

ARTICLE 8(J) AND RELATED PROVISIONS**NON-PAPER REV 2****Item 14. Article 8(j) and related provisions: guidelines for the repatriation of traditional knowledge; guidelines for the development of legislation or other mechanisms; and recommendations from the United Nations Permanent Forum on Indigenous Issues**

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

The Conference of the Parties,

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

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

Recalling Aichi Biodiversity Target 18, which calls, inter alia, for traditional knowledge to be respected at all relevant levels by 2020, and *also recalling* Aichi Targets 11 and 16,

Noting that the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization also applies to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such traditional knowledge, and *recognizing* the contribution that guidance can make to the implementation of the Convention on Biological Diversity and the Nagoya Protocol,

[Stressing the need to enhance synergies among international processes and organizations addressing issues related to traditional knowledge, innovations and practices of indigenous peoples and local communities in order to ensure consistency with work undertaken under these processes and organizations] and to prevent diminishment of the rights of indigenous peoples and local communities to their traditional knowledge.

Waiting for Compromise Text from Switzerland and Canada

Stressing the need to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

Underlining that these guidelines are not construed as changing the rights of Parties or obligations under the CBD or the NP and should be applied in a manner that seeks consistency with and does not run counter to the NP for those who are Parties;

1. Welcomes and aAdopts the Voluntary Guidelines as contained in the annex to the present decision;
2. *Invites* Parties and other Governments to use the Voluntary Guidelines, as appropriate;
3. *Invites* Parties, other Governments, relevant organizations and indigenous peoples and local communities to promote the guidelines through appropriate educational and awareness-raising activities, as appropriate;
4. *Also invites* Parties, other Governments, relevant organizations and indigenous peoples and local communities to make available through the clearing-house mechanism, where appropriate, best practices, lessons learned and good examples of community protocols relevant to access and benefit-sharing arising from the use of traditional knowledge;
5. *Invites* Parties to report on experiences gained by using the Voluntary Guidelines through the national reports;
6. *Invites* Parties, other Governments, relevant organizations and indigenous peoples and local communities to promote regional cooperation and share experiences and best practices on relevant measures, including approaches and measures relating to traditional knowledge shared across borders, where they exist;
7. *Also invites* Parties, other Governments, relevant organizations and indigenous peoples and local communities to submit their views concerning measures to address publicly available traditional knowledge to the Executive Secretary, and *requests* the Executive Secretary to compile the measures and views received and make the results available for the consideration of the Working Group on Article 8(j) and Related Provisions at its tenth meeting, in order to contribute to the finalization of Tasks 7 and 12 of the revised multi-year programme of work on Article 8(j) and related provisions, as appropriate;

7.bis Further invites Parties, other Governments, relevant organizations and indigenous peoples and local communities to submit their views concerning best practices to implement 'free prior and informed consent' to the Secretary, and requests the Executive Secretary, to compile the best practices received and make the results available for the consideration of the Working Group on Article 8(j) and Related Provisions at its tenth meeting, in order to contribute to the finalization of Tasks 7 and 12 of the revised multi-year programme of work on Article 8(j) and related provisions, as appropriate;

8. *Invites* relevant international agreements, agencies, and organizations to take into consideration the guidance contained in the annex to the present decision in the implementation of their work;

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

Annex

DRAFT MO'OTZ KUXTAL¹ VOLUNTARY GUIDELINES FOR THE DEVELOPMENT OF MECHANISMS, LEGISLATION OR OTHER APPROPRIATE INITIATIVES TO ENSURE THE [FREE,] PRIOR AND INFORMED CONSENT [OR APPROVAL AND INVOLVEMENT] OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES² 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

I. PURPOSE AND APPROACH

1. The present guidelines are voluntary and are intended to provide guidance for the development of mechanisms, legislation, administrative and policy measures or other appropriate ~~initiative~~^{initiatives} to ensure that potential users of knowledge, innovations and practices that are held by indigenous peoples and local communities, embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity (hereinafter “traditional knowledge”), obtain the [free,] prior and informed consent [or approval and involvement], where appropriate and in accordance with national legislation, of these indigenous peoples and local communities, that these indigenous peoples and local communities obtain a fair and equitable share of benefits arising from the use and application of such traditional knowledge and for reporting and preventing unlawful appropriation of traditional knowledge relevant for the conservation and sustainable use of biological diversity.

