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

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Item 7 of the provisional agenda\*

### **ADVICE ON HOW ARTICLE 10 (c) CAN BE FURTHER ADVANCED AND IMPLEMENTED AS A PRIORITY**

*Note by the Executive Secretary*

#### **I. BACKGROUND**

1. The Convention on Biological Diversity acknowledges the interconnectedness of traditional knowledge and customary practice both in its preamble and in Article 8(j). Furthermore, Article 10 (c) of the Convention on Biological Diversity states that Parties shall, as far as possible and as appropriate:

“Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.”

2. In paragraph 4 of its decision IX/13 A, the Conference of the Parties requested the Executive Secretary to continue to compile case-studies, analyse and report on work concerning related provisions, focusing on Article 10 (c), and to provide advice to the Working Group at its sixth meeting on how this related provision may be further advanced and implemented as a priority.

3. With this in mind, the Secretariat conducted an electronic online forum, from 11 February to 11 March, 2009 (refer notification SCBD/SEL/OJ/JS/SG/66366, dated 9 February 2009), through the Traditional Knowledge Portal, requesting input from representatives of indigenous and local communities, Parties, NGOs, academics, and other interested individuals and organizations. Thirty-seven experts participated over the four weeks of the electronic forum. The forum was guided by the framing question: How can Parties to the Convention ensure that obligations arising from Article 10 (c), to protect and encourage the customary use of biological resources (in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements), are further advanced and implemented as a priority? As well as this initiative, the Secretariat has continued to compile case-studies from various sources and has analysed them with a view to provide advice to the sixth session of the Working Group on Article 8(j) and Related Provisions for its consideration.

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\* UNEP/CBD/WG8J/6/1.

4. The following provides an overview of case-studies analysed and the input received through the electronic consultative process.

## II. INTRODUCTION: CUSTOMARY AND SUSTAINABLE USE OF BIOLOGICAL RESOURCES

5. Indigenous and local communities relying on fishing, horticulture, subsistence agriculture, and/or hunting and gathering have accumulated substantial knowledge relevant to sustainable resource use and management and the conservation of biodiversity in their traditional territories. The interdependence of indigenous and local communities and biodiversity means that protecting and encouraging the vitality of biological diversity requires protecting and encouraging the vitality of indigenous and local communities on those territories.

6. Customary use practices are closely connected with traditional knowledge, as these practices are learned, maintained and applied in hands-on settings and transmitted orally. Although there is continuity in customary use practices, they also change over time to reflect new technologies and respond to changes in environmental, social, economic and political conditions. Indigenous and local communities, like humans everywhere, are resilient and capable of adapting their customary use practices to changing conditions within the limits set by the ecosystems in which they live, as well as the overarching policies set in place by local and national Governments, as well as global environmental agreements.

7. Customary use practices are often linked to *sui generis* systems that help regulate equitable access to resources and help protect local resources from overuse. Practices relating to use of biological resources are often guided by customary regulations, moral codes, ethical norms, and specific sanctions that help to promote sustainability. *Sui generis* systems guiding customary use are by definition local and therefore unique, but common principles underlying ethical use may include: mutual recognition (recognition that nature is made up of living, sentient beings), least damage (injunction to cause the least amount of damage or suffering in hunting or resource use as reflected in the precautionary principle); avoidance of waste or overharvest, protection of sacred species, and protection of the rights of future generations to enjoy the benefits of biological diversity.<sup>1</sup>

8. In many cases, customary use is guided by a system of customary management practices that include a broad range of strategies. For example, in Vanuatu, customary management practices of marine resources incorporate a variety of strategies, including: the identification of custodians with rights to control or restrict fishing and harvesting in certain areas; the creation of species-specific prohibitions, implementing “seasonal closures” in which reef resources would be protected during periods of agricultural production; the creation of protected areas along coasts and reefs to which access is restricted at all times due to the symbolic importance of the areas; behavioural prohibitions (for example, if a visitor should arrive and stay overnight, fishing would be prohibited the following day); and temporary closure of certain areas due to the occurrence of a special event (for example, the death of a respected leader), amongst others.<sup>2</sup>

9. As is clear from the above example, many traditional use practices of indigenous and local communities are framed within local belief systems and cosmologies, in such a way as to respect and support the diversity of life on earth. For example, the Sundarbans, a tidal mangrove forest in Bangladesh, is home to a great diversity of plant, animal, bird, and fish species. An estimated 3.5 million people depend directly or indirectly on the Sundarbans for their livelihoods. The traditional resources

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<sup>1</sup> SCBD Information Note: Development of Elements of *Sui-Generis* Systems for the Protection of Traditional Knowledge, Innovations and Practices to Identify Priority Elements (UNEP/CBD/WG8J/5/6).

