As such, a Global ABS Clearing-House contemplated under the *Nagoya Protocol* should facilitate exchange of information in regard to ABS governance in other regimes to advance the practical and operational interests of owners and users of genetic resources.

In Canada, Aboriginal Peoples within the Federation of the Peoples of Canada must have an opportunity or be involved in validating a National ABS Focal Point or a National ABS Clearing-House. As indicated earlier, the complexities of a federal State, particularly one like the Canadian Federation, with its division of jurisdictions and recent 1982 constitutional recognition of the Treaty Rights, Aboriginal Rights, and other rights of Aboriginal Peoples, hold paramountcy as a supreme national law. This fact, including recent Supreme Court of Canada jurisprudence, the common law, and the Government of Canada’s requirement to respect the *Honour of the Crown* in its dealings with Aboriginal Peoples, requires the ABS national strategy, national policy, national legislation, and administration thereof to be developed and implemented with the full involvement and effective participation of Aboriginal Peoples. This is fundamental and anything less is wrong in law, subverts the purposes and principles of CBD and the *Nagoya Protocol*, and violates the ethic of good faith, peace, and friendship between Peoples.

In Canada, an advisory body of Aboriginal Peoples, selected by the five National Aboriginal Organizations, and appointed by Order-in-Council, can be established under a National ABS Clearing-House implementation act. The advisory body can monitor and report on the implementation and administration of the National ABS Focal Point or National ABS Clearing-House. Such advisory bodies within national legislation already exist; for example Canada’s *Species at Risk Act*, for the national conservation of biodiversity, legislates the National



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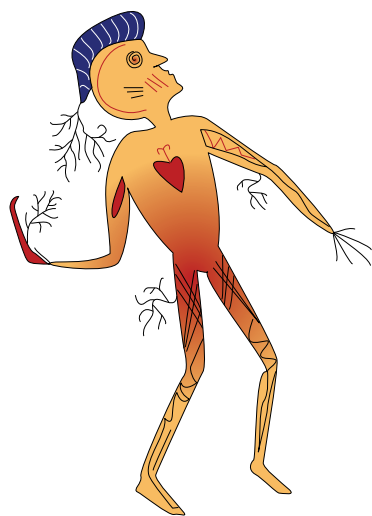
**Capacity-building  
at human and  
institutional levels  
is mutually  
re-enforcing**

Aboriginal Council on Species at Risk to advise the competent ministers on the implementation and administration of the act.

The clearing-house model of operation must be more than a “body sympathetic” to Indigenous Peoples. It must, in the spirit of the evolution of international policy and international law hold under constant review UNDRIP and the CBD, and ensure that the *Nagoya Protocol*’s intent by application of procedures and process does not knowingly or unknowingly resurrect the *doctrine of dominance* and mindsets of the past. We do not want to resurrect subjugation; suffering; injustices; dispossession of lands and resources and benefits therefrom; disinheritance of identity, worldviews, and knowledge; and the denial of rights and our continuum as Indigenous Peoples, part of the *family of humankind* on Mother Earth.

The superior views, actions, and doctrines of the past have already taken their toll to relegate Indigenous Peoples to be the most vulnerable, the most discriminated, and the most oppressed throughout the world, and the most illegally dispossessed of resources, innovations, and technologies, without benefit or gain. Those days, those eras, those mind-sets, those doctrines must be abandoned. This era, for fair and equitable sharing of benefits of genetic resources and Indigenous knowledge must take a path for the life-serving and life-saving benefit of humankind, through honest dealings and fair sharing.

**ISSUE 2: Measures to Assist in the Capacity-Building, Capacity Development and Strengthening of Human Resources and Institutional Capacities in Developing Countries in particular the least developed countries and small island developing States amongst them, and Parties with economies in transition, taking into account the needs identified by the Parties concerned for the implementation of the Protocol.**



Indigenous Peoples and their civilizations predate many of the present day modern States in which they are nested. Some of those States, including Canada, the United States of America, and elsewhere are leading members of the so called developed or industrialized countries. However, several centuries of colonial domination, cultural suppression, and various forms of marginalisation have relegated Indigenous Peoples to the status of minorities. In those developed countries, including Canada, Indigenous Peoples are now under the threat of cultural extinction. Consequently, in Canada, while Aboriginal Peoples may be located on federal *Indian Act* reserves or may continue on our traditional ancestral homeland territories, there is no radical disparity in our socio-economic status in comparison to our counterparts in the developing world, which, unlike the Aboriginal Peoples of Canada, have experienced settler withdrawal. In that regard, the issues of capacity-building, capacity development, and strengthening human resources and institutional capacities on ABS are as much an imperative in developing countries as it is with Indigenous Peoples within developed nations, as is the case for Aboriginal Peoples nested within the borders of the Federation of the Peoples of Canada.