2. These guidelines have been developed pursuant to decision XII/12 D on how tasks 7, 10 and 12 of the multi-year programme of work on the implementation of Article 8(j) and related provisions could best contribute to work under the Convention on Biological Diversity (hereinafter “the Convention”) and the Nagoya Protocol on Access to Genetic Resources and the

¹ Meaning is “Roots of life” in Maya language.

² The use and interpretation of the term “indigenous peoples and local communities” in these Guidelines should refer to decision XII/12 F, paragraph 2 (a), (b) and (c).

Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (hereinafter “the Nagoya Protocol”).

3. Nothing in these guidelines should be construed as changing the rights or obligations of Parties under the Convention or under the Nagoya Protocol.

4. The guidelines should be applied where appropriate and in accordance with national legislation and in a manner that ~~ensures consistency~~ is consistent with domestic law, gives due importance to the customary laws and community protocols and practices of indigenous peoples and local communities, and seeks consistency when applied to traditional knowledge associated with genetic resources under the Nagoya Protocol.

II. GENERAL PRINCIPLES

A. Access to traditional knowledge

5. Access to traditional knowledge of indigenous peoples and local communities should be subject to [free,] prior and informed consent [or approval and involvement] of the ~~owners~~ holders or holders of such traditional knowledge. [Free,] prior and informed consent includes the right to say no.

CHAIRS COMMENT: Para 5bis was provided by a party as a concise summary of SECTION III BELOW.

5.bis Consent is the agreement of the traditional knowledge holders to provide a potential user with access to the traditional knowledge in question. Consent shall be obtained in good faith with no coercion, intimidation or manipulation and is voluntarily given, consistent with national law and with due regard to customary laws, community protocols and customary decision-making processes, prior to the access, unencumbered by expectations and timelines that are externally imposed.” As such it is understood that prior informed consent must be freely given.

6. [Free,] prior and informed consent [or approval and involvement] ~~should~~ may be understood as a continual process building mutually beneficial, ongoing arrangements between users of traditional knowledge and indigenous peoples and local communities, in order to build trust, good relations, mutual understanding, intercultural spaces, knowledge exchanges, create new knowledge and reconciliation and should include the full and effective participation of indigenous peoples and local communities, ~~including~~ taking into account customary laws ~~and,~~ community protocols and practices of indigenous peoples and local communities.

7. It is not practical to propose a “one-size-fits-all” approach for [free,] prior and informed consent [or approval and involvement] of indigenous peoples and local communities as regards access to the traditional knowledge they ~~own or~~ hold; and, therefore, these guidelines are intended to be used taking into account national and local circumstances of the indigenous peoples and local communities concerned.

8. The customary laws, community protocols, practices and customary decision-making processes of indigenous peoples and local communities should be given due importance in relation to the procedural and substantive aspects of the ~~consent~~ process to access traditional knowledge.

9. Granting [free,] prior and informed consent to users of traditional knowledge, unless otherwise mutually agreed, does not ~~transfer ownership~~ affect who holds the knowledge, but merely

allows temporary use. In such cases, ~~ownership is retained by~~ the indigenous peoples and local communities remain the holders.

9.bis These measures should be selected in accordance with national circumstances.

B. Fair and equitable sharing of benefits

10. Indigenous peoples and local communities should receive fair and equitable benefits based on mutually agreed terms from the use of the traditional knowledge that they ~~own or~~ hold.

11. Benefit-sharing should be regarded as a way of recognizing and strengthening the contribution of indigenous peoples and local communities to the conservation and sustainable use of biological diversity, including by supporting the intergenerational transmission of traditional knowledge.

12. Benefit-sharing should be fair and equitable within and among relevant groups, taking into account inter alia relevant community level procedures, and gender and age/intergenerational considerations, when appropriate.

C. Reporting and preventing unlawful appropriation

13. Important tools against unauthorized use/appropriation of traditional knowledge include, among others: ~~The implementation of measures, and subject to ensure~~ national legislation, measures that traditional knowledge that is ~~owned or~~ held by indigenous peoples and local communities is accessed with their [free,] prior and informed consent [or approval and involvement] and that mutually agreed terms for sharing benefits arising from the use of that traditional knowledge are established;

~~(a) — Measures subject to national legislation.~~

CHAIRS COMMENT: SECTION III WAS DELETED BY SEVERAL PARTIES AND SOME SUGGESTED REPLACEMENT BY PARA 5BIS ABOVE.

