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**CONVENTION ON
BIOLOGICAL
DIVERSITY**

Distr.
GENERAL

UNEP/CBD/WG8J/AG/2/4

16 April 2007

ORIGINAL: ENGLISH

ADVISORY GROUP MEETING
ON ARTICLE 8(j) AND RELATED
PROVISIONS OF THE CONVENTION
ON BIOLOGICAL DIVERSITY
Second meeting
Montreal, 30 April – 03 May 2007

DRAFT REPORT OF MEASURES AND MECHANISMS TO ADDRESS THE UNDERLYING
CAUSES OF THE DECLINE OF TRADITIONAL KNOWLEDGE- ELEMENT D OF THE PLAN OF
ACTION FOR THE RETENTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND
PRACTICES OF INDIGENOUS AND LOCAL COMMUNITIES

Note by the Executive Secretary

The Executive Secretary is circulating herewith, for the consideration of participants in the Second meeting of the Advisory Group on Article 8(j) and Related Provisions, the above-mentioned draft report, which will be used as input to further develop the second phase of the composite report on the same subject.

The report is being circulated in the form and language in which it was received by the Secretariat.

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INTRODUCTION

At the eighth meeting of the Conference of Parties (COP), in decision VIII/5 B, the COP expressed appreciation for the completion of Phase I of the *Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Use of Biodiversity*.

In decision VIII/5 B, section X, the COP sought advice on “the further development of phase two of the composite report and, in particular, element D which relates to research on and implementation of mechanisms and measures to address the underlying causes of the decline in traditional knowledge, innovations and practices.” and in decision VIII/5, B, section II, paragraph 12, requested “further development of the plan of action, giving priority to sections B and D and to report on the advancement of this task to the Working Group at its fifth meeting.”

This next stage of the Composite report is to conduct research on mechanisms and measures and the implementation of such measures and mechanisms to address these underlying causes, drawing upon those referred to in phase I and phase II of the composite report. The report will be tabled at the fifth meeting of the Working Group on Article 8(j) and related provisions, to be held on 15-19 October, 2007.

The causes of decline of traditional knowledge are diverse, as identified in the Composite Report, and traverse local, national and international levels. Measures and mechanisms to retain traditional knowledge relevant to the conservation and use of biodiversity are correspondingly diverse and traverse local, national and international levels. Furthermore, Article 8(j) and traditional knowledge are cross-cutting issues and measures and mechanisms to retain traditional knowledge will intersect with many sectors of society including politics, research, administrative measures, economy, legislation, education, and information.¹

The concern of Indigenous people and local communities to preserve and maintain their knowledge systems is not only motivated by the desire to conserve ‘biodiversity’ as an end in itself, but also by the desire to live on their ancestral lands, to preserve their traditional livelihoods, to safeguard local food security and, to the extent possible, exercise local economic, cultural and political autonomy.²

The draft Declaration on the Rights of Indigenous Peoples states that:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.³

It has been suggested that preservation of traditional knowledge has to be addressed through two complementary approaches:

- the management of cultural processes, primarily inter-generational transmission; and,

¹ UNEP/CBD/WG8J/4/4

² Langton and Zea “Traditional Indigenous Biodiversity Related Knowledge” in Australian Indigenous Knowledge Libraries (2005) at p. 42

³ Article 31(1)

- the management of the major drivers of cultural change which address the underlying causes of knowledge loss and cultural erosion.⁴

In general, reports emphasize the relative scarcity of examples of measures and initiatives specifically designed to protect, promote and facilitate the use of traditional knowledge.

Measures and initiatives that are most effective appear to be those that are local in focus and involve the active participation of traditional knowledge holders in planning, execution and management.

Many initiatives are directed towards the conservation and sustainable use of biodiversity, or the protection and promotion of traditional knowledge, but there are few examples which address both.

Most projects that do prioritize biodiversity do not prioritize traditional knowledge.⁵ On the other hand of the many projects to restore and preserve traditional knowledge, conservation or sustainable use of biodiversity is rarely a priority in the planning of such activities. This is a common theme throughout the regions.⁶

As noted in the Latin American Regional Report:

from the perspective of traditional knowledge maintenance in the long term, the essential challenge is to ensure inter-generational transmission within indigenous and local communities; the second major challenge is to encourage and support the adaptation of traditional knowledge to socio-economic and cultural change, particularly in terms of maintaining its functionality and its dynamic connections with the practices of individuals and groups in their daily interactions with their surroundings.⁷

This necessitates targeting funding and resources and local levels and empowering indigenous and local communities to strengthen links between traditional knowledge and biodiversity at the local level.

⁴ UNEP/CBD/WG8J/4/INF/5 at Page 19

⁵ <http://www.biodiv.org/doc/meetings/tk/wg8j-03/official/wg8j-03-04-en.pdf>

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TERMINOLOGY

Something about terminology / what is meant by TK / IK / TEK

MECHANISMS TO PROMOTE COOPERATION IN ORDER TO ADDRESS THE CAUSE OF DECLINE SHOULD BE IDENTIFIED IN COOPERATION WITH THE PERMANENT FORUM ON INDIGENOUS ISSUES OF THE UNITED NATIONS AND OTHER RELEVANT INITIATIVES AND ORGANISATIONS

- **INTERNATIONAL COOPERATIVE MECHANISMS**
 - **REGIONAL COOPERATION**
 - **NATIONAL/LOCAL COOPERATIVE MECHANISMS**
-

INTERNATIONAL

There are at least eleven UN agencies currently working on traditional knowledge issues, which highlights the need for greater coordination to ensure a holistic approach and thereby generate better outcomes concerning the protection and promotion of traditional knowledge.

The Revised Phase One, and Phase Two of the Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity ('The Phase I and Phase II Composite Report') recommends that increased communication and collaboration is necessary between institutions and organizations to address issues of indigenous knowledge and biodiversity.⁸

Whilst Indigenous participation at the international level has improved in recent times, indigenous communities remain concerned that the level of involvement and their capacity to be involved continues to be extremely limited.⁹ Given the transboundary nature of threats to traditional knowledge it is important to cooperate internationally in devising solutions.¹⁰ For example, many problems facing Arctic areas originate from the countries in the south. Climate change accelerates the movement of pollution and contamination of the Arctic regions. International and local observations of climate change, species, and ecosystems are of importance and have to be supported.

United nations Permanent Forum on indigenous Issues & the Inter-Agency Support Group on Indigenous Issues

Internationally, the mechanism for the coordination of Indigenous issues in the United Nations system is the *Permanent Forum on Indigenous Issues*. This work is supported by an interagency mechanism referred to as the *Inter-Agency Support Group* (IASG). The IASG is made up of focal points working on indigenous issues and is nominated by the Heads of Agencies. The Permanent Forum has made a number of recommendations calling for the issue of Indigenous traditional knowledge to be addressed as a matter of urgency.¹¹

By ECOSOC resolution 2000/22, the Permanent Forum (UNPFII) was created with a broad mandate to deal with six main areas: economic and social development, culture, the environment, education, health and human rights.

