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

Tenth meeting

Montreal, Canada, 13-16 December 2017

Item 5 of the provisional agenda\*

**FINALIZATION OF TASKS 7 AND 12 OF THE REVISED MULTI-YEAR PROGRAMME OF  
WORK ON ARTICLE 8(J) AND RELATED PROVISIONS**

*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.

2. In order to accomplish these tasks, the Conference of the Parties, in decision XII/12 D, paragraph 1, divided the work into five sub-tasks and two phases of work and agreed on an integrated approach to their consideration.

3. These sub-tasks consist, in Phase I, of the following:

(a) Developing 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 (Task 7);<sup>1</sup>

(b) Developing 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 (Task 7);

(c) Developing standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge (Task 10);<sup>2</sup>

(d) Developing a glossary of relevant key terms and concepts;

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\* CBD/WG8J/10/1.

<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.

4. Phase II consists of a single task on advancement of the identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices are used.

5. The adoption of the Mo'otz kuxtal<sup>3</sup> Voluntary guidelines in [decision XIII/18](#), addresses the sub-tasks (i), (ii) and (iii) of phase I in an integrated way through a single set of guidelines.

6. The fourth sub-task under Phase I (iv), concerning a glossary, is being taken up by the Working Group at its tenth meeting, under agenda item 4.<sup>4</sup>

7. The remaining sub-task under Phase II, on “advancement of the identification of the obligations of countries of origin and countries of use”, is further considered in section II of the present document.

8. With a view to contributing to the finalization of tasks 7 and 12 of the multi-year programme of work, the Conference of the Parties at its thirteenth meeting, in decision XIII/18, paragraphs 7 and 8, invited Parties, other Governments, relevant organizations and indigenous peoples and local communities to submit their views concerning (a) measures to address publicly available traditional knowledge; and (b) best practices to implement “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, and requested the Executive Secretary to compile the information for the consideration of the Working Group, as appropriate.

9. Accordingly, in a notification dated 27 January 2017,<sup>5</sup> the Executive Secretary invited other Governments, relevant organizations and indigenous peoples and local communities to provide views on three matters:

- (a) Measures to address publicly available traditional knowledge;
- (b) Best practices to implement “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”;<sup>6</sup>
- (c) The advancement of the identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices are used.

10. Submissions were received from Australia,<sup>7</sup> Bolivia, Brazil, the European Union on behalf of its member States, Finland, Mexico, Peru, Sweden and Venezuela, as well as the following indigenous organizations: Assembly of First Nations; Coordinator of Indigenous Organizations of the Amazon River Basin (COICA); Indigenous Women's Biodiversity Network for the Latin American and Caribbean Region. Submissions were also received from the following non-governmental organizations: Conservation International; Forest Peoples Programme; and Natural Resource Stewardship Circle (NRSC).<sup>8</sup> They are compiled and made available in the language of submission in an information document (CBD/WG8J/10/INF/3) and analysed in the next section of the document.

11. The submissions received formed the basis of the present document, an initial draft of which was made available for peer review from 4 to 28 August 2017<sup>9</sup> in order to prepare an advanced draft to assist the Working Group on Article 8(j) and Related Provisions in finalizing this matter at its tenth meeting.

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<sup>3</sup> Meaning “roots of life” in the Maya language.

<sup>4</sup> Glossary of key terms and concepts to be used within the context of Article 8(j) and related provisions (CBD/WG8J/10/3).

<sup>5</sup> SCBD/SPS/DC/VN/JS/DM/86220 (2017-006).

<sup>6</sup> See decision XIII/18, paras. 7 and 8.

<sup>7</sup> And the Great Barrier Reef Marine Park Authority.

<sup>8</sup> A non-governmental organization supporting the beauty, fragrance, and flavours industries. For more information, see <http://nrsc.fr>.

<sup>9</sup> See notification SCBD/SPS/DC/VN/JS/VF/86690 dated 12 September 2017.