III. ~~UNDERSTANDING OF [FREE,] PRIOR INFORMED CONSENT [OR APPROVAL AND INVOLVEMENT]~~

~~13. — [Free implies that indigenous peoples and local communities are not coerced, pressured, intimidated or manipulated and that their consent is voluntarily given, consistent with national law and with due regard to customary laws, community protocols and customary decision-making processes, prior to the access, unencumbered by expectations and timelines that are externally imposed.]~~

~~14. — Prior implies that consent is to be sought sufficiently in advance of any authorization to access traditional knowledge respecting the customary decision-making processes and time requirements of indigenous peoples and local communities.~~

~~15. — Informed implies that information is provided that covers relevant aspects, inter alia: the intended purpose of the access, its duration and scope; a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks; personnel likely to be involved in the execution of the access; and procedures the access may entail. This process may include the option of withholding consent. Consultation and effective participation by indigenous peoples and local communities are crucial components of a consent [or approval] process.~~

~~16. — Consent [or Approval] is the agreement of the traditional knowledge owners or holders to provide a potential user with access to the traditional knowledge in question. Consent [or approval] shall be obtained in good faith with no coercion, intimidation or manipulation.~~

~~17. [Involvement refers to the effective participation of indigenous peoples and local communities, as traditional knowledge owners, holders or providers, in decision-making processes related to access.]~~

~~IV.~~ PROCEDURAL CONSIDERATIONS FOR [FREE,] PRIOR AND INFORMED CONSENT [OR APPROVAL AND INVOLVEMENT,] AND MUTUALLY AGREED TERMS FOR BENEFIT-SHARING

A. Relevant authorities and other elements

19. Consent [or approval] processes and establishment of mutually agreed terms for fair and equitable benefit-sharing may be required at different levels depending on national circumstances and the diverse internal organization of various indigenous peoples and local communities, and may include the following elements:

- (a) A competent authority at the national or subnational level;
- (b) The competent authorities of indigenous peoples and local communities;
- (c) Elements of a consent [or approval] process including:
 - (i) Written application in a manner and language comprehensible to the traditional knowledge ~~owner or~~ holder;
 - (ii) Legitimate and culturally appropriate process and decision-making, including possible social, cultural and economic impacts;
 - (iii) Adequate and balanced information from a variety of sources that is made available in indigenous or local languages using terms understood by indigenous peoples and local communities and including safeguards to ensure that all parties to an agreement have the same understanding of the information and terms provided;
 - (iv) Culturally appropriate timing and deadlines;
 - (v) Specification of use with clause to address change of use and transfer to third parties;
 - (vi) Implementation and monitoring;
- (d) A template taking into account the possible actions required by potential users of traditional knowledge;
- (e) [Free,] prior and informed consent [or approval and involvement] granted/established on the basis of mutually agreed terms ensuring the fair and equitable sharing of benefits;
- (f) Consultation process with indigenous peoples and local communities;
- (g) Procedures consistent with customary laws, community protocols, practices and customary decision-making processes.

B. Community protocols and customary law

20. In line with Article 12 of the Nagoya Protocol, community protocols and customary law can play a role in processes for access to traditional knowledge and the fair and equitable sharing

of benefits arising from the use of such knowledge. They can contribute to legal certainty, transparency and predictability concerning processes for obtaining [free,] prior and informed consent [or approval and involvement] of indigenous peoples and local communities and for establishing mutually agreed terms for benefit-sharing.

21. *Community protocols* is a term that covers a broad array of ~~documents~~instruments generated by communities to set out how they expect other stakeholders to engage with them. They may reference customary as well as national or international laws to ~~affirm~~indicate their ~~rights~~expectations to be approached according to a certain set of standards. Articulating information, relevant factors, and details of customary laws and traditional authorities helps other stakeholders to better understand the community's values and customary laws. Community protocols provide communities an opportunity to focus on their development aspirations vis-à-vis their rights and to articulate for themselves and for users their understanding of their bio-cultural heritage and therefore on what basis they will engage with a variety of stakeholders. By considering the interconnections of their land rights, current socio-economic situation, environmental concerns, customary laws and traditional knowledge, communities are better placed to determine for themselves how to negotiate with a variety of actors.³

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

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

23. Community protocols can help address any number of community issues. They can articulate a number of concerns important to communities, relevant to biological diversity, such as how they intend to:

- (a) Conserve biodiversity;
- (b) Sustainably use plants and animal biological resources;
- (c) Manage and benefit from local biodiversity;

³ Refer to <http://www.unep.org/communityprotocols/protocol.asp> and http://www.unep.org/delc/Portals/119/publications/Community_Protocols_Guide_Policymakers.pdf

- (d) Use, protect and benefit from traditional knowledge;
- (e) Provide [free,] prior and informed consent [or approval and involvement] to access traditional knowledge for any number of reasons including commercial and non-commercial research and by the media;
- (f) Ensure environmental and other laws are implemented according to customary laws;
- (g) ~~Oppose unsustainable~~ Address sustainable development on their lands;
- (h) Engage with governmental or other support.