Capacity-building at human and institutional levels is mutually re-enforcing. It is critical for the realization of the objectives of both the CBD and the *Nagoya Protocol*, especially in

regards to Indigenous Peoples. Capacity-building targeted at Indigenous Peoples and their local communities in the developed and less-developed countries, which promotes Indigenous knowledge relevant to conservation of biological diversity and realizing benefits resulting from equitable access and sharing mechanisms, is critical for sustainable development. This understanding is at the core of Indigenous Peoples aspirations, as articulated in UNDRIP.

Two aspects of capacity-building involves:

1. proactive efforts toward promotion of Indigenous Peoples' bio-cultural knowledge and its intricate relationship with modern biotechnology, and
2. support for the development of institutional knowledge among Indigenous Peoples, local communities, and their technical and advocacy institutions toward the mastery of the complex national and international bureaucratic space for the governance of Indigenous knowledge, conservation of biological diversity, and the subject of ABS pursuant to the CBD, the Nagoya Protocol, and other relevant regimes.

In the spirit of Article 22 of the Protocol, both (a) and (b) would involve a broad-based trans-disciplinary revision of education curricula in member States in a range of pre-existing subject areas while allowing for the development of new ones in a manner to accommodate articulated expectations on ABS under existing and emerging regimes.

In Canada, there must be time or at least there must be respected or accommodated in national educational institutions, primary schools to higher academic institutions, including research institutions, the time and space to encourage, without censure, youth or the inquisitive to meet with knowledge-holders and have discussions and learned discourse about terrestrial and aquatic biodiversity and their genetic properties, practices, and approaches. In other words, trans-generational learning must be encouraged.

Canada must allow or accommodate the learning to continue as a process that is uninterrupted, open, and one which freely develops traditional knowledge confidence – again, trans-generational teaching and learning into the future. This obviously requires that communities and traditional ancestral homelands have undisturbed territories and natural spaces to follow the teachings and understandings.

Aboriginal Peoples must have a greater understanding of the classifications of taxa in Canada and the modern sciences techniques and technologies, exploring and revealing other genetic secrets of terrestrial and aquatic life-forms from the laboratory setting perspective.

In Canada, institutions of non-Aboriginal Peoples should have goals and missions to out-reach with their capacity, so that Aboriginal Peoples in all areas; with the modern technologies of communications, can take advantage of collaborative research, dialogue, and partnerships in addressing or better understanding the intent for disclosure of *Source of Origin* to Aboriginal Peoples, seeking *Free, Prior, and Informed Consent* of Aboriginal Peoples, and developing *Mutually Agreed Terms* for equitable benefit-sharing with Aboriginal Peoples, and so that both Aboriginal Peoples and non-Aboriginal Peoples can become fully informed with all the pros

and cons available, or at least raised and discussed. Both traditional knowledge and scientific knowledge have merit and worth.

The properties, conditions, habitats, and times for which traditional knowledge is nurtured and acquired and passed on, must be respected and given every opportunity to occur and flourish, as determined by the Aboriginal Peoples concerned, within our traditional ancestral homeland territories.

An integral aspect of capacity building at human and institutional levels will also involve awareness-raising (Article 21 of the *Nagoya Protocol*) through community networking, formal educational programs, curricula, and public mainstreaming initiatives in which the subject of ABS becomes a deliberate and integral aspect of the broader discourse among Indigenous Peoples. Overall, every measure designed to enhance capacity-building and development and the strengthening of human and institutional competence on ABS is best promoted and disseminated via both the National and Global ABS Clearing-Houses. As a desirable measure, Indigenous Peoples are in a position to self-articulate the nature of the support they require in the areas of capacity-building from member States. A few examples can take the form of immediate and long term measures including research endowments, scholarships, training opportunities, taxonomic and inventorying projects, development of customary legal protocols; youth challenge projects, etc. around ABS and integral subjects.