12. To ensure coherence, complementarity and harmony in recommendations emanating from the tenth meeting of the Working Group, including any proposals for new work that may be considered within the broader framework of post-2020 arrangements for the Convention, the Working Group may wish to take into account the related agenda items regarding the draft guidelines for the repatriation of traditional knowledge (item 3), which also deals with an overlapping issue of “publicly available traditional knowledge”, and the integration of Article 8(j) and related provisions in the work of the Convention and its Protocols (item 7), which addresses future work.

## **I. ANALYSIS OF THE INFORMATION RECEIVED**

13. This section provides an analysis of the information received in response to the notification dated 27 January 2017<sup>10</sup> concerning the three above-mentioned issues. On these three separate issues, a wide range of views were expressed, and the following analysis attempts to extract the main points and draws some conclusions at the end of the discussion on each issue and an overall conclusion at the end of the section.

### **A. Measures to address publicly available traditional knowledge**

14. As mentioned above, views concerning publicly available traditional knowledge were also expressed in the context of the development of the guidelines for the repatriation of traditional knowledge.<sup>11</sup> These are taken into account below to ensure complementarity and coherence in the draft recommendations emanating from the tenth meeting of the Working Group concerning publicly available traditional knowledge.<sup>12</sup>

#### *1. Community protocols*

15. Some submissions received advocate the development of community protocols as mechanisms that promote transparency in activities related to the access and use of traditional knowledge. Community protocols can assist the competent authorities in the administrative and judicial processes for acts affecting the rights of indigenous peoples to their traditional knowledge and assist in identifying and reporting on matters affecting the rights of indigenous peoples to their traditional knowledge, and increase transparency with respect to public and/or private activities. Community protocols could address issues such as identifying the original traditional knowledge holders, including in instances where traditional knowledge may be publicly available, and by providing advice on possible benefit-sharing arrangements.

#### *2. Proactive measures to stop traditional knowledge from entering the public domain*

16. Other submissions promote proactive measures to stop traditional knowledge from entering the public domain, such as national laws against misappropriation or misuse<sup>13</sup> of traditional knowledge that require scientific publications, databases and cultural inventories to recognize traditional knowledge and the original holders. One Party promoted a national law that guarantees indigenous peoples and local communities the right to have the origin of access to associated traditional knowledge indicated in all publications, uses, developments and other disseminations. The same Party also reported a national law in place that requires ongoing commercial use of publicly available traditional knowledge to be taxed on gross sales and resulting funds deposited into a monetary fund created for the development of indigenous peoples. A number of Parties indicated that they supported the Mo'otz kuxtal Voluntary Guidelines as

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<sup>10</sup> SCBD/SPS/DC/VN/JS/DM/86220 (2017-006).

<sup>11</sup> Through notification SCBD/SPS/DC/VN/JS/DM/86220, dated 27 January 2017.

<sup>12</sup> See the note by the Executive Secretary on the Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge Relevant for the Conservation and Sustainable Use of Biological Diversity ([CBD/WG8J/10/2](#)).

<sup>13</sup> Note that the Mo'otz kuxtal Voluntary Guidelines for Traditional Knowledge use the term “unauthorized access” as opposed to “misappropriation” or “misuse”.

guidance on proactive measures for traditional knowledge; however, these guidelines do not address traditional knowledge in the public domain per se.

17. However, some submissions, including those received under agenda item 3 on repatriation of traditional knowledge, noted that there is a great deal of publicly available traditional knowledge and that it would be impossible to restrict or regulate its use.

### 3. *Publicly available versus public domain?*

18. Indigenous peoples and local communities emphasized in their submissions that traditional knowledge that is publicly available is also incorrectly referred to as being in the public domain. From a legal perspective, “traditional knowledge in the public domain” is traditional knowledge possibly written down and published, after a prescribed period of legal protection (such as copyright) that becomes free availability. Therefore, not all traditional knowledge that is publicly available may be in the public domain. This type of knowledge and information has originated in the cultures of indigenous peoples and local communities and is deposited in bibliographic collections, databases or data collections, or ex situ centres of ethnobotany by researchers, and may have been obtained with or without the free, prior and informed consent of those indigenous peoples and local communities.