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

V. FAIR AND EQUITABLE SHARING OF BENEFITS

25. In order to achieve a fair and equitable sharing of benefits, Parties, other Governments and users of traditional knowledge should take the following into account:

- (a) Partnership and cooperation should guide the process of establishing mutually agreed terms to ensure the fair and equitable sharing of the benefits arising from the utilization of traditional knowledge with and among the ~~owners or~~ holders of that traditional knowledge;
- (b) Community protocols, which may provide guidance from the community perspective on the fair and equitable sharing of benefits;
- (c) The benefits obtained from the use of traditional knowledge, innovations and practices, including results of research, should, as far as possible, be shared where appropriate and in line with mutually agreed terms with the relevant ~~owners or~~ holders of the traditional knowledge in understandable and culturally appropriate formats, with a view to building enduring relationships, promoting intercultural exchanges, knowledge and voluntary technology transfer, synergies, complementarity and respect;
- (d) In developing mutually agreed terms, Parties, other Governments, and others seeking access to traditional knowledge should make efforts to ensure that the ~~owners or~~ holders of that traditional knowledge can negotiate on a fair and equal basis and are fully informed about any proposals including potential opportunities and challenges in order to make informed decisions;
- (e) The [free,] prior and informed consent and mutually agreed terms should constitute a legal contract between the indigenous peoples and local communities, and the corresponding parties to the contract;
- (f) In developing mutually agreed terms, those seeking to use traditional knowledge could undertake to renegotiate if the use varies significantly from the original purpose, including on possible commercialization of the traditional knowledge within national legislation and/or contract requirements;

(g) The [free,] prior and informed consent and mutually agreed terms should contain agreed grievance and redress mechanisms to address non-compliance with its provisions.

A. Possible mechanisms for benefit-sharing

26. Mechanisms for benefit-sharing may vary depending upon the type of benefits, the specific conditions and laws in the country and the stakeholders involved. The benefit-sharing mechanism should be flexible as it should be determined by the partners involved in benefit-sharing and will vary on a case-by-case basis.⁴

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

28. Parties, other Governments and relevant regional organizations may wish to consider, taking into account regional arrangements ~~and~~, model laws, international law and national law, the need for the establishment of regional trust funds or other forms of transboundary cooperation, as appropriate, for traditional knowledge held across borders, for traditional knowledge held in several countries or where the ~~traditional knowledge is unattributed~~.⁵ holders are no longer identifiable.

B. Types of benefits

29. Benefits may include monetary and non-monetary benefits, including but not limited to those listed in the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising from their Utilization.

VI. REPORTING AND PREVENTING UNLAWFUL APPROPRIATION

30. These guidelines are voluntary by their nature; however, Parties and other Governments may wish to consider incentives or other ways to ~~ensure~~promote compliance, in their consideration of the use of the guidelines in the development of mechanisms, legislation or other appropriate initiatives to ensure that private and public institutions, interested in using traditional knowledge obtain the [free,] prior and informed consent [or approval and involvement] of the indigenous peoples and local communities that hold the traditional knowledge and establish mutually agreed terms for benefit-sharing.

31. Compliance measures that also support the [free,] prior and informed consent [or approval and involvement] of indigenous peoples and local communities for access to the traditional knowledge that they hold and benefit-sharing with indigenous peoples and local communities for use of the traditional knowledge that they hold could include:

(a) Capacity-building, awareness-raising and information-sharing within indigenous peoples and local communities;

(b) Codes of conduct and best practice codes of users;

(c) Model contractual clauses for mutually agreed terms to promote equity between the negotiating positions of the parties;

⁴ Adapted from paragraph 49 of the Bonn Guidelines.

⁵ ~~The knowledge owners or holders are no longer identifiable.~~

(d) Minimum standards for access and benefit-sharing agreements.

32. Parties and other Governments may wish to consider:

(a) The complex nature of traditional knowledge and evidentiary issues in customary legal traditions mean that customary law may be appropriate to settle disputes arising over traditional knowledge, to the extent it does not contravene national law;

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

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