In Canada, we should have an adequately funded federal program to facilitate workshops, symposia, and other fora to continually raise awareness and provide intellectual spaces where Aboriginal Peoples, with our traditional knowledge, and western scientists, with their contemporary laboratory science, can come together and look at opportunities and solutions through two eyes. There are instances already where Aboriginal Peoples with traditional knowledge have also acquired contemporary or scientific laboratory knowledge. Conversely there are contemporary scientists working in the field with Aboriginal Peoples and have come to learn, understand, and hold traditional knowledge. This greater capacity of individuals, seeing the world through both eyes, should be promoted and celebrated, rather than hidden or treated as lesser in worth, merit, or capacity.

There is a need for federal financial support to develop institutions where Aboriginal Peoples can formally and informally acquire the wherewithal to fully grasp the intent of disclosing *Source of Origin*, the meaning of *Free, Prior, and Informed Consent*, and how to develop *Mutually Agreed Terms*. There is also a need to learn the skills and have the abilities to negotiate enforceable contracts and arrangements which require the disclosure of *Source of Origin* to Aboriginal Peoples, require the *Free, Prior, and Informed Consent* of the Aboriginal People concerned, and require *Mutually Agreed Terms* for the benefit of the Aboriginal People's communities who hold knowledge or on who's traditional ancestral homeland territories the resource is located.

In Canada, the federal and provincial governments need to provide funding to established "research chairs on ABS" within a number of universities within Canada, preferably one for each of the major academic institutions within each province, including Aboriginal Peoples'



institutions, and have them tie-in internationally. These research chairs should be well funded to allow them both the time and human resources to provide outreach connection with Aboriginal Peoples and the time and human resources to conduct specific research. Time to provide academic teaching, *in-situ*, and time to review scientific, administrative, legal, political, and international norms or international rules for the exploring, exploiting, and sharing of benefits from the access, use, and equitable sharing of benefits from biodiversity is equally important in considering the establishment of research chairs. This capacity within accessible institutions would ensure ongoing ABS security for the benefit of all human-kind.

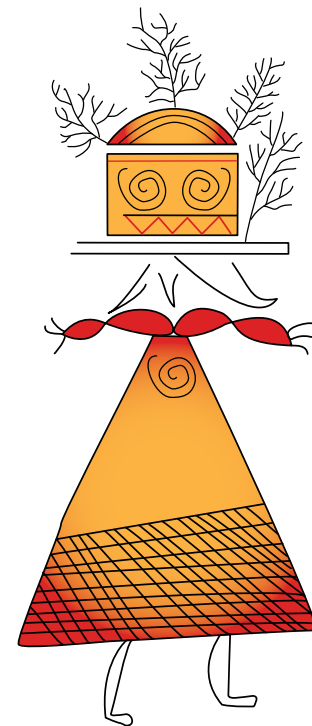
There definitely is a pressing need in Canada for the federal and provincial governments to work with Aboriginal Peoples and invest in developing curriculum and the climate for research that will also educate Aboriginal Peoples about non-Aboriginal Peoples' approaches or principles for the classification of taxa, certain procedures or methodologies, scientific norms and expectations for verification, research ethics, including peer-reviews, and that much more. It is important in Canada for Aboriginal Peoples to have the opportunity and wherewithal to understand what is at stake and what should be sought by both users and providers from disclosure of *Source of Origin, Free, Prior, and Informed Consent*, and *Mutually Agreed Terms*.

In the field of education, Canada and Aboriginal Peoples, together, must begin to form working partnerships that are transparent, honourable, and mutually respectful to begin the process of developing educational facilities and mechanisms for Aboriginal Peoples to continue trans-generational teaching and the opportunities for youth to learn and continue to hold and nurture Aboriginal knowledge about genetic resources, as a continuing, living Aboriginal knowledge. The joining and sharing of knowledge about natural resources and their genetic properties is an investment in advancing the bio-technology industry in Canada, where benefits are shared equally and recognition given proudly.

Let us involve the work of UNESCO, WIPO, CITES, FAO, UNPFII, and IMF, as well as that of respected researchers, to continually add to the subject of access, use, and benefit-sharing. Have that knowledge introduced in the development of Indigenous Peoples' human capacity, institutional capacity, and strengthening of human resources amongst Indigenous Peoples' institutions, universities, States, and the whole of the UN family of agencies and directorates. In other words, through the involvement of many interests, we will demystify the work of modern science and the essence of Indigenous knowledge. Through knowledge, we can end the *doctrine of dominance* professed by academic laboratory science over Indigenous Peoples Traditional Knowledge. Both are real. Both have merit and worth. Both draw from the secrets of the biodiversity of natural resources on one Mother Earth.