### 4. *Recognition of the original knowledge holders*

19. Even in cases where traditional knowledge has been written down and attributed to researchers, through such mechanisms as copyright laws, indigenous peoples and local communities believe that they maintain rights over their traditional knowledge as the original holders of that knowledge. These nuances of legal and ethical ownership are important considerations in determining how to address traditional knowledge that is publicly available.

20. In their submissions, indigenous peoples and local communities maintain that publicly available traditional knowledge should recognize the original holders of that knowledge and their right to a fair and equitable share of benefits through mutually agreed terms for its ongoing use. They also recommend that States establish appropriate mechanisms to enforce compliance with and safeguard the right of indigenous peoples to benefit from their traditional knowledge, whether it is publicly available or not.

21. In relation to traditional knowledge that is publicly available, indigenous peoples and local communities suggest that there are at least two options that could be considered:

(a) Indigenous peoples and local communities can, on their own, establish repositories and registers for traditional knowledge; and/or

(b) Competent public bodies can establish specialized repositories on such subjects as ethnobotany, anthropology and natural sciences in general, to collect traditional knowledge which may have been lost or appropriated from indigenous peoples and local communities. In these instances, these bodies could carry out repatriation to return information to the relevant communities so that they can continue to be beneficiaries of their own traditional knowledge.

22. The actions proposed by indigenous peoples and local communities above could address the need to protect traditional knowledge more generally and could be considered proactive measures to stop traditional knowledge from entering the public domain. They may also assist in identifying the original knowledge holders of publicly available traditional knowledge.

5. *Special measures for publicly available traditional knowledge*

23. Some submissions received from Parties suggested that there should be special considerations for publicly available traditional knowledge and an encouragement for the equitable sharing of benefits arising from ongoing use. Indigenous peoples and local communities also argue for special measures to address publicly available traditional knowledge. However, other submissions from Parties emphasized, in the context of repatriation of publicly available traditional knowledge, that repatriation of such knowledge should facilitate the exchange of such information rather than limit or restrict it, while respecting the rights of the holders of such knowledge. The repatriation of information should not impede the continued use of such publicly available information in the Party that decides to repatriate it. Indigenous peoples and local communities added that they require more opportunities to further discuss mechanisms for dealing with traditional knowledge that is publicly available or in the public domain.

6. *Compensation for ongoing use of traditional knowledge*

24. Some Parties propose that compensation should be considered for ongoing use, including an encouragement for ongoing commercial users to enter into mutually agreed terms for the equitable sharing on benefits and/or the return of copyright to the original knowledge holders. They also suggest the development of mechanisms for equitable sharing of benefits from traditional knowledge that was collected and used for a specific or ongoing period. One Party proposes that, where the specific indigenous peoples and local communities that are the knowledge holders cannot be identified, the competent national authority of the Party concerned (country of origin) should enter into mutually agreed terms with the user of the publicly available traditional knowledge, for benefit-sharing, where there is ongoing use.

7. *Conclusion*

25. Overall, those Parties that advocate in their submissions special measures for publicly available traditional knowledge also argue in favour of proactive national measures to protect traditional knowledge (and the knowledge holders), in order to restrict traditional knowledge from entering the public domain in the first place. Other submissions note the difficulty of restricting or regulating traditional knowledge already in the public domain.

26. While there remains a range of views on this issue, the views are not necessarily incompatible. For instance, some views suggest that Parties and other Governments should be proactive in putting measures into place to address the unlawful appropriation of traditional knowledge. Additionally, some Parties have advocated for no impediments to the ongoing use of publicly available traditional knowledge, while others consider that there should be benefit-sharing with the original knowledge holders where there is ongoing use or even for use over specific periods of time. Entering into benefit-sharing arrangements with the original knowledge holders regarding ongoing use, including the use of publicly available traditional knowledge, need not impede nor should it be considered an obstacle to its continued use in the Party, institution or entity that continues to use such knowledge. Increasingly, for many products, identification of the indigenous peoples and local communities who are the original knowledge holders and the sharing of benefits with them can in itself have multiple benefits, such as increasing the marketability of and adding value to products (those based on traditional knowledge) and providing opportunities for companies to demonstrate corporate responsibility and ethical sourcing and trade practices.