⁸ (UNEP/CBD/WG8J/4/4 at p. 10)

⁹ PHASE I and Phase II Composite Report at para 109

¹⁰ UNEP/CBD/WG8J/4/4 at p. 9

¹¹ PFII/2005/WS.TK

In carrying out its mandate, the UNPFII is required to provide expert advice and recommendations on indigenous issues to the Economic and Social Council, as well as to programmes, funds and agencies of United Nations, raise awareness and promote integration and coordination of activities related to indigenous issues within the UN system and prepare and disseminate information on indigenous issues.

Coordination of Indigenous issues within the UN system is achieved via through various means including the Inter-Agency Support Group (IASG). The IASG contains focal points from all relevant international agencies.

Initially the IASG was established to support and promote the mandate of the UN Permanent Forum on Indigenous Issues within the United Nations system which has been expanded to include support for indigenous related mandates throughout the inter-governmental system.

The Chairperson of the UN Permanent Forum on Indigenous Issues (UNPFII) stressed just before the UN MDG + 5 Summit that “indigenous peoples are invisible in the Millennium Development Goals (MDGs).” On this basis the UNPFII recommended a clearer approach to involving indigenous peoples in implementation of the MDGs, through a rights-based approach¹² and through the development of indicators that capture indigenous realities.

The IASG allows the UN system and other intergovernmental organizations to analyze recommendations made by the Forum with a view to facilitating comprehensive and coordinated responses to the UNPFII. The IASG Chairmanship rotates annually. As of 2007, the Chairmanship has been held by the ILO, the World Bank, WIPO, UNDP, UNICEF, IFAD and the CBD.¹³

The IASG membership includes:

- UN Department of Economic and Social Affairs (DESA)
- UN Department of Public Information (DPI)
- Secretariat for the Convention on Biological Diversity (SCBD)
- Food and Agriculture Organisation of the United Nations (FAO)
- International Fund for Agricultural Development (IFAD)
- International Labour Organisation (ILO)
- United Nations Office of the Coordination of Humanitarian Affairs (OCHA)
- Office of the United Nations High Commissioner for Human Rights (OHCHR)
- United Nations Programme on HIV/AIDS (UNAIDS)
- United Nations Conference on Trade and Development (UNCTAD)
- United Nations Development Program (UNDP)
- Regional Initiative on Indigenous Peoples' Rights and Development in the Asia Pacific
- United Nations Environment Programme (UNEP)

¹² UNEP/CBD/WG8J/4/INF/5 at p. 32

¹³ <http://www.un.org/esa/socdev/unpfii/en/iasg.html>

- United Nations Educational Scientific and Cultural Organisation (UNESCO)
- United Nations Framework Convention on Climate Change (UNFCCC)
- United Nations Population Fund (UNFPA)
- United Nations Human Settlements Programme (UN-HABITAT)
- Indigenous Peoples' Right to Adequate Housing: A Global Overview
- United Nations High Commissioner for Refugees (UNHCR)
- United Nations Children's Fund (UNICEF)
- United Nations Development Fund for Women (UNIFEM)
- United Nations Industrial Development Organisation (UNIDO)
- United Nations Institute for Training and Research (UNITAR)
- World Intellectual Property Organization (WIPO)
- World Health Organization WHO
- World Bank
- Inter-American Development Bank (IADB)
- European Union
- Fondo Indígena

The Permanent Forum convened an International Technical Workshop on traditional knowledge on 25 September 2005 to address the various TK-related activities being undertaken by some 11 UN agencies with a view to better integrating indigenous peoples' views in these activities. The workshop recommended that the Permanent Forum commission a study on “customary laws pertaining to traditional knowledge in order to investigate to what extent such customary laws should be reflected in international and national standards addressing indigenous traditional knowledge.”¹⁴

The UNPFII intends to develop a matrix of UN related activities and outcomes regarding TK to ensure a more holistic approach is developed regarding the promotion and protection of TK.¹⁵

Programme of Action

The Programme of Action for the 2nd Decade for the World's Indigenous Peoples contains clear recommendations regarding indigenous traditional knowledge, such as the fair and equitable sharing of the benefits from the use of genetic resources, cultural, environmental and social impact assessments for developments on sacred sites, lands and waters traditionally occupied and used by indigenous and local communities, full and meaningful participation of indigenous people in programmes and projects planned

¹⁴ E/C.19/2006/2 at para 41.

¹⁵ UNEP/CBD/WG8J/4/INF/14 at p. 7

on their territories, and the non-persecution or harassment of indigenous persons promoting the protection of the environment.

In relation to coordination and cooperation the Programme of Action also recommends:

that the Permanent Forum on Indigenous Issues should hold regional meetings on indigenous issues with existing regional organizations with a view to strengthening cooperation and coordination. The Permanent Forum should support regional initiatives of United Nations agencies, funds and programmes.¹⁶

Collaboration between the World Intellectual Property Organisation & UNESCO

The United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) have collaborated to develop a mechanism for protection and preservation of 'folklore'.

This collaboration resulted in the formulation of a set of guidelines for national laws relating to legal protection of 'folklore'. Some national governments attempted legislations based partially on Model Provisions adopted by UNESCO and WIPO, namely the Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982 ("the Model Provisions").

WIPO has established an *Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* in September of 2000.

The Committee's work is to facilitate the possibilities of finding common ground for international cooperation with regard to these issues, and if possible, through legally binding international norms.

REGIONAL COOPERATION

There are a number of regional systems and frameworks that aim for greater cooperation around the issues of Indigenous traditional knowledge. They include Model Law and Model Provisions, Declarations such as the *Mataatua Declaration*, the *UNESCO Declaration on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands*, the *Kari-Oca Declaration*, and the *Organisation of American States Draft Declaration of the Rights of Indigenous Peoples*.

THE *UNESCO Declaration on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands* was adopted by the UNESCO Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Culture in the Pacific Islands, Noumea, 15-19 February 1999. The Declaration recommended:

1. Any approach to harmonise the protection of traditional knowledge and expressions of indigenous culture must take into account different needs of Pacific countries and territories;
2. Common goals for the protection, preservation, conservation, promotion and/or enhancement of traditional knowledge and expressions of indigenous cultures through legal and non-legal means can be conceived despite these differences;
3. Regional goals approach should reflect the cases of inappropriateness of conventional intellectual property rights regime for the protection of traditional knowledge and expressions of indigenous cultures;

¹⁶ http://www.un.org/esa/socdev/unpfii/en/second_programme_of_action.htm#b5

4. Appropriate model /Sui generis law for the region for intellectual property rights must be developed to ensure protection for heritage and environment while promoting reciprocity amongst Pacific countries and territories;

5. The development of an effective Pacific/regional bloc to negotiate at the international arena must be fostered.

To ensure the viability of such a regional policy, countries and territories must adopt the following measures:

- Develop, enact and implement appropriate legislation useful for the protection of traditional knowledge and expressions of indigenous cultures that are consistent with the regional goals;
- Develop non-legal mechanisms specific to the needs of individual sustainable Pacific countries and territories;
- Develop sustainable mechanisms in the political, social, scientific, economic, educational and structural areas in line with the legal regimes for the "protection" of traditional knowledge and expressions of indigenous cultures.

NATIONAL COOPERATION & COORDINATION

Cooperation and coordination at the national level is necessary. An effective committee representing indigenous and local communities at the national level to enhance the exchange of information between the international, national and local levels is recommended as an essential mechanism to facilitate effective indigenous and local community involvement and participation in the implementation of the Convention.¹⁷

There are a numerous policy and legislative initiatives at the national level that seek to address indigenous traditional knowledge, some of which are outlined in the sections throughout this report by way of example.