In addition to national initiatives, the CBD Secretariat could also take cue from some intergovernmental organization, especially WIPO. WIPO's World-wide Academy is instrumental for the development of intellectual property capacity in less-developed countries post-TRIPS. The Academy does this through its various training programs and diverse collaboration with offshore educational institutions. As ABS processes evolve at national and

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international levels, the expertise of the CBD Secretariat could be expanded to accommodate the provision of training, in collaboration with identified independent technical experts or institutions competent in areas of Indigenous knowledge, biodiversity conservation, ABS, and related matters, in order to provide support, advice, and assistance toward capacity-building on ABS among Indigenous Peoples. Needless to mention that, pursuant to letters of the *Nagoya Protocol*, attempts at capacity-building would involve bottom-up approaches designed to galvanize Indigenous Peoples' in-put, integrate Indigenous customary legal traditions relevant to ABS, and associated matters. This approach should be designed to eschew the criticisms associated with the WIPO Academy.

States need to build on the *Bonn Guidelines* and the *Nagoya Protocol*, as a point of departure into this new era. A new era, where both providers and users join to realize the benefits of sharing knowledge from an equal stage of mutual capacity understanding, mutual respect, institutional support, fair access, and use of institutional research expertise. Together, the *Bonn Guidelines* and the *Nagoya Protocol* promotes an ideal to exhibit an honest ethic for the respectful access, use, and equitable sharing of benefits arising from both a willing provider and a willing user in an honest partnership.

An honest partnership must be guided by the noble purposes and principles for global peace, human dignity, and human freedom. Human dignity means freedom from want of safe food, clean water, clean air, and security for the well-being and continuum of the *family of humanity* on Mother Earth, integrated and interconnected with all that is life, our living natural world, and its natural resources, including the knowledge thereof.

### **ISSUE 3: Measures to Raise Awareness of the Importance of Genetic Resources and Associated Traditional Knowledge, and Related Access and Benefit Sharing issues.**

The *Nagoya Protocol* calls for relevant organizations, as appropriate, to carry out awareness-raising activities among relevant stakeholder groups, including the business community, the scientific community, and others, to support the implementation of the *Nagoya Protocol* – *mainstream the existence of the Nagoya Protocol*.

The *Nagoya Protocol* clearly recalls the relevance of CBD Article 8(j), as it relates to traditional knowledge associated with genetic resources and notes the interrelationship between genetic resources and traditional knowledge and their inseparable bond with Indigenous Peoples and local communities.

The importance of traditional knowledge for the conservation of biological diversity, and for the sustainable use of its components, and for the sustainable livelihoods of those communities, requires providers and users to recognize the diversity of circumstances in which traditional knowledge is held and owned by Indigenous Peoples.

Canada must be mindful of the rights of Aboriginal Peoples within the Federation of the Peoples of Canada to be identified as rights-holders of our traditional knowledge. Canada must



recognize the unique circumstances of Aboriginal Peoples who hold traditional knowledge, acquired by our continuum on traditional ancestral homeland territories, now nested within the borders of the Federation of the Peoples of Canada.

States should recognize the infinite value and benefits realized by partnerships and sharing of scientific knowledge and Indigenous knowledge. The Indigenous knowledge of an Indigenous People opens a window onto the rich cultural heritage and continuum of that Indigenous People, while demonstrating the relevance of conservation, sustainable use, and knowledge about natural resources and their genetic properties held by that Indigenous People, which has nurtured the continuum of that Indigenous People on their traditional ancestral homeland territory for millennia.

States which have adopted UNDRIP appreciate that nothing in the *Nagoya Protocol* shall be construed as diminishing or extinguishing the existing rights of Indigenous Peoples.

The significance of clearly one third of the preambular statements to the *Nagoya Protocol*, highlight the vital role and place for the Indigenous Peoples of the world within the *Nagoya Protocol*. The *Nagoya Protocol* provides an opportunity for Indigenous Peoples to realize the intents of Articles 31 and 32 of UNDRIP and particularly their role and significance within States, as articulated by the four sections of Article 12 “Traditional Knowledge Associated with Genetic Resources” of the *Nagoya Protocol*.

Awareness-raising measures are integral aspects of capacity-building. It is hard to separate the two. Consequently, all measures canvassed about their relevance to capacity-building apply, to a large extent, as aspects of awareness-raising. For example, creation of awareness, especially at institutional levels, regarding the importance of genetic resources, associated traditional knowledge, and the subject of ABS, among Indigenous Peoples assists to elicit interest among their local communities to increase human capacity. Mobilization of Indigenous Peoples and their local communities through awareness-raising is a necessary prerequisite for capacity-building, which then with increased capacity forms a feed-back loop that further self-promotes ABS awareness-raising, in addition to specific work on the various aspects of ABS.