27. The Conference of the Parties dealt with many of these matters in decision XIII/18, in which welcomed and adopted the Mo'otz kuxtal Voluntary Guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the "prior and informed consent", "free, prior and informed consent" or "approval and involvement", depending on national circumstances, 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 relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge. These guidelines provide advice concerning the development of national measures which Parties and other Governments may put into place to address the unlawful appropriation of traditional knowledge; they also provide advice on benefit-sharing. As many of the matters raised in this section may be addressed through the Mo'otz kuxtal Voluntary Guidelines, Parties may wish to gather experience with their implementation before considering the need for further work on these issues.

**B. Best practices to implement “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”**

28. Parties and other contributors provided various contexts to the three terms “prior and informed consent”, “free, prior and informed consent” or “approval and involvement” and used the various forms according to national circumstances. Some Parties also welcomed the adoption of the Mo'otz kuxtal Voluntary Guidelines as useful guidance for developing mechanisms for prior informed consent. Some Parties also noted that prior informed consent is required under the Nagoya Protocol for access to traditional knowledge associated with genetic resources and in instances where indigenous and local communities have the established right to grant access to genetic resources.

29. One Party also explained in its submission that prior informed consent for access to traditional knowledge (associated with genetic resources) from indigenous and local community knowledge holders in their national context, can be facilitated through such mechanisms as community protocols, a signed prior-and-informed-consent form or an audio-visual record of prior informed consent, as decided by the relevant indigenous and local community knowledge holders. The same Party also noted that technical advice on prior informed consent processes of indigenous peoples and local communities in the national context can be obtained from the competent national authority (for genetic resources and associated traditional knowledge).

30. Some submissions reflected on the integrity of the prior informed consent process and one Party in particular emphasized the need for indigenous peoples and local communities not to be coerced, pressured or intimidated in the choices they make regarding access to their traditional knowledge. This Party also emphasized that it has legislative arrangements that place an obligation on the national Government to negotiate with indigenous peoples and local communities on issues related to their rights to traditional knowledge. This Party also emphasized that the adoption of the Nagoya Protocol by the European Union had also placed obligations on member States to ensure that users of genetic resources and associated traditional knowledge conformed to standards such as prior informed consent.

31. Submissions from conservation organizations and several non-governmental organizations, referred to various guidelines for prior and informed consent processes, which provided detailed advice and are successfully being used in various contexts. Some indigenous organizations provided additional advice on characteristics of prior informed consent processes which could be considered “best practices”, including how to approach indigenous peoples and local communities and enter into dialogue and the importance of using indigenous languages, as well as ensuring the participation of women members of indigenous peoples and local communities.

32. In connection with the requirement for consent for access to traditional knowledge, some Parties indicated they have established proactive legal and policy arrangements for the protection of traditional knowledge, which include such measures as defining specific terms, creating registers, or developing templates to assist communities in developing community protocols, and developing and implementing other forms of public protection for traditional knowledge. One Party noted that its policy arrangements (a protocol) for prior and informed consent was based on the country's ratification of the International Labour Organization's Convention 169 on indigenous and tribal peoples.

33. As regards specifically the creation of registers for traditional knowledge, some Parties have indicated they are pursuing registers as a mechanism for the protection of traditional knowledge with the proviso that traditional knowledge provided is with the free, prior and informed consent of the original knowledge holders.

### *Conclusion*

34. Many of the submissions received from Parties indicated that prior informed consent had been incorporated into national laws and policies relevant to indigenous peoples and local communities, with good affect. At the same time, indigenous peoples and local communities in their submissions mentioned that unauthorized access continues to occur and that compliance with prior informed consent for access to traditional knowledge requires a binding legal framework, especially in instances where the traditional knowledge in question leaves the country of origin. However, submissions received did not indicate the need for further work on this issue at this time.