¹⁷ UNEP/CBD/WG8J/3/6 at para 25

PARTIES SHOULD BE ENCOURAGED, IN ACCORDANCE WITH DOMESTIC LAW AND INTERNATIONAL OBLIGATIONS, TO RECOGNISE LAND TENURE OF INDIGENOUS AND LOCAL COMMUNITIES, AS RECOGNISED RIGHTS AND ACCESS TO LAND ARE FUNDAMENTAL TO THE RETENTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES

BACKGROUND

RECOGNITION OF INDIGENOUS LAND TENURE

- International Standards
- Statutory recognition of Indigenous peoples' lands

ACCESS TO RESOURCES

FAIR AND EQUITABLE RESOLUTION OF LAND CLAIMS

BACKGROUND

Access to the land upon which traditional knowledge is based, together with the opportunity to practice it, is paramount for retention of traditional biodiversity-related knowledge yet most of the world's indigenous people live on land to which they have no legal title, or the title they have is restricted. Severing or restricting the relationship of Indigenous peoples and local communities with traditional lands and waters, removes their economic base and strikes at the heart of their emotional, social, cultural and spiritual support.

Continued connection to the land and maintenance of decision-making authority with respect to the land is the greatest determinant of wealth and fundamental to the survival of Indigenous peoples, and to the maintenance, preservation and application of their knowledge systems.¹⁸

Because traditional knowledge is intimately connected to lands and waters, indigenous and local communities need to remain "*in situ*" if they are to be empowered to exercise their traditional knowledge relevant to the conservation and sustainable use of biological diversity.¹⁹

At the Permanent Forum in May 2005 Pacific Indigenous organizations highlighted the link between loss of land and their extinction as a people, the importance of guarantees to the right of self-determination, and the need for preventive measures.

Guaranteeing access to lands and specifically secure land tenure is necessary for Indigenous peoples and local communities so they can maintain, cultivate and continually renew their traditional knowledge.²⁰ Loss of ancestral land, waters and marine areas is regarded as "the single most significant cause of decline

¹⁸ UNEP/CBD/WG8J/4/INF/7 Page 16

¹⁹ <http://www.biodiv.org/doc/meetings/tk/wg8j-04/official/wg8j-04-04-en.pdf>

²⁰ Australian Indigenous Knowledge and Libraries at p. 54

in traditional knowledge²¹ including knowledge of land practices which translates to a loss of knowledge of land practices and a loss of biodiversity knowledge overall.²²

Although the modern system of land tenure adhered to by the State seems inapplicable to the traditional model which are often conceptually very different from the legal systems adhered to by many modern States, there is a need for recognition of Indigenous land tenure within the dominant framework. It is a collective right by virtue of which states are obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources.²³

Within the context of the Convention on Biological Diversity, the adopted Akwe:Kon Guidelines and the proposed draft elements of an *Ethical Code Of Conduct To Ensure Respect For The Cultural And Intellectual Heritage Indigenous And Local Communities Relevant To The Conservation And Sustainable Use Of Biological Diversity* both recognize:

the inalienable rights of indigenous and local communities to their sacred sites and lands and waters traditionally occupied or used by them and associated traditional knowledge and that their cultures, lands and waters are inseparable. Parties should be encouraged, in accordance with national domestic law and international obligations, to recognize traditional land tenure of indigenous and local communities, as recognized rights and access to land and water as fundamental to the retention of traditional knowledge and associated biological diversity. Sparsely populated lands and waters should not be presumed to be empty but may in fact be lands and waters traditionally occupied or used by indigenous and/or local communities.²⁴

Recognition of Indigenous land tenure must include a statutory land claims process, technical and financial resources to assist indigenous and local communities with making claims that are highly technical and specialised. It also necessitates expeditious resolution of the claims rather than the tendency for protracted resolution based on unrealistic evidentiary thresholds.

As long as the issue of land ownership or land tenure is not adequately addressed, benefit sharing, access and sustainable use of the components of biodiversity will be problematic. This will have a significant impact on the maintenance of the related traditional knowledge, innovations and practices of Indigenous peoples.²⁵

RECOGNISING LAND TENURE

International Standards

*The Statement of Principles and Guidelines for the Protection of Heritage of Indigenous Peoples of the Working Group on Indigenous Populations, UN Commission on Human Rights, emphasizes that the discovery, use and teaching of indigenous peoples' knowledge, arts and culture is inextricably connected with the traditional lands and territories of each people; and that control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and its full protection.*²⁶

²¹ (Canadian Regional Report)

²² UNEP/CBD/WG8J/4/4 at p. 7

²³ Ibid at para 40

²⁴ UNEP/CBD/WG8J/4/8 14 November 2005 at para 19

²⁵ UNEP/CBD/WG8J/4/INF/2 PAGE 49

²⁶ UNEP/CBD/WG8J/4/INF/18 Page 4

The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993)

The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993) underlines that indigenous flora and fauna is inextricably bound to the territories of indigenous communities, and that land and natural resource claims must be settled in order to promote traditional production systems. A number of international instruments on indigenous and human rights also recognize rights to land and traditional territories, as vital for the survival of indigenous peoples and cultures.

The Final Report of the Special Rapporteur, Madame Erica Irene A. Daes on Permanent Sovereignty of Indigenous Peoples over their Natural Resources recognised that:

*The developments during the past decades, international law and human rights norms in particular, demonstrate that there now exists a developed legal principle that indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories.*²⁷

Statutory recognition of Indigenous peoples' lands

*As outlined above, legal recognition and guarantees of access to lands and upon which traditional knowledge is based and practiced is essential to the implementation of Article 8(j).*²⁸ *For Indigenous Peoples the legal recognition of rights to their land and waters, especially land and territorial security, is paramount over monetary and non-monetary benefits. Only from this position of security can flow equitable sharing of benefits.*²⁹

Whilst a minority of states have developed land rights legislation or other arrangements, it is often applicable only to the remnants of the traditional territories of indigenous and local communities that have not been claimed by other elements of society. Moreover the title granted is often conditional in terms of access to resources, control over decision-making, and developmental aspects.

Some countries have introduced a land claims process.

In Australia the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (ALRA) was the first major land rights legislation in Australia, and provided for statutory titles granted on the basis of Aboriginal customary land tenure systems and procedures relating to use and access of Aboriginal land. The Act sets out the processes for negotiation of exploration and mining agreements, and other activities such as bio-prospecting that might occur on Aboriginal land, in practice individual communities have limited control compared with other forms of title such as freehold.

²⁷ E/C.4/Sub.2/2004/30 para 39

²⁸ UNEP/CBD/8J/3/4 at p. 13

²⁹ *Statement of International Indigenous Forum on Biodiversity at the Ad Hoc Open-Ended Working Group on Access and Benefit Sharing Convention on Biological Diversity, 22-26 October 2001 - Bonn, Germany*

http://www.treatycouncil.org/new_page_523211.htm

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Also in Australia the *Native Title Act 1993* was enacted to give effect to the principles of the *Mabo* decision. The act provides a regime for determining whether native title exists over particular areas of land or waters, for validating certain past acts of government and for regulating future acts which may affect Aboriginal rights in land. Claims for compensation are also provided for. The difficulty with the Native Title Act is the protracted claims process through the Native Title Tribunal and Federal Court, the high evidentiary thresholds, administrative delays that have involved reregistering native title representative bodies, and the limited funding available for representative bodies to pursue claims.