Awareness-raising is not, and should not be, pursued as an isolated venture limited to CBD and the Nagoya framework. For effect, measures designed to raise awareness over the importance of genetic resources, associated traditional knowledge, and ABS ought to traverse a broad regime compass at international and national levels governing these and related subject matters. Consequently, a key aspect of a Global ABS Clearing-House is the recognition, that while the *Nagoya Protocol* applies only to genetic resources within the rubric of the CBD, there are also several other regimes in which the subject of ABS is implicated or still being negotiated.

From the perspective of Aboriginal Peoples within Canada, awareness-raising must be holistic. For instance, the *Nagoya Protocol* is silent on the issue of disclosure of *Source of Origin* of genetic resources in intellectual property (patent) applications – that issue remains critical for the implementation of an effective ABS regime, both internationally and within Canada.

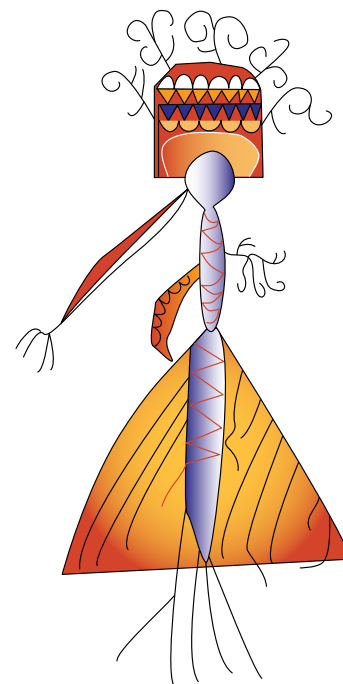
**Awareness-raising**

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Discussion on the necessity for disclosure of *Source of Origin* continues to be engaged at diverse forums, including the WTO, WIPO-IGC, UNESCO, and WIPO Patent Agenda. Expectedly, it will not escape the ongoing elaboration and implementation of the WIPO Development Agenda.

We submit it is crucial that National and Global ABS Clearing-Houses, must not only liaise with each other, but must also liaise with other regimes at the intersection of Indigenous knowledge, genetic resources, ABS, and intellectual property. That way, National and Global ABS Clearing-Houses would be able to map out a navigational scheme through which Indigenous Peoples, genetic resource users, and various stakeholders are familiarised with the holistic scheme for inter-regime development, practices, and expectations on the subject of ABS and related matters.

To this end we propose the establishment of an ABS Inter-Regime Linkage Desk, charged with the integration of ABS inter-regime competence at both the Global and National ABS Clearing-House levels and also charged with raising-awareness at global and national levels on the complex regime interactions and relationships around the subject of ABS.

Aside from the global and inter-regime level, awareness-raising is important at national and local levels taking into consideration the prevailing contingencies and compositions of constituent stakeholders on ABS in a given country. Perhaps for more than any stakeholders, raising awareness among Indigenous Peoples rightsholders takes an urgent imperative for a number of reasons.

First, Indigenous Peoples, their traditional ancestral homeland territories, and rich biological resources, as well as their knowledge systems, are at the centre of biodiversity conservation, sustainable use, and ABS.

Second, Indigenous Peoples are at the receiving end of inequitable exploitation that has characterized global mismanagement of these resources.

Third, perhaps more importantly, Indigenous Peoples are the most vulnerable and the least equipped to navigate the emerging national and global bureaucracy around ABS and related matters.

Unfortunately in Canada, as we have mentioned earlier, Canada does not have a Canadian strategy to raise awareness about the *Nagoya Protocol*, let alone the emerging complex regime interactions on ABS. In fact to date, no level of any government within Canada has taken any steps to invite, involve, or engaged any of the over seventy-three nations of Aboriginal Peoples within the Federation of the Peoples of Canada to begin serious, direct, meaningful, and supported involvement in the development of a national ABS strategy or policy in Canada. Aboriginal Peoples have not been invited to be a part of the Canadian delegation on the matter to ensure that the interests and needs of Aboriginal Peoples within Canada were represented in the development of the *Nagoya Protocol* or at any other international ABS fora.