35. As the Conference of the Parties requested the Secretariat to produce a technical series publication on possible elements of *sui generis* systems for the protection, preservation and promotion of traditional knowledge, innovations and practices of indigenous and local communities (see [decision XII/12 E](#), para. 5), the Secretariat could complete the publication by including the information and examples received on best practices to implement “prior and informed consent”, “free, prior and informed consent” or “approval and involvement” so the valuable information received for the present document is not lost.

### **C. Advancement of the identification of the obligations of countries of origin as well as Parties and Governments where such knowledge, innovations and practices are used<sup>14</sup>**

36. On this particular matter, submissions were received from two Parties and two indigenous organizations.

#### *1. Obligation to recognize the original indigenous and local community knowledge holders*

37. In a submission received from a Party, it was noted that the historic experience of that country is that their biological resources and traditional knowledge had been collected for centuries without identifying the origin of the resources or the traditional knowledge. In this context, the Party recommended that Parties and Governments where traditional knowledge are used make an effort to recognize the original indigenous and local community owners of the traditional knowledge in question, and that Parties and Governments from which traditional knowledge originates take policy or legal measures to ensure that the origin of traditional knowledge is clearly stated and that its access is based on prior informed consent. Another Party noted that “countries of origin” should be understood as the country where the traditional knowledge was created and is associated with an indigenous people or local community.

#### *2. Obligation to establish mechanisms that require access to traditional knowledge is based on prior informed consent*

38. Another Party noted that it has laws that establish mechanisms for access and use of traditional knowledge based on prior informed consent, mutually agreed terms and the equitable sharing of benefits and punish inappropriate access of traditional knowledge.

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<sup>14</sup> See [decision XII/12 D](#), para. 2.

39. The submissions received from indigenous organizations emphasized that countries should include measures to ensure that users of traditional knowledge state the origin of any traditional knowledge used, and that it has been accessed according to the national law and with free, prior and informed consent of the indigenous and local community knowledge holders. Another indigenous organization emphasized that obligations in countries of origin should be to care for, respect and protect traditional knowledge. To do this, Governments could take policy or legal measures, drawing on the Mo'otz kuxtal Voluntary Guidelines, and fund projects that support traditional knowledge retention, transmission and use. Governments could also take measures such as establishing databases accessible to indigenous peoples and local communities to track the use of traditional knowledge and to ensure that access is based on free, prior and informed consent.

### 3. *Conclusion*

40. Regarding the identification of the obligations of countries of origin as well as Parties and Governments where such knowledge, innovations and practices are used, the submissions received placed emphasis on Parties and Governments attributing the traditional knowledge in question to the original indigenous and local community traditional knowledge holders, and ensuring that it is accessed with their prior and informed consent, regardless of whether the Party or Government is a country of origin or a Party or Government where the traditional knowledge in question is used. Therefore, the use of the Mo'otz kuxtal Voluntary Guidelines by Parties and other Governments to develop and implement mechanisms, legislation or other appropriate initiatives,<sup>15</sup> for traditional knowledge would address matters raised under this section.

#### **D. Overall conclusion**

41. Based on views expressed on the three matters above, the Mo'otz kuxtal Voluntary Guidelines are useful for addressing many of the issues raised in this section, including by: (a) establishing a framework for access and benefit-sharing arrangements for traditional knowledge where access is based on prior informed consent and use is determined through mutually agreed terms providing for benefit-sharing arrangements; (b) assisting with the identification of the original knowledge holders; and (c) putting in place proactive arrangements to stop the unlawful access of traditional knowledge. As no specific suggestions for further work have been received, Parties may wish to gather experience in the implementation of the Mo'otz kuxtal Voluntary Guidelines before considering the need for further work on these issues.

## **II. DRAFT RECOMMENDATION FOR THE CONSIDERATION OF THE WORKING GROUP**

42. In the light of the views contained in section I above, the Working Group may wish to recommend that Parties gather experience in the implementation of the Mo'otz kuxtal Voluntary Guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, 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 relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge, and, in the light of those experiences, consider the need for further work on these issues within the framework of a fully integrated programme of work in the post-2020 arrangements for the Convention on Biological Diversity.

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<sup>15</sup> With the effective participation of indigenous peoples and local communities.