<sup>2</sup> Hickey, F. R. (2006). Traditional Marine Resource Management in Vanuatu: Acknowledging, Supporting and Strengthening Indigenous Management Systems. SPC Traditional Marine Resource Management and Knowledge Information Bulletin, 20: 11-23. [http://www.spc.int/coastfish/News/Trad/20/Trad20\\_11\\_Hickey.pdf](http://www.spc.int/coastfish/News/Trad/20/Trad20_11_Hickey.pdf)

users of the forest depend on it for wood cutting, fishing, and gathering honey, golpata leaves, and grass to name a few. Hindu and Muslim alike see their subsistence practices as guided by and dependent on the beneficence of various deities, in particular the goddess of the Sundarbans, *Banobibi*. The indigenous and local peoples of the Sundarbans observe various cultural events and festivals in order to honour and thank the gods and goddesses who are protectors of trees and wildlife. Cultural and religious practices therefore play an important role in maintaining the sustainable use of biodiversity and in transmitting its importance to the next generation.<sup>3</sup>

10. Because of the connections between customary use and traditional knowledge, cosmologies and belief systems, it is important to consult indigenous and local communities in all aspects of research, documentation, and establishment of related policy guidelines. Some aspects of customary use – for example, knowledge of certain medicinal plants – may be viewed as sacred knowledge that only authorized community members have access to. Consideration of the right of free, prior and informed consent and the promotion of ethical practices of research, are important in this context.

***A Approaches to promoting access to and management of biological resources for customary and sustainable use***

11. Case-studies suggest that customary use practices are maintained by a diversity of indigenous and local communities living in diverse ecosystems with diverse customary laws guiding access and management of resources. Furthermore, these practices often occur under a wide variety of national legal systems. As such, it may be useful to explore a full spectrum of possible approaches through which Parties could promote access to and management of biological resources by indigenous and local communities for the purpose of customary and sustainable use.

*1. Relationship between customary use and access to lands and resources*

12. In order to maintain traditional cultural practices and sustainable use of biological resources, indigenous and local communities must have ongoing access to such resources. The cultural survival of indigenous and local communities relies on their cultural vitality and their ability to continue to practice and pass on their unique knowledge, innovations and practices to future generations. Access to lands and resources upon which their culture is based is necessary for their very survival. Providing access to lands and resources and involving indigenous and local communities in decision-making and management of those resources (refer to (b) below) are the two most important equity issues that Parties to the Convention face in relation to Article 10 (c). The two items are interrelated, as the most secure and sustainable form of access for indigenous and local communities is the recognition of local traditional land use and tenure (which may include tenure of lands, waters, and coastal seas). However, in cases where local land use and tenure has not yet been determined or where legal ownership of land rests with entities other than indigenous and local communities, providing access to biological resources is still both possible and desirable.

13. Access to lands and biological resources could be provided according to a spectrum of possible mechanisms, including (but not limited to) the mechanisms listed below, all of which are highly complementary to the Ecosystem Approach (especially principles 1 and 2) and the Addis Ababa Principles and guidelines (especially principle 2):

(a) *Land tenure.* Because the customary and sustainable use of biological resources by indigenous and local communities is rooted in longstanding and intimate familiarity with a particular place, secure land tenure is an important mechanism for providing access, enhancing local management