Aboriginal Peoples' hands have been extended since 1992 to work in partnerships on the

CBD and its three interconnected and interdependent pillars of: *the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources*. With the Nagoya Protocol, the invitation for partnerships remains extended. Aboriginal Peoples are prepared to work with the Government of Canada to establish an effective honest partnership and a collaboration to extend efforts to develop a national strategy and national processes, which will eliminate bio-piracy, illegal appropriation, dispossession of resources, and denial of Aboriginal Peoples' knowledge and sources of traditional knowledge. For a partnership to begin, the same effort must be reciprocated by Canada to Aboriginal Peoples within the Federation of the Peoples of Canada.

Access and benefit-sharing has a moral, social, political, and economic dimension, which, if not policed or addressed, perpetuates a fundamental violation of international rights. The right to be free from want, subjugation, and abuse, for no other reason than being an Indigenous person, must be defended by all States.

At both local and national levels, a fundamental aspect of awareness-raising will involve radical curricula revisions and expansion at various educational levels as elaborated under capacity-building above. Indigenous Peoples and their local communities are the best custodians of their institutional networks and would benefit from funding, infrastructural and moral support from national governments and relevant intergovernmental organizations and applicable financial mechanism under relevant treaties toward the promotion of a new generation of Indigenous Peoples to advance interest and awareness of the link between genetic resources, traditional knowledge, and ABS.

In the short-run, workshops, seminars and symposia designed to promote and articulate Indigenous Peoples' stakes on ABS and related matters is a starting point. Indigenous Peoples' delegates to various national and international forums and deliberations on ABS and related subject should be promoted and incentives developed so that those delegates assume responsibility to further disseminate, brief, generally publicize, and update their communities in regards to developments from those forums. The use of electronic communication and new social media to disseminate information to Indigenous youth, networks, and communities should be encouraged. ABS and related matters should become part of community outreach issues among Indigenous Peoples, particularly through partnership with public libraries, film/movie and public interest artistic communities, environmental non-government organizations (especially those engaged in the promotion of traditional bio-cultural knowledge and anti-biopiracy campaigns), local research universities, and various research institutions with relevant expertise.

At the national level, relevant agencies of government can promote awareness by cross-sectoral integration or mainstreaming of ABS as an integral part of trade, environmental, and corporate governance policy. For instance, in a country like Canada, which is both a user and provider of genetic resources, with multiple bio-technology stakeholders and Aboriginal Peoples, all levels of government are in a position to integrate ABS into trade, environmental, and corporate governance policy at local, national, and international levels.

#### **ISSUE 4: Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Protocol and to Address Cases of Non-Compliance, including Procedures and Mechanisms to Offer Advice or Assistance**

From Aboriginal Peoples' perspective it is important to note the following matters under the above issue for promoting compliance:

1. The *Nagoya Protocol* affirms the rights of Indigenous Peoples as articulated under UNDRIP.
2. The *Nagoya Protocol* neither extinguishes nor diminishes "the existing rights of Indigenous Peoples and local communities".
3. Consequently, the *Nagoya Protocol* advances such rights.
4. In Canada, the *Honour of the Crown* is always called into question when the Government of Canada undertakes matters which may affect Aboriginal Peoples' rights, lands, or resources, or where it ought to know, by virtue of notice of intent or application for granting a regulatory approval, license, lease, or permit, or other form of approval for an activity, project, works, undertaking, or appropriation which affects Aboriginal Peoples' rights.
5. In Canada, the *Constitution Act, 1982*, Sections 25 and 35, as paramount national legislation, trumps other national law; and therefore implementation legislation for a National ABS Clearing-House must be developed with the effective participation of Aboriginal Peoples.

To take the moral good faith purposes and high ground, which all Parties to the *Nagoya Protocol* should strive for, we must ensure that the fair and equitable sharing of benefits, access, and use of resources and genetic innovations, practices, knowledge and sciences are for the benefit of humanity and not just for shareholders or the wealthy.

Which bio-technology corporation today can replicate the benevolence of persons like Dr. Banting, who gave the world insulin, without monetary benefit? Which bio-technology corporation today can replicate the Indigenous knowledge and caring ethic of the Mi'kmaq People who provided the first settlers, in 1604, with the fever reducing properties of an alder-shoot broth, without monetary gain? Which bio-technology corporation today can renounce the practice of bio-piracy and agree to disclose *Source of Origin*, undertake *Prior Informed Consent*, and effect *Mutually Agreed Terms*, with Aboriginal Peoples for our knowledge of a natural resource to ensure fair and equitable benefits arising therefrom?

We need to spend time to nurture the values and benefits of the social responsibility of humankind for humankind in addressing and approaching the subject of genetic resources, Indigenous knowledge of those resources, and development of life-serving and life-saving discoveries. We must look at social consciousness, mainstreaming awareness, regulatory institutional compliance regimes, best-practices advice and assistance, and the humanity of humankind.