In Sabah in Malaysia there is a level of recognition for customary titles given through the *Sabah Land Ordinance (1930)*. However there remains a significant number of qualifications for the establishment and continued enjoyment of this customary title such as a 15 acre limit, the legislative enforcement of non-traditional fallow periods and the non-consideration of native title if land is to be taken for a public purpose.³⁰

In 1973, the Canadian federal government established a federal policy for the negotiation and settlement of Aboriginal land claims.³¹ A number of land claims and self-government agreements that have been negotiated, notably in the north, but these remain the exception and not the rule.

In New Zealand the focus is on remedies for wrongful dispossession. New Zealand settlements usually take the form of an agreement on a financial amount (the biggest are the \$170 million packages agreed to in the Ngai Tahu and Waikato/Tainui settlements). Once the amount is agreed, a package is developed which might include cash, land, forests and other assets to the value of the agreed amount. The package might also include return of specific sites of spiritual significance.³²

In Latin America land security for indigenous peoples and rural communities in the region has increased since the start of agrarian reforms several decades ago, but has not been fully achieved. In the last decade most of the countries have started a process for the recognition of indigenous peoples' lands in rainforests.

Only Peru had already recognized collective property rights of indigenous communities from the Amazon in 1974. A different approach has been taken by Brazil, which, since 1910, has established a legal regime to protect indigenous lands in the form of reserves.

During the 1990s several Latin American countries implemented land market-oriented measures (Colombia, Ecuador, Peru, Mexico) with the aim to foster and modernize the agricultural sector. Indigenous lands from the rainforest were kept out of the land market, with the exception of Peru (1995) and Mexico (1992).

Argentina, Bolivia, Paraguay, Guatemala, Brazil, Colombia, and Ecuador have undertaken constitutional and legal reforms in order to recognize or strengthen land rights of indigenous peoples.³³

The Peruvian Land Law of 1995 has been criticised by several experts and largely contested by indigenous peoples on the grounds that it threatens the integrity of their traditional lands and put pending land claims at risk. In Mexico, the 1992 Amendment to its Constitution permitted *ejidos* to decide if they want to remain under communal property or divide the land in individual plots.

³⁰ UNEP/CBD/WG8J/4/INF/4 Page 32

³¹ <http://www.atns.net.au/background.php>

³² <http://www.nntt.gov.au/publications/talkingvic1.html>

³³ Latin American Regional Report on Threats

Several Latin American constitutions have “started to recognize not only land rights, but also the cultural dimension of such rights. In order to adapt land rights to the special needs and characteristics of indigenous peoples’ relation with lands and natural resources, several countries incorporated special guarantees for indigenous lands (inalienable, imprescriptibly and non-mortgagable), with the exception of Peru and Mexico.

In Canada, even though many Indigenous peoples have treaties that guarantee a continued right to hunt and gather in their traditional territories these rights have been constrained through the years.³⁴

The Arctic Regional Report on Threats to Traditional Knowledge recommends that Parties restructure their land rights policies because “in many cases, indigenous societies and groups do not have sufficient national legislative support and or any degree of self-governance that is needed for maintenance of their biodiversity-related practices and knowledge for successful implementation of Article 8(j).

One of the main problems with land tenure claimed, retained or granted to Indigenous peoples is that the power to make decisions concerning land is restricted under the empowering legislation.

Recent ideological shifts in some developed countries regarding options for privatization of collectively owned lands are regarded as detrimental in the long term to community land-bases and traditional knowledge.³⁵

Policies in Canada and the United States have resulted in the privatization of most of the once communally held land of Indigenous peoples. This has resulted in the inability to exercise control over the use of their traditional territory and are often excluded from the land where their traditional activities are normally performed.³⁶

ACCESS TO RESOURCES

Land title does not necessarily guarantee land security evident in the frequent granting of private rights over traditional Indigenous territories. Where land rights of Indigenous peoples have been recognized, authorities have often been unable to defend these rights which makes it difficult to manage natural resource in traditional ways and preserve related knowledge.

Without customary title to the land, it can be illegal to gather seafood or shellfish and to manage the marine resources sustainably according to customary law and traditional knowledge.³⁷

There is a need for processes at a national level to recognize the traditional territories of Indigenous peoples and more autonomy for management and use of the natural resources.

Traditional resource rights are collective in nature but can include individual rights and apply to natural and/or traditional resources occurring on lands and waters traditionally occupied or used by indigenous and local communities. Indigenous and local communities should determine for themselves, the nature and scope of their respective resource rights regime according to their customary law/s. Recognition of traditional resource rights is crucial for the sustainable use of biological diversity and cultural survival.

³⁴ UNEP/CBD/WG8J/4/INF/7 at p. 16

³⁵ Composite report at para 36

³⁶ UNEP/CBD/WG8J/4/INF/7

³⁷ <http://www.biodiv.org/doc/meetings/tk/wg8j-04/official/wg8j-04-04-en.pdf> at para 80

FAIR & EQUITABLE RESOLUTION OF LAND CLAIMS

Subject to national legislation and international obligations, Parties should be encouraged to pursue the fair and equitable resolution of land claims as an essential element of efforts to facilitate the retention and use of traditional knowledge, innovations and practices.

Governments must speed up and finalize land claim negotiations and ensure negotiations are respecting principles of fairness and good faith and are in line with international standards and human rights obligations.³⁸

In New Zealand the land claims process is through the *Treaty of Waitangi Act* 1975 came into effect providing for the observance and confirmation of the principles of the *Treaty of Waitangi* by establishing the *Waitangi Tribunal* to make recommendations on claims relating to the practical application of the Treaty. The Treaty settlement process was developed to resolve historical grievances between Māori and the Crown relating to the loss of land since British sovereignty. The Treaty of Waitangi Tribunal is established to create a land claims process.

In order for the settlement process to begin, a claim must be registered with the *Waitangi Tribunal*. Once this is done, claimant groups can seek negotiations with the Crown straight away, or may choose instead to have their claims heard by the Tribunal before entering negotiations.

In Australia the Native Title Tribunal.....

The Draft Declaration on the Rights of Indigenous Peoples recognizes the right to restitution of traditional lands, territories and resources, and cultural, intellectual and spiritual property taken without proper authorization is also recognized by the UN Draft Declaration on the Rights of Indigenous Peoples.

Not being arbitrarily removed and relocated

21. Activities, including research, should not cause indigenous and local communities to be removed from lands and waters traditionally occupied or used by them, by force or coercion and without their prior and informed consent. Where they agree to removal from lands and waters traditionally occupied or used by them with their prior and informed consent, they should be given compensation and the possibility to return. Nor should any activities cause indigenous and local community members, especially the elderly, the disabled and children to be removed from their families by force or coercion.