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<sup>3</sup> Kabir, D.M.H. and J. Hossain (2008). Resuscitating the Sundarbans: Customary Use of Biodiversity and Traditional Cultural Practices in Bangladesh. Report prepared for Unnayan Onneshan (The Innovators). And other 10(c) case-studies. <http://www.forestpeoples.org/documents/conservation/bases/10c.shtml> and <http://unnayan.org/reports/Resuscitating.the.Sundarbans.pdf>

and supporting customary use. The recognition and respect of traditional land tenure is arguably the most effective method, as it ensures secure and long-term access to lands and biological resources and allows resource allocation and use to be based on traditional knowledge and practices (refer to (b) below). In some cases, recognizing customary tenure has directly improved the health of animal and plant species by way of revitalized customary use practices.<sup>4</sup> The *United Nations Declaration on the Rights on Indigenous Peoples*<sup>5</sup> provides a framework for respecting the fundamental human rights of indigenous peoples, and provides a legal and environmental basis for protecting and encouraging customary sustainable use. Because of this, the Declaration may be viewed as a supporting document for the full and effective implementation of Article 10 (c) of the Convention;

(b) *Recognition of Indigenous and/or Community Conserved Areas.* Many areas important to customary and sustainable use are already recognized as sacred or protected areas by indigenous and local communities. These areas, known as Indigenous and/or Community Conserved Areas (ICCAs), include sacred forests, wetlands, village lakes, catchment forests, river and coastal stretches and marine areas. ICCAs are recognized by the Convention's programme of work on protected areas and the IUCN Strategic Direction on Governance, Communities, Equity and Livelihoods in relation to Protected Areas, and discussed in the IUCN's "Guidelines for Applying Protected Area Management Categories."<sup>6</sup> A key feature of these conserved areas is that indigenous and local communities have decision-making and management authority over them, although other stakeholders may also have input. Although ICCAs have been protected by customary law for centuries, local and national Governments often have not officially acknowledged them as conserved or protected areas, and in many cases, official tenure may be unresolved. One mechanism for promoting and strengthening access to biological resources for the purposes of customary use, therefore, is to document and recognize the existence of ICCAs, and to support local communities in their stewardship of these areas;

(c) *Special Access.* In some cases, Governments have created provisions so that indigenous and local communities have special access to certain areas that is not permitted to the population at large. This access is justified based on previous traditional tenure of Indigenous and local communities in areas that are now under state or private control. States may recognize rights to access and may grant access to indigenous and local communities to state lands (i.e. protected areas, state forest and watershed areas) for such purposes as customary sustainable use and cultural practices. In some countries, private land owners have entered into bilateral agreements to provide access to lease-hold lands (i.e. pastoral and mining leases) to traditional resources and for cultural practices, where this is compatible with existing uses such as grazing of livestock. Such arrangements can be enhanced and promoted with government support. Examples of state recognition of rights to customary use often enhances the viability of parks and protected areas because it contributes to subsistence of indigenous and local communities and helps prevent illegal use of these resources by third parties. An initial step in this process in some places might be to identify and document the traditional occupations and livelihoods of indigenous and local communities so that decisions about access to biological resources might be guided by a clearer understanding of past and current ILC access and use;

(d) *General Access.* As a minimal standard to promote the implementation of Article 10(c), Governments should ensure that indigenous and local communities have equal access to natural resources, sacred sites and places of cultural significance on lands and waters traditionally occupied or used by them, for the purposes of customary practices (customary sustainable use).

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<sup>4</sup> For example, recognition of Cree land tenure rights led to the re-adoption of customary use practices and an increase of beaver populations in Cree territory.

<sup>5</sup> *United Nation Declaration on the Rights of Indigenous Peoples* (61/295, annex) [UNDRIP].

<sup>6</sup> <http://data.iucn.org/dbtw-wpd/edocs/PAPS-016.pdf>.

14. Apart from methods to legally promote physical access to biological resources, other methods that will support indigenous and local communities in being able to access biological resources for customary use purposes include:

(a) *Supporting Indigenous and local communities to exercise their customary practices and laws.* In some cases, the documentation of these practices and laws (under the guidance and supervision of Indigenous and local communities) may be beneficial;

(b) *Supporting Indigenous and local communities in representing themselves through their own institutions.* Indigenous and local communities may benefit from capacity-building in order to strengthen local institutions in their capacity to interface with regional, national, and international bureaucracies in asserting and maintaining their rights to access. Additionally, local institutions can be strengthened and supported through participation in decision-making processes at the regional and national levels;

(c) *Recognizing the right to free, prior and informed consent (FPIC)* as reflected in the *United Nations Declaration on the Rights of Indigenous Peoples*. The principle of FPIC ensures that Indigenous and local communities are granted the right to participate in all matters that will impact their lives or affect their wellbeing; as such, it should serve as a foundational principle for addressing issues relating to customary use of biological resources.