To promote compliance with the majority of the obligations arising from the *Nagoya Protocol*, member States must devise a framework of engagement with Indigenous Peoples and their local communities on how to give recognition to their “customary laws, community protocols and procedures, as applicable with respect to traditional knowledge and associated genetic resources” (Article 12 of the *Nagoya Protocol*).

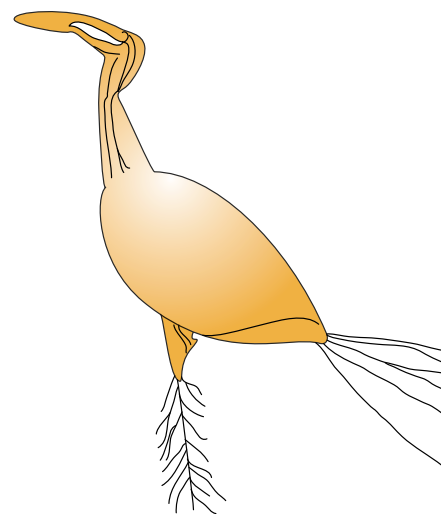
Throughout the text of the *Nagoya Protocol*, consideration of Indigenous Peoples’ customary laws, protocols, and procedures is given effect. Unlike the Constitutional guarantees to Aboriginal Peoples within the Federation of the Peoples of Canada, in many other countries, there are no guarantees that the domestic laws of a State are in sync with Indigenous Peoples’ customary laws, protocols, and procedures regarding the access and use of traditional knowledge or the access and use of associated genetic resources. Member States’ commitments to promote genetic resource user compliance with Indigenous Peoples’ customary laws, protocols, and procedures, as being “subject to” or “in accordance with” existing domestic laws, without creating obligations on those States to ensure that existing domestic laws do not undermine the intent or commitments under the *Nagoya Protocol* or the CBD, in effect *short-changes* some of the promises of UNDRIP.

For instance, Article 31 of UNDRIP affirms the rights of Indigenous Peoples to ownership and control of their knowledge, intellectual property, genetic resources, technologies, culture, and other matters. It is hard to see what affect this article and similar affirmations could have where domestic laws, practices and protocols of member States constitute an obstacle to its realization.

In States, like Canada, where the supreme national law qualifies the assertion of federal authority to determine access to natural resources and their genetic properties, the absence of a national strategy, national policy, or compliance measures to enforce laws and policies to protect Indigenous Peoples’ interests, in effect, creates a vacuum or doorway for rampant unscrupulous bio-piracy. For this reason alone, the *Nagoya Protocol* is a significant step for all Indigenous Peoples and member States. For Aboriginal Peoples within the Federation of the Peoples of Canada, opportunities and a framework now exists, through the *Nagoya Protocol*, to propose and advance effective partnerships with the governments of Canada, mechanisms and compliance measures for ABS, which do not and must not abrogate or derogate Aboriginal Peoples’ rights, including the rights advanced by UNDRIP, to our *complete liberty* to access and use natural resources and their genetic components and for the fair and equitable sharing of benefits arising therefrom.

The *Nagoya Protocol* is an important platform to advance the recognition of the significant and vital role of Indigenous Peoples in the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of Indigenous knowledge and genetic resources.

Aside from the obvious need to seek an interpretive clarity regarding aspects of the *Nagoya Protocol* text, in order to promote compliance, there is much more to be done to ensure that the objectives of the *Nagoya Protocol*, the CBD, and UNDRIP, especially in regard to ABS, are complied with.



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Again, at domestic and international levels, the roles of Competent National Authorities, National ABS Focal Points, National ABS Clearing-Houses, and a Global ABS Clearing-House are critical. ABS Clearing-Houses are particularly important as they are foremost situated to articulate step-by-step protocols and check-lists for cross-sectoral operational interactions and, through their oversight capacity and position, ensure compliance.

In Canada, at the national level, a number of departments (e.g. agriculture, health, environment, culture, natural resources, consumer and corporate affairs, international trade, industry, customs, justice, intellectual property, labour, employment, and the Privy Council Office, to name but a few) may be implicated on ABS matters. Consequently, the operational design of a Competent National Authority on ABS must take these into consideration where the *whole of government* is involved and working to meet the honourable objectives of the *Nagoya Protocol*.