³⁸ UNEP/CBD/WG8J/4/INF/7

INDIGENOUS AND LOCAL COMMUNITIES SHOULD, WHERE RELEVANT, BE ACTIVELY INVOLVED IN THE MANAGEMENT OF PROTECTED AREAS

RIGHTS OF INDIGENOUS AND LOCAL COMMUNITIES SHOULD BE GIVEN DUE RESPECT WHEN ESTABLISHING NEW PROTECTED AREAS

-
- **BACKGROUND**
 - **RIGHTS OF INDIGENOUS COMMUNITIES GIVEN DUE RESPECT WHEN ESTABLISHING NEW PROTECTED AREAS**
 - **PARTICIPATION IN DECISION MAKING**
 - **PROMOTING EQUITY, ACCESS AND BENEFIT SHARING**
-

The commitment to promote the rights and interests of indigenous and communities under the CBD also applies to communities within protected areas, and assumes recognition of rights and interests in the development of protected area policies and management strategies.³⁹

The IUCN defines a ‘protected area’ as: *“an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means”*. The CBD defines it as *“a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives”*.⁴⁰

Many protected areas have been established on lands held in common property by communities during the nineteenth and twentieth centuries on the premise of terra nullius. Considering that more than 11.5% of the terrestrial surface of the world comprises protected areas,⁴¹ it has had a significant and detrimental impact on indigenous and local communities who were occupying the lands deemed ‘protected’ and subsequently expelled and/or restricted from accessing their lands.

When Indigenous peoples lose their traditional territories or no longer have access necessary to maintain their living cultural traditions, the processes which sustain and create traditional knowledge and beliefs are likely to be severely weakened or lost, thus putting traditional knowledge at serious risk.⁴²

The primary aims of protected areas have tended to be focussed on “the sustainable use of natural resources, the preservation of ecosystem services and integration with broader social development processes and biodiversity conservation,” there is increasing focus on respecting cultural values as essential aspects of biodiversity.

Participatory co-management or joint management of protected areas can ensure respect for the cultural and natural values of lands and their traditional owners whilst enabling a partnership approach to managing conservation areas. This in turn this enables protection and transmission of traditional knowledge. Successful co-management of protected areas is limited but growing rapidly with some

³⁹ http://www.ias.unu.edu/binaries/UNUIAS_ProtectedAreasReport.pdf

⁴⁰ http://www.iucn.org/bookstore/HTML-books/BP11-indigenous_and_local_communities/section1.html

⁴¹ The United Nations Environment Programme's World Conservation Monitoring Centre (UNEP-WCMC)

⁴² UNEP/CBD/WG8J/4/INF/18 Page 3

positive developments in co-management of protected areas, and the establishment of Indigenous Protected Areas.

The key criteria to ensure traditional biodiversity related knowledge is maintained in relation to protected areas is to ensure participation of Indigenous and local communities in decision making and management of protected areas, and to enable access and benefit sharing of resources within protected areas.

The IUCN policy on social equity in relation to conservation has affirmed the need to:

- recognize the social, economic and cultural rights of indigenous peoples such as their right to lands and territories and natural resources, respecting their social and cultural identity, their customs, traditions and institutions;
- ensure full and just participation of indigenous peoples in all conservation activities supported and implemented by IUCN;
- support indigenous peoples' right to make their own decisions affecting their lands, territories and resources; and,
- promote gender equality and equity within conservation, and a more balanced relationship between women and men in the distribution of costs and benefits, access and control, and decision-making opportunities, over natural resources.

The 1999 joint policy statement of IUCN and WWF entitled Principles and Guidelines for Indigenous and Traditional Peoples and Protected Areas, recognizes the rights and interests of indigenous peoples in relation to protected areas. The Principles and Guidelines reiterate that:

- Indigenous and other traditional peoples have long associations with nature and have made significant contributions to the maintenance of many of the earth's most fragile ecosystems;
- there should be no inherent conflict between the objectives of protected areas and the existence, within and around their borders, of indigenous and other traditional peoples;
- Agreements drawn up between conservation institutions, including protected area management agencies, and indigenous and other traditional peoples for the establishment and management of protected areas should be based on full respect for the rights of indigenous and other traditional peoples to traditional, sustainable use of their lands, territories, waters, coastal seas and other resources
- Such agreements should be based on the recognition by indigenous and other traditional peoples of their responsibility to conserve biodiversity, ecological integrity and natural resources harboured in those protected areas;
- The principles of decentralization, participation, transparency and accountability should be taken into account in all matters pertaining to the mutual interests of protected areas and indigenous and other traditional peoples; and,
- Indigenous and other traditional peoples should be able to share fully and equitably in the benefits associated with protected areas.⁴³

The World Conservation Congress (WCC) has recommended that members “recognize indigenous rights in conservation, establish co-management agreements and secure equitable benefit sharing”.⁴⁴ The WCC

⁴³ http://www.iucn.org/bookstore/HTML-books/BP11-indigenous_and_local_communities/section1.html

Resolutions are reflected in guidelines of the IUCN that when establishing new protected areas there is a need to work with rather than against Indigenous and local communities, and that all such actors are committed to basic conservation goals.⁴⁵ Such management partnerships should benefit from complementary capacities and advantages.¹⁵

LEGAL FRAMEWORK

Some States have implemented constitutional recognition of the rights of Indigenous peoples to protected areas.

Under article 105 of the Samoa Constitution, the use of areas in marine protected areas up to high tide mark current, rests with the communities. However there is a push from external interests for more government control in marine protected areas, and communities may no longer be allowed access to these demarcated areas.

The Argentinian Constitution recognizes indigenous peoples rights to land and Forest law allows co-management and access to resources within PA. However, when the National Parks were established by the military governments, all indigenous peoples were expelled out of these areas to make way for protected areas. A total of 1,660 million ha of PA including the Yungas Biosphere Reserve, was created before 2004.

Other enabling legislation.....?

PARTICIPATION IN MANAGEMENT OF PROTECTED AREAS

Successful implementation of conservation programmes can only be guaranteed on long term basis when there is consent for and approval by indigenous peoples and local communities because their cultures, knowledge and territories contribute to the building of comprehensive protected areas.⁴⁶ There is often commonality of objectives between protected areas and the need of indigenous peoples to protect their lands, territories and resources from external threats.

The active participation of Indigenous peoples and local communities in the management of protected areas is way of protecting biodiversity related knowledge by facilitating access to lands that had previously been appropriated. Furthermore the involvement of indigenous and local communities in the early stages of planning for a protected area may assist with identifying biodiversity hotspots and other significant areas that should be included in such areas.

In Australia Kakadu National Park is managed through a joint management arrangement between the Aboriginal traditional owners and the government. Participation of Aboriginal people in the management Kakadu is enabled through the *Environmental Protection and Biodiversity Conservation Act* which provides for boards of management to be established for parks on Aboriginal land which has an Aboriginal majority that represent the Aboriginal traditional owners of land in the park. The Kakadu Board determines policy for managing the park and is responsible for preparing plans of management for the park. The ensuing Kakadu Plan of Management ensures the rights of the Aboriginal traditional owners are recognised, that traditional owners contribute to managing the park, and that they are able to benefit from the park economically and through the promotion of Aboriginal values.