15. *Protected areas and the right of access to biological resources for customary use:* Participants in the online forum on Article 10(c) flagged the creation of protected areas as posing challenges to Indigenous and local communities in terms of both access and management of biological resources. See section 3 below for further discussion of this issue.

## 2. *Relationship between customary use and management*

16. Customary use of biological resources is guided by local understandings of stewardship and ecological relationship. Customary use should be recognized as a form of traditional, local management. As such, customary use and the effective participation of indigenous and local communities in the management of resources form two sides of the same coin. Customary use can be incorporated into a variety of management practices, but the involvement of local people in planning, implementing and monitoring environmental management is a necessary prerequisite for success.

Specific management arrangements that could support customary use practices include:

(a) *Local control* over environmental management, either through recognition of land tenure (as previously mentioned), or through government ownership with devolved management and decision-making to the local level. This management arrangement is based on recognition and respect for the knowledge, practices and rights of indigenous and local communities, and on the rights of Indigenous and Local Communities to full and effective participation in decision-making policies and legal reforms dealing with biodiversity at all levels (local, national, regional, international). In some cases, beyond addressing outstanding issues of land tenure, Parties can support local control through capacity-building to strengthen local and traditional institutions (see discussion under “Access” above);

(b) *Co-management systems* in which Governments and indigenous and local communities work together to identify and agree on goals and practices for use of biological resources, as well as collaborating on ongoing monitoring practices. A co-management approach has the potential to provide a means of enhancing sustainability by combining the intimate local knowledge of indigenous and local communities with conservation tools and approaches rooted in biological and ecological science. One of the challenges of co-management is that the full participation of indigenous and local communities is often hampered due to lack of institutional capacity and resources in comparison with those that are at the disposal of state and regional governments. Many Indigenous and local communities do not have the

human capacity to effectively engage and advocate their positions, support and conduct research and assessment work that may be required, or maintain information management systems and databases, whilst performing their traditional obligations. Because of this, co-management systems may be skewed in favour of Government participation simply because Governments have greater capacity and finances to support their engagement. Awareness and sensitivity to these issues, as well as to historic and contemporary power imbalances between Governments and Indigenous and local communities, can help in designing co-management arrangements that will support the full and effective participation of Indigenous and local communities. Funders and large conservation organizations can also help by targeting capacity-building initiatives at the community level;

(c) *State-led management with the full and effective participation of indigenous and local communities* that takes into account the needs of these communities for ongoing customary and sustainable use, as well as knowledge, innovations and practices useful in local environmental management.

17. In all of the above examples of management arrangements, there is a need for awareness-raising at the level of national environmental governance to ensure that government authorities at all levels, are aware of the benefits to biological diversity and sustainability of local involvement in governance and decision-making. Additionally, enhanced coordination between government departments will ensure that local initiatives can be fully supported (for example, an initiative to support local management of resources might include inputs and capacity-building from departments dealing with both environment and sustainable development).

### 3. *Protected areas*

18. The impact of protected areas on customary use, specifically in relation to both access and management, was highlighted during the online forum on Article 10 (c). Although protected areas are not inherently antithetical to local control over access and management of resources, depending on how they are implemented by state and regional governments, they may create challenges for indigenous and local communities that depend on biological resources for subsistence. Protected areas can be implemented in ways that support the customary use practices and devolve management and authority to ILCs, but in many cases they are implemented in ways that place new burdens of bureaucratic management and oversight on ILCs that may result in undermining traditional tenure and leadership systems rather than supporting or strengthening them.<sup>7</sup> It was also pointed out that protected areas are simply one strategy for managing resources while within traditional resource management systems, there are numerous other strategies employed that may be tailored to and better target an area's resource management (TRM) needs. The protected area approach tends to promote a 'one size fits all' approach to resource management for nations ranging from highly developed industrial countries to small island states populated by indigenous and local communities with traditional land/marine tenure systems and highly developed TRM systems and a wealth of TK to draw upon. The need for more diverse and appropriate models is clear given this broad diversity, including projects that explicitly support and promote traditional tenure and TRM systems. Concern about protected areas soaking up the majority of financial resources available for biodiversity conservation projects while adjoining areas are polluted, overfished, clear cut or otherwise used unsustainably and consequent downstream effects undermining the value of protected areas was also expressed.