In some ways, measures to promote compliance is inherently a cooperative venture across departments and involves both promotion of awareness and capacity-building across various sectors for effective administration and implementation of commitments made under the *Nagoya Protocol* and other relevant instruments. From Indigenous Peoples' perspective, aside from the integration into these cross-sectoral cooperative mechanisms for compliance, part of the "compliance and enforcement capacity-building" would need to include competence and certification processes for the utilization of genetic resources and associated traditional knowledge in accordance with appropriate checkpoints, standards, best-practices, relevant national laws, and international obligations, particularly those articulated or advanced under the CBD and UNDRIP.

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## CONCLUSION

Each State must review and consider their fundamental national laws and consider whether there are constitutional provisions that are paramount to other national laws, regarding access and use of natural resources and their genetic properties, as is the case in Canada.

States must recall the intent of UNDRIP and keep under advisement the assertions and discussions where from an Indigenous Peoples' perspective, natural resources encompass genetic resources, and the discussion cannot remain narrow or restricted simply to genetic resources.

States must, in good faith, advance the *Nagoya Protocol* with the full and effective participation of Indigenous Peoples. States must recognize the unique circumstances of Indigenous Peoples nested within their current national borders. States can no longer rely on the *doctrine of dominance* over Indigenous Peoples, nor allow unscrupulous bio-piracy or other illegal policies or practices to continue, which directly or indirectly subjugate Indigenous Peoples to be lesser in worth, lesser in merit, lesser in capacity, or lesser in dignity than other members of the *family of humankind*, be they in developed or developing countries.

In retrospect, the informed knowledge of Indigenous Peoples, as first Peoples by their continuum on their traditional ancestral homeland territories, with specific knowledge about natural resources and their genetic properties, have always been a contributing source to the continuum of humanity, through their customs, innovations, practices, and knowledge as Indigenous Peoples, legally or illegally acquired by others.

The *Nagoya Protocol* marks a point-of-departure and a need to look at, recognize, and respect Indigenous Peoples as members of the *family of humanity*. Showing fundamental acts of recognition, disclosing *Source of Origin*, developing effective partnerships, and honourably accepting and applying the principle of first seeking the *Free, Prior, and Informed Consent* of Indigenous Peoples and working with Indigenous Peoples on a level field to develop *Mutually Agreed Terms* for fair and equitable benefit-sharing to accrue to the benefit of Indigenous Peoples is a good start. States and the bio-technology industry must adopt an ethic, with practices and measures, which raise awareness and acknowledge complete compliance with the *Nagoya Protocol*, advancing a pillar of the CBD.

Advancing life-saving and life-serving knowledge, as revealed by Indigenous Peoples' knowledge and their natural resources, including genetic resources and the practices thereto, are for the benefit of all humankind, as should be that of States and the contemporary bio-technology industry, for the ultimate purposes of peace, friendship, and the well-being of all humanity on Mother Earth.



Indigenous Peoples' knowledge, practices, and innovations for thousands of years about natural resources grandfather contemporary bio-technology. The human condition to search, understand, test, and work with terrestrial, aerial, and aquatic biodiversity is in response to an appetite to explore and change natural biodiversity resources, which could lead to life-serving and life-saving discoveries.

Access and benefit-sharing (ABS) for natural resources has a moral, social, political, and economic dimension, which, if not policed or addressed, perpetuates a fundamental violation of international rights. The right to be free from want, subjugation, and abuse, for no other reason than being an Indigenous person, must be defended by all States.

On October 29, 2010 the *Nagoya Protocol* on ABS was hurriedly crafted and cavalierly ignores Article 10c of the *Convention on Biological Diversity*. The *Nagoya Protocol* does not acknowledge the struggle of Indigenous Peoples' assertion for fundamental human rights, ownership of natural resources, the *UN Declaration on the Rights of Indigenous Peoples*, nor the Convention articles about Indigenous Peoples and their resources.

The *Nagoya Protocol* deepens the conundrum about resource ownership and access to resources, "subject to national legislation". For Aboriginal Peoples nested within the Federation of the Peoples of Canada, Canada cannot abrogate or derogate the rights of Aboriginal Peoples, as guaranteed by the *Constitution Act, 1982*, Sections 25 and 35.

Canada and other member States to the Convention and the *Nagoya Protocol* are required to keep under constant review Articles 8j, 10c, and 15.1 of the Convention, review national laws, develop strategies and policies, and introduce practices, with the effective involvement and full participation of Indigenous Peoples. Anything less is a violation of international law and an example of resurrecting the *doctrine of dominance*.