⁴⁴ Resolution 1.53 on “Indigenous Peoples and Protected Areas” and Resolution 1.42 on “Collaborative Management for Conservation”

⁴⁵ http://www.iucn.org/bookstore/HTML-books/BP11-indigenous_and_local_communities/section1.html#fn36#fn36

⁴⁶ <http://www.iucn.org/themes/wcpa/wpc2003/pdfs/outputs/recommendations/approved/english/pdf/r24.pdf>

Indigenous Protected Areas (IPA) in Australia cover 13 million hectares as part of the National Reserve System. The IPA Programme is a suitable vehicle that can facilitate the passing on this knowledge to new generations.⁴⁷

Beyond the direct economic or financial benefits that might follow on from declaration of lands as Indigenous Protected Areas there are considerable social and cultural outcomes from promoting conservation activities for Indigenous communities. Indigenous people have a deep cultural relationship to the land. The opportunity to be active in conservation of their lands, or in some cases of rehabilitation, provides mechanisms whereby this relationship is strengthened.

In Peru, the Global Environment Facility Indigenous Management of Protected Areas in the Amazon Project is promoting greater involvement of indigenous peoples in the direct management of protected areas to ensure equitable benefit sharing will result from the establishment of communal reserves.⁴⁸

GEF acknowledges that “successful implementation of conservation projects affecting indigenous and local communities can be guaranteed on a long term basis only when there is consent and collaboration with the communities.” (Ibid)

As of 2005 the GEF has supported 134 Biodiversity conservation projects that address issues involving indigenous people worldwide. THE GEF includes Indigenous and local communities in the conservation action process from the early stages of project formulation up to project implementation and monitoring. Many of GEF projects that involve indigenous communities focus on capacity building and awareness raising, policy and institutional development, sustainable economic opportunities, and practical innovative conservation actions in the protected areas and buffer zones, as well as in the larger production zones.

For example, the GEF’s Indigenous and Community and Biodiversity Conservation Project in Mexico, which promotes sustainable protection and use of biodiversity resources by the Indigenous communities of Oaxaca, Michoacan, and Guerrero. The project is establishing and strengthening community conservation areas .

ACCESS AND USE OF RESOURCES

In many countries there are limitations imposed on access to and use of resources in protected areas. 'No take' protected areas have serious implications for indigenous peoples environmentally, socially, culturally and economically. It is argued that the issue of sustainable use is central to, not only biodiversity protection, but also the survival of cultures.

It is essential that Plans of Management be negotiated to ensure Indigenous peoples can maintain access and use of resources on Indigenous Protected Areas they manage and occupy.

Use of biotic resources in protected areas for cultural purposes should be permissible, including in and around sacred natural sites, if the overall quality of the environment is not jeopardised. It has been noted above that respect for sacred natural sites tends to be beneficial for environmental conservation, and are often biodiversity hotspots, yet traditional belief systems not only require the conservation of the area but may also require offerings and sacrifices of plant/animal species that live within a sacred natural site.

This is a source of conflict between protected area managers and Indigenous and local communities. There is a need for mechanisms by which selective usage of such plant/animals species may be

⁴⁷ IPA Reviewat p. 38

⁴⁸ (“Indigenous and Local Communities and Biodiversity Conservation” Global Environment Facility)

/...

permissible for cultural purposes. For example, selective usage of biotic resources could be spelled out in a ‘social contract’ between parties concerned.⁴⁹

In Australia under the joint management of some Australian Government National Parks, title to Indigenous land is granted to its traditional owners who in turn lease it back to the Australian Government for management as a national park. The traditional owners are paid rent and other fees in recognition of the land’s use for conservation purposes and public benefit.⁵⁰

The Kakadu Plan of Management provides that:

Aboriginal people are able to continue to exercise their traditional rights to gather plants and plant material for food and making artefacts. The impacts of Aboriginal use of resources will be monitored and regulated while consulting with Aboriginal people.

Traditional owners will be involved in management programs for native plants, and Aboriginal people will be encouraged and supported to use traditional knowledge and skills in managing plants and habitats.

Traditional owners will be involved in management programs for native animals. Aboriginal people will be encouraged and supported to use traditional knowledge and skills relating to managing animals and their habitats.

In the Northern Territory of Australia capture, possession, killing and trading in wildlife and their parts is controlled by permits issued under Section 43 of the *Territory Parks and Wildlife Conservation Act* (TPWCA). Section 122 of the Act provides for Aboriginal traditional harvest of wildlife for hunting, food gathering (other than for purposes of sale) and for ceremonial and religious purposes.

In Malaysia where the current Park laws and policy do not provide for the sharing of benefits from protected areas, efforts are now being made to establish a framework for equitable sharing of management costs and also to recognize Community Use Zones through the Southeast Asia Collaborative Management Learning Network (CMLN) on Indigenous Peoples and Protected Areas initiated at the regional level involving 7 PA sites. It is hoped that amendments to Park laws and policies would be finalized in 2007.

INTERNATIONAL COLLABORATION

In Samoa the IUCN and the World Bank were involved with setting up three Samoan Marine PA mainly involving the Government of Samoa in 2003. However the community sees the demarcation of some “No Take” areas to go against their concept of sustainable use since existing traditional governance structures for sustainable use and management that have worked for generations.

(other examples....)

REGIONAL COLLABORATION

⁴⁹ UNESCO/IUCN Working Guidelines for the Conservation and Management of Sacred Natural Sites

⁵⁰ (“Australia Now” fact sheet DFAT)

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Marine Protected Areas in Western Melanesia

Collaboration between Torres Strait Islanders and Australian conservation authorities has resulted in the establishment of a number of indigenous marine protected areas. These areas have integrated sacred, totemic sites and distinctive coral reef habitats. The experience suggests that “cultural and ceremonial sites in the seas can work to enhance marine conservation, and reciprocally, how marine protected area approaches can protect sacred sites and traditional environmental knowledge.”⁵¹

In the Pacific Islands protected areas for nature conservation have been an integral part of Pacific island communities for thousands of years. Pacific island reserves were established by taboos to prevent anyone from entering the area, with the express purpose of allowing the wildlife to recover. Taboos were placed on garden areas as well as on coral reefs and lagoons. In some instances, particular species were protected. Papua New Guinea, Vanuatu, Fiji and Samoa acknowledge the value of community law in their national legislation and have recently made progress in forming partnerships between communities and national agencies for conservation.

⁵¹ (Oviedo at p. 12)

RESTRICTIONS ON USE OF LAND AND ACCESS TO SACRED SITES OR OTHERWISE CULTURALLY SIGNIFICANT SITES SHOULD BE INCORPORATED INTO APPROPRIATE LOCAL OR NATIONAL LEGISLATION, IN CONSULTATION WITH AND WITH FULL INVOLVEMENT OF INDIGENOUS AND LOCAL COMMUNITIES.

BACKGROUND

INTERNATIONAL STANDARDS, DECLARATIONS & GUIDELINES

RESTRICTIVE LEGISLATION

CONSULTATION / PARTICIPATION

CASE STUDIES

BACKGROUND

The *Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity* recommends that Parties to the Convention:

*Incorporate restrictions of use and access to “sacred” or otherwise culturally significant sites into appropriate local or national legislation. Appropriate legislative action can strengthen and enforce traditional laws and restrictions, and preserve intact the local biodiversity in keeping with local traditions. This should be done only after full consultation with local indigenous groups.*⁵²

Sacred sites have been instrumental in preserving the ecological integrity of entire landscapes.⁵³ If properly managed, these areas of cultural significance can contribute meaningfully to both the conservation of biological diversity and the maintenance of cultural identity.