19. Participants in the forum pointed out the value to Governments of basing resource management initiatives on traditional resource management (TRM) practices. When a resource management initiative is firmly anchored in the context of traditional land/marine tenure systems and draws upon traditional knowledge and practice, the capacity of the community to sustain the initiative with less need for outside

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<sup>7</sup> Ruddle, K. and F. Hickey (2008). Accounting for the Mismanagement of Tropical Nearshore Fisheries. *Environment, Development and Sustainability*, 10:565-589.

funding or technical assistance is strengthened. This makes this approach cost effective for national Governments as well as donors.

20. When indigenous and local communities initiate the process of creating Protected Areas and work as equal partners in negotiating the terms with regional or national Governments, the potential for Protected Areas to provide sustainable, long-term access to resources is heightened. One example is an initiative of the Cree Community of Wemindji in northern Quebec to create terrestrial and marine protected areas on their lands, building on existing Cree institutions for environmental stewardship and on Cree practices of indigenous ecological knowledge. This initiative has been developed in response to large-scale industrial development plans from the urban south, the need for economic diversity and jobs for young people, and a commitment to safeguard hunting, fishing and trapping as a way of life. Knowledge-sharing, knowledge creation, and cultural and environmental education are central to the Crees' vision for enhanced community control.<sup>8</sup>

21. The Parties to the Convention are working to address issues of equity in Protected Areas, calling on parties to address the equitable division of the costs and benefits of conservation for indigenous and local communities and to make use of conservation benefits to reduce poverty. Element 2 of the Convention's programme of work on protected areas addresses "Governance, Equity, Participation and Benefit Sharing,"<sup>9</sup> which requests Parties to:

- Develop better practices of accountability in protected area governance;
- Promote the creation and recognition of Indigenous and Community Conserved Areas (see above);
- establish policies that will ensure the full participation of Indigenous and local communities in decision-making processes;
- Ensure that the principle of free, prior and informed consent is implemented in the context of resettlement caused by the establishment of protected areas;<sup>10</sup>
- Incorporate traditional knowledge and traditional resource management practices into the governance of protected areas.

22. As the implementation of Article 10 (c) is a cross-cutting issue and is also related to the Convention's programme of work on protected areas, it may be necessary to address the implementation of Article 10 (c) through various avenues but with an initial focus on protected areas.

## ***B. Other substantive issues***

### *1. Sustainability*

23. Indigenous and local communities may be seen as ecosystem peoples and their cultures are often cultures of habitat.<sup>11</sup> Hence the traditional environmental management by indigenous and local communities is through an ecosystem approach. The customary use of biological resources by indigenous and local communities can support the long-term sustainability of biological diversity. Case-studies suggest that customary use practices such as plant collecting and cultivating diverse local varieties of food crops supports flourishing ecosystems and enhances biological diversity. Customary use practices of indigenous and local communities tend to make holistic use of environmental resources further consistent with an ecosystem approach to managing biological diversity. Such diverse practices draw on different ecosystem products and services and minimize risk of depleting a single resource. The *Addis Ababa*

<sup>8</sup> Mark, R. and C. Scott. "Cree Goals and Interests in Relation to Environmental Protection and Development". In, Scott, C., M. Mulrennan and K. Scott, eds. *The Science and Politics of Protected Area Creation: Striking the Balance*. (Forthcoming).

<sup>9</sup> <https://www.cbd.int/protected/pow.shtml?prog=p2>. (Decision VII/28, annex)

<sup>10</sup> 2.2.5 Ensure that any resettlement of indigenous and local communities as a consequence of the establishment or management of protected areas will only take place with their prior, informed consent that may be given according to national legislation and applicable international obligations.