Access restrictions that are associated with sacred sites have resulted in sacred groves, mountains, rivers, caves, forest groves and temple sites that have served as reservoirs of biological diversity, preserving unique and/or rare plant and animal species.⁵⁴ Sacred and taboo associations attached to mountains, rivers, caves, forest groves and temple sites play an important role in the protection of particular ecosystems by indigenous and local people. Particular plant species of sacred sites are often used by traditional healers who require preservation of such sites, landscapes and ecosystems.

The Permanent Forum on Indigenous Issues has recommended that the “rights of indigenous peoples to their sacred sites and ceremonial objects...should be respected.”⁵⁵

INTERNATIONAL STANDARDS, DECLARATIONS AND GUIDELINES

⁵² <http://www.biodiv.org/doc/meetings/tk/wg8j-03/official/wg8j-03-04-en.pdf> at para 22

⁵³ UNESCO/IUCN Working Guidelines For The Conservation And Management Of Sacred Natural Sites at http://www.unesco.org/mab/biodiv/Cdiversity/symposium/UNESCO_IUCN_guidelines.pdf

⁵⁴ *Ibid*

⁵⁵ (Para 27 C, E/2002/43 (Part 1) – E/CN.19/2002/3 (Part 1).

The rights protected by Article 27 of the Covenant on Civil and Political Rights include protection of cultural, religious and ancestral sites. Regarding article 27 rights, the Human Rights Committee has stated in General Comment 23, at paragraph 6.1:

Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a ‘right’ and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

At the *International Symposium Conserving Cultural and Biological Diversity: The Role of Sacred Natural Sites and Cultural Landscapes* in Tokyo, Japan 2005 (‘the Tokyo Symposium’), the participants called upon national authorities, protected area and site managers, indigenous peoples and local communities, the international systems, governments and non-governmental organisations, to consider and implement, where appropriate:

- the UNESCO/IUCN Guidelines for the Conservation and Management of Sacred Natural Sites;
- the CBD Akwe: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding *Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*
- The Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage.

The resulting *Declaration on the Role of Sacred Natural Sites and Cultural Landscapes in the Conservation of Biological and Cultural Diversity* acknowledges the “important role of indigenous peoples and local communities as custodians of sacred natural sites and as holders of traditional knowledge, which is fundamental for the preservation of biological and cultural diversity.”

The Declaration also calls upon governments, non-governmental organizations, religious institutions, indigenous and local communities to work together to ensure respect for religious and spiritual traditions and practices linked to sacred natural sites, and to protect such sites against desecration destruction.⁵⁶

The 7th COP to the CBD adopted the *Akwé:Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* in February 2004.

The Akwe:Kon Guidelines were developed, in cooperation with indigenous peoples, to implement Article 8(j)’s provisions and to ensure that indigenous peoples would be able to participate in impact assessments on any projects that may affect them and may affect sacred sites.

The guidelines are voluntary and subject to national legislation in developments that impact sacred sites, lands and waters traditionally occupied by Indigenous and local peoples. They promote the full and effective participation of indigenous and local communities in screening,

⁵⁶ UNEP/CBD/WG8J/4/INF/14

scoping and development planning exercises, and require that the cultural, environmental and social concerns and interests of indigenous and local communities are taken into account.

Specifically the Guidelines recommend that impact assessment:

- take into account the traditional knowledge of indigenous and local communities, with due regard to the ownership of the need for its protection; promoting the use of technologies associated with TK;
- identify and implement appropriate measures to prevent or mitigate any negative impacts of proposed developments; and,
- take into consideration of the interrelationships among cultural, environmental and social elements.

The “voluntary” nature of the guidelines and the phrase “subject to national legislation”, may provide governments with strategies to avoid their responsibilities regarding their CBD obligations. The effectiveness of the Akwe:Kon Guidelines remains in the domestic implementation of these guidelines which has so far been limited. Indigenous peoples argue that there is a need for a binding treaty regarding impact assessment, which incorporates processes of free, prior and informed consent and mutually agreed terms.

In the progress report on the implementation of article 8(j) through the national reports (UNEP/CBD/WG8J/4/2), no country reported on the actual implementation of the Akwé:Kon Guidelines. However, Estonia and Thailand reported on review processes that are considering the protection of sacred sites and the improvement of environmental impact assessment mechanisms. Norway indicated that they already have sufficient legislation and mechanisms to protect Sami cultural heritage. Sweden has provided funding for indigenous communities in the developing world to hold workshops and build capacity regarding the implementation of the Akwe:Kon Guidelines. Zimbabwe reported that there is no review being undertaken, but present EIA legislation addresses some of the Guidelines. It is been recommended that a set of legal and operational instruments for the implementation of the Akwe:Kon Guidelines be developed.⁵⁷

RESTRICTED ACCESS TO SACRED SITES

Sacred sites can contribute to the conservation of biological diversity and maintenance of cultural diversity if managed properly. This requires legislation and policy to require consultation with Indigenous and local communities in the management of sacred sites, and restricted access as appropriate.

Sacred sites can lie within legally protected areas or outside such areas.

In protected areas it is often the case that protected areas are ‘superimposed’ over traditional use areas of Indigenous and traditional peoples.⁵⁸ Historically the establishment of protected areas has tended to ignore the values of Indigenous and local communities in relation to the sites that lie within.

Where sacred sites lie outside protected areas they are vulnerable to desecration, as a result of trespassers, but also vulnerable to inadequate environmental impact assessment regulations that fail to adequately

⁵⁷ Parshuram Tamang “THE Permanent Forum on Indigenous Issues and Its Mandate on Education and the Environment” at *International Symposium on Conserving Cultural and Biological Diversity: The Role of Sacred and Natural Sites and Cultural Landscapes*, 1 June 2005.

⁵⁸ UNESCO/IUCN Working Guidelines for the Conservation and Management of Sacred Natural Sites at p.2.

protect sacred sites. For example, in Australia when a sacred site is destroyed, there is a defence of not knowing the site was there. Environmental impact assessment that reflects the Akwe:Kon Guidelines may be helpful in prevent this sort of destruction from happening for example by requiring heritage assessment of proposed development areas to survey for sites of importance to Indigenous and local communities, and which are pivotal to the maintenance and preservation of their knowledge systems.

Environmental Impact Assessment legislation is necessary to ensure that decisions to approve developments take into consideration cultural impacts, particularly impacts of developments on sacred sites, including sacred natural sites.

The American Congress has enacted numerous provisions to carry out its Indian trust responsibilities to ensure access to sites is maintained. For example, as far back as 1978, Congress set a policy stating:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Native American concerns about development activities adversely affecting “sacred sites” have emerged in recent years in relation to mineral and energy development projects. In 2000, the Department of the Interior withdrew over 9,000 acres of federal land to protect an alleged Native American sacred site in the vicinity of the proposed Glamis Imperial gold mining project in the California desert.⁵⁹ The decision withdraw the lands was to protect Quechan resources claimed as traditional cultural property and, protect cultural transmission of traditional knowledge and practices. It was argued that:

If implemented, the [Imperial] Project would be so damaging to historic resources that the Quechan Tribe’s ability to practice their sacred traditions as a living part of their community life and development would be lost. Overall, the Council is convinced that the cumulative impacts of the proposed mine . . . even with the mitigation measures proposed by the company, would result in a serious and irreparable degradation of the sacred and historic values of the [land] that sustain the tribe. Therefore the Council concludes that the Glamis Imperial Project would effectively destroy the historic resources in the project area, and recommends that Interior take whatever legal means available to deny approval for the project.⁶⁰

In Australia the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* provides for the Commonwealth Minister to make declarations for protection over significant areas, sites or objects that are under threat of desecration. However the Act does not include provisions for protection of non-material aspects of heritage.

A review of the legislation recommends the need to include consideration of intangible components of heritage (including intellectual property) in protection measures, and matters concerning the need to respect confidentiality, and customary restrictions on information in dealing with heritage protection.

The report also recommended that, if State and Territory governments do not establish appropriate bodies, the Commonwealth Government should establish an Indigenous cultural heritage committee to ensure that Indigenous peoples have primary responsibility in deciding the significance of sites. This may allow the

⁵⁹ Kochan, Donald J., "An Examination of Increasing Protection for Sacred Sites and the Trust Responsibilities of the Federal Government" . Rocky Mountain Mineral Law Foundation, Chapter 12, 2003 Available at SSRN: <http://ssrn.com/abstract=907694>

⁶⁰ *Ibid* citing
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potential for the inclusion of intangible aspects of cultural heritage, including knowledge in frameworks for protection. (FN)

CONSULTATION / PARTICIPATION

[More here on consultation / participation models.....](#)

CASE STUDIES

Light of the Ancient Lands Network

The formation of a community-based indigenous network referred to as “Light of the Ancient Lands” has united eleven indigenous associations of indigenous peoples of Siberia and the Russian Far East. The members of this association shared common goals such as the development legal protection of scared sites. (Workshops on sacred sites CBD doc)

The network chose two strategies with varying degrees of success. The Lake Baikal region examined the possibility of developing regional legislation and the Altai Mountains region examined the creation of a specific form of specially protected territories within a framework of existing regulatory schemes.

[\(more here about conclusions/findings of network\)](#)

Alaska Highway Pipeline project

The Alaska Highway Pipeline Project is an example of a developmental impact assessment that involved three first Nations in Canada as well as four different jurisdictions: federal, provincial, territorial and Aboriginal jurisdictions.

It became apparent in the course of the project that in the implementation of international obligations, such measures as the Akwe:Kon Guidelines, there is need for a gap analysis to ensure the principles stipulated in the guidelines are fulfilled at the community level which included notification and public consultation, mechanisms (and resources) for indigenous participation, impact and benefit agreements (or the possibility of no-action options/alternatives), review and appeal processes and the importance of cultural impact assessments.

Identified cultural concerns included cultural heritage, traditional knowledge agreements, customary practices forms of social organization, systems of natural resource use, places of cultural significance, economic valuation of cultural resources, languages and customary law systems, which should be taken into account in an effective assessment.

In the course of the project it was apparent that it may remain the responsibility of informed Aboriginal groups to take proactive measures to ensure compliance. Information and capacity building strategies are therefore necessary to support such community action and translate to more meaningful implementation of the guidelines on the ground.

The Conservation Value of Sacred Sites of Indigenous Peoples of the Arctic: A Case Study in Northern Russia—Report on the State of Sacred Sites and Sanctuaries

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In 2000, a coalition of organizations led by the Russian Association of Indigenous Peoples of the North (RAIPON) initiated a program to document sacred sites in two regions of the Russian Arctic and explore protection measures in partnership with Conservation of Arctic Flora and Fauna (CAFF) and the Danish Environmental Protection Agency, which funded the project. The project was designed to support integrated conservation of Arctic biodiversity and the cultural heritage of northern indigenous peoples, through documenting the biological and cultural significance and status of indigenous peoples' sacred sites and sanctuaries.⁶¹

The project resulted in the release of a report entitled "*The Conservation Value of Sacred Sites of Indigenous Peoples of the Arctic: A Case Study in Northern Russia—Report on the State of Sacred Sites and Sanctuaries.*" (2004) It details both the environmental impact of threats, such as destruction of wildlife, vegetation and water supplies, and the impact on sacred sites.

Increased development has brought increased access to sites by people unfamiliar with local culture and belief. Some sites have been burned or dug up, for example, by mining operations, while at other sites newcomers have looted sacred objects.

The Russian Federation lacks a specific policy approach to the sacred sites of indigenous peoples and legislation to secure sacred sites, but existing laws related to environmental protection, cultural heritage and indigenous peoples' rights could potentially be a means for sacred site protection. The report advocates a "bottom-up" approach to sacred site protection, allowing indigenous communities themselves to designate sites and determine the most effective protection strategies.

The report describes existing policy that may aid in preservation and recommends changes that could further this cause:

(insert examples here)

Along with empowering indigenous communities and enabling them to sustain their traditional livelihoods, local control and management of sacred places also protects biodiversity. According to the report, "Sacred sites provide a 'win-win' opportunity for strengthening biodiversity conservation and protect area networks through integrating various models of ancestral territorial management based on indigenous land use."⁶²

John COMMENTS UP TO HERE

Conservation of Biodiversity Rich Sacred Natural Sites of Indigenous and Traditional Peoples

The project has been developed by the IUCN in partnership with the Rigoberta Menchu Tum Foundation (FRMT) and in collaboration with UNEP, UNESCO, and the Global Environment Facility.

The goal of the project is to "achieve a strengthened enabling environment to support conservation and sustainable use of biodiversity of sacred sites of indigenous and traditional peoples." It will focus on Meso-America, South America, South Asia, East Africa, and West Africa.

The specific objectives are:

⁶¹ http://www.sacredland.org/world_sites_pages/Arctic_Russia.html

⁶² http://www.sacredland.org/world_sites_pages/Arctic_Russia.html

- (i) increase awareness globally and nationally, through improved information, knowledge sharing and communications;
- (ii) Strengthen legal and policy frameworks, globally and nationally;
- (iii) Improve the institutional capacity of relevant actors to work at the national and local levels; and,
- (iv) Make available lessons and field-tested tools.

LEGISLATION INTENDED TO PROTECT, PROMOTE THE USE OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES SHOULD BE CONSISTENT WITH THE NEEDS AND VIEWS OF INDIGENOUS AND LOCAL COMMUNITIES, COMPREHENSIVE AND ENFORCEABLE.

BACKGROUND

INTERNATIONAL

REGIONAL MODEL LAW

NATIONAL

- Constitution / Treaty
 - Sui Generis Systems
 - Customary law mechanisms
 - Access and Benefit Sharing legislation
 - Reform of intellectual property laws
 - Role of registers / databases
 - Environmental protection legislation
 - Legislation to Promote and Protect Health Care Systems
 - Use of Contracts and Protocols
-

BACKGROUND

Legislation provides an important foundation for the objectives of Article 8(j) of the CBD to be experienced within Indigenous and local communities.

At the national level legislation is required across sectors to create a degree of enforceability, and a degree of uniformity and