<sup>11</sup> Dasmann 1964.m *Indigenous and Traditional Peoples of the World and Eco-regional Conservation*, WWF and Terra Lingua, Gland Switzerland, 2001. ISBN 2-88085-247-1.

*Principles and Guidelines for the Sustainable Use of Biodiversity* offer a framework for assisting Governments, indigenous and local communities, resource managers, the private sector and other stakeholders, in ensuring that their uses of biological diversity will not lead to its long-term decline.<sup>12</sup>

## 2. *Commercial use of biological resources*

24. The online forum on Article 10 (c) included discussion of a variety of issues related to commercial use of biological resources. Commercial use is a sensitive topic that involves a wide variety of stakeholders, including indigenous and local communities, national Governments, NGOs, corporations and consumers, and the broader public. Conflicting views highlight the need for collaboration and open-mindedness of different stakeholders. Other prerequisites for sustainable commercial use include community control over decision-making, as well as effective community-based management systems.

25. Sport hunting is one issue of commercial use with relevance for indigenous and local communities. In some cases, Indigenous and local communities benefit from revenues provided by serving as guides or selling licenses or permits to hunt animals on their traditional lands and territories. In other cases, Indigenous and local communities are not able to benefit from such revenues because national or international legislation prevents either the hunting of certain species or the shipping of sport trophies. There is a need to balance conservation needs, the protection of species, and the rights of Indigenous and local communities to benefit from the use of these species.

26. Although the question of whether or not sport hunting constitutes customary use is contentious, clearly sport hunting, when managed and practiced in a careful manner with local control and input, can be beneficial to Indigenous and local communities. It can also contribute to a broader programme of conservation when revenues assist with tracking the overall health and numbers of the species and when the revenue generated for Indigenous and local communities allows local people to see the species as an asset rather than a liability to other income-generating activities.

27. One example discussed during the electronic forum is that of polar bear hunting in Arctic Canada. Inuit communities are allocated a certain number of polar bear hunting licenses per year, and communities can decide whether to distribute all of the licenses internally or whether to sell a select number to sport hunters. Although polar bear hides from subsistence hunting have commercial value, communities can obtain greater commercial benefit from selling their hunting rights to trophy hunters. Research suggests that cash returns from trophy hunts have not changed local values about hunting, which continue to emphasize subsistence practices and long-term sustainability of resources. In many cases, Inuit hunters act as guides for trophy hunters and revenues from these activities support subsistence hunting practices.<sup>13</sup> Findings suggest that community-based sport hunting of polar bear in the Arctic may in fact be beneficial to Arctic biodiversity. The opportunity for benefit to the local communities and their involvement in the management of the bears can serve as the impetus for community-based record-keeping and reporting of polar bear numbers that are critical to maintain the harvest at a sustainable level. Additional benefits stem from the greater visibility of the value of polar bear to the community, which may result in communities making different decisions about oil, mineral, and gas development (since this is viewed as destructive of bear habitat), as well as in a reduction of the number of “nuisance kills” of bears.

28. A similar case-study emanates from Namibia, where local communities are involved in the management of elephant herds in protected areas. Where individual animals are identified for necessary culling, some communities opt to sell the right to hunt and shoot a particular elephant to a trophy hunter bringing in tens of thousands of dollars to the community and assisting the community in maintaining

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<sup>12</sup> *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity* (Montreal: Secretariat for the Convention on Biological Diversity, 2004) at para 1 [*Addis Ababa*].

<sup>13</sup> Freeman, M.R. and GW Wenzel (2006). The Nature and Significance of Polar Bear Conservation Hunting in the Canadian Arctic. *Arctic* 59(1):21-30.

their protected areas. The intimate traditional knowledge which allows the community experts to identify specific animals who may be rouge and/or diseased and/or elderly assists in maintaining the overall health (including genetic health and diversity) of the heard and further assists in ensuring that overgrazing from an over-populations of elephants does not occur within that particular area.

29. However, the issue of commercial use of biological resources raises a number of challenging questions in relation to sustainable use. It may be more productive in the long run to focus on thresholds for maintaining resilience of species in the context of adaptive management rather than on whether or not a particular practice qualifies as “customary use.” One mechanism for addressing these issues might be to review and further develop the Addis Ababa Principles and Guidelines for Sustainability.

30. Within the context of the Convention on Biological Diversity, commercial use of biological resources needs to be considered in the context of the ongoing negotiation and elaboration of the International Regime on Access and Benefit-sharing (ABS). Some of the mechanisms that have been suggested to protect the rights of indigenous and local communities to benefits stemming from traditional knowledge associated with genetic resources within their traditional territories, could also be helpful in protecting customary use practices. For example, a proposal for ‘community protocols’ has been put forward in the ABS process that would assist Indigenous and local communities in documenting customary use practices and outlining guidelines for access by outside researchers and companies. These protocols could provide a mechanism to ensure prior and informed consent and also could assist in ensuring that communities can equitably share in any benefits stemming from the commercial use of traditional knowledge and traditional cultural practices.

### 3. *Customary law*

31. Customary laws governing the traditional use of biological resources commonly require resource users to abide by norms consistent with a contemporary understanding of the ethics surrounding sustainable use. These customary norms include, for example, causing the least amount of possible damage to the environment and ensuring that resource harvesting does not prohibit future generations from meeting their needs.<sup>14</sup> Customary law incorporates notions of land and property; organization of time and labour; the ordering of social structures and institutions that help shape local practices and activities; the development of social rules and regulations; the division of power and exercise of authority, and the guidance provided by spiritual beliefs. Because subsistence work is often gendered, women’s roles in customary use practices, for example through harvesting local plant resources for medicinal, food, or craft use, deserves special consideration and may require special forms of recognition and legal protection.

32. Recognition of “on the ground” *sui generis* systems based on the customary laws of indigenous and local communities can be an important strategy to ensure biological resources are both sustainable used and managed. Case-studies suggest that recognizing and supporting customary legal systems, with particular attention to protecting women’s customary use practices, can be an effective way of promoting customary use of biological resources.

### 4. *The right to sustainable development*

33. Customary use of biological resources provides an important component of indigenous and local communities’ livelihoods. However, indigenous and local communities also have the right to practice sustainable development, drawing on innovations and best practices that may not fall under conventional definitions of “traditional” or “customary” use. For example, commercial use of biological resources often plays an important role in supporting the customary and sustainable use of biological resources in

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<sup>14</sup> “Development of Elements of *Sui Generis* systems for the Protection of Traditional Knowledge, Innovations and Practices to Identify Priority Elements” 2007, at para 50 (UNEP/CBD/WG8J/5/6).

indigenous and local communities. Commercial use of local products, such as non-timber based forest products, can provide access to income that supplements other livelihood strategies such as hunting or agriculture. In some cases, commercial use of local resources provides a critical role in supplying local people with the cash needed to continue their subsistence activities.

34. Customary use, like traditional knowledge, is not a static concept or practice, but it is continuously evolving and adapting to changing circumstances, developing innovations to address environmental, social, economic and political challenges. Commercial activities that support customary use and contribute to sustainable development can be considered an aspect of responding to challenges and a component of the right of indigenous and local communities to development. In addition to supporting access of indigenous and local communities to biological resources for the purpose of sustainable use, indigenous and local communities' right to pursue their aspirations for sustainable development through their own institutions and following their own practices should be supported and upheld.

35. One mechanism for supporting sustainability in the context of customary use is the development of environmental assessment processes that support the participation and inclusion of both scientific and local and traditional knowledge and management practices. This allows for a balance of perspectives in the assessment of developments on traditional lands and territories, allowing communities to assess and weigh the benefits and impacts of development. The Akwe:Kon Guidelines provides a useful mechanism for ensuring social and cultural impacts are taken into account in such environmental impact assessments.

### III. CONCLUSIONS

36. The world's indigenous and local communities are as diverse as the ecological environments in which they live. Rather than being united by a common culture or experience, they are united by a common set of aspirations, including the aspiration to enjoy their traditional lands and territories, to practice traditional cultural practices including customary use practices, to have recognized rights to the lands and territories on which their subsistence depends, to pass all this on to future generations and to have the ability to participate in and control decision-making processes that will impact their well-being. In addition to these commonalities, the above discussion points to some general conclusions about customary practices, and how customary sustainable use can be protected and encouraged:

(a) Customary use depends on striking a balance between two interdependent aspects: access to customary lands and resources, and management of such resources in a way that fully includes indigenous and local communities and other stakeholders. Management options that devolve authority to indigenous and local communities have the greatest potential for long-term sustainable customary use;

(b) Customary management by indigenous and local communities of traditional territories is highly complementary to the Ecosystem Approach (especially principles 1 and 2) and the Addis Ababa Principles and Guidelines (especially principle 2);

(c) Encouraging and protecting customary sustainable use depends on the recognition of the fundamental human rights of indigenous and local communities;<sup>15</sup>

(d) Indigenous and local communities have the right to sustainable development, and recognition of rights to customary use should be compatible with the right to development. Ideally, the

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<sup>15</sup> The *United Nations Declaration on the Rights of Indigenous Peoples* (61/295, annex), which aims to enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith, provides a framework for understanding, recognizing, and protecting the rights of indigenous peoples.

two should be supported in tandem so that impacts on customary use practices by proposed development plans could be taken fully into account in decision making processes;

(e) They are highly complementary to the Ecosystem Approach (especially principles 1 and 2) and the Addis Ababa Principles and guidelines (especially principle 2): Recognizing customary use rights can benefit conservation efforts, while denying customary use rights can threaten biological diversity;

(f) Recognition of the intimate connection between indigenous and local communities and their traditional territories, and recognition of customary tenure systems, is essential to encouraging and promoting customary sustainable resource use;

(g) Indigenous and local communities must be involved and effectively participate at all levels of resource management, and national Governments must be responsive to the input of local communities.

#### **IV. RECOMMENDATIONS FOR THE CONSIDERATION OF THE SIXTH MEETING OF THE WORKING GROUP ON ARTICLE 8(j) AND RELATED PROVISIONS**

37. Further to the request of the Conference of the Parties to the Executive Secretary to provide advice to the Working Group at its sixth meeting on how this related provision may be further advanced and implemented as a priority, the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions may wish to consider this issue in its consideration of the revised programme of work and the possibility of including a new task focusing on Article 10 (c) in the revised Programme of Work on Article 8(j) and Related Provisions, under element 3 on ‘Traditional cultural practices for conservation and sustainable use’, as follows:

“The Ad Hoc Working Group on Article 8(j) and related provisions, building on the Addis Ababa Principles and Guidelines, to develop further guidance on sustainable customary use and related incentive measures for indigenous and local communities (Article 10 (c)) and also consider measures to increase the engagement of local communities in the implementation of Article 10 (c)”

38. The Working Group may wish to recommend to the Conference of the Parties to convene an expert group meeting, with the participation of Parties, Governments, international organizations and representatives of indigenous and local communities, to provide advice on how this task could be implemented and to submit the report of the meeting for consideration of the seventh meeting of the Working Group on Article 8(j) and Related Provisions to assist the Working Group in taking this task forward.

39. The Working Group may also wish to consider adopting a target related to Article 10 (c): “*Customary sustainable use and practices of indigenous and local communities are effectively protected and encouraged*”; to be included in the revised 2010 framework (post 2010) under the Focal Area ‘Promote Sustainable Use’ and Goal 4 ‘Promote sustainable use and consumption’, in line with, the implementation of, paragraphs 1, 2 and 4 of decision IX/13 A, and to submit the proposal to the tenth meeting of the Conference of the Parties, for consideration and possible adoption.<sup>16</sup>

40. Finally, the Conference of the Parties could request the Ad Hoc Working Group on Article 8(j) and Related Provisions, at its seventh meeting, to develop a strategy to integrate Article 10 (c) as a cross-cutting issue into the Convention’s various Programmes of Work and thematic areas, beginning with the Programme of Work on Protected Areas.

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<sup>16</sup> Indicator/s for this new task can be informed through the Article 8(j) indicator process as outlined in decision IX/13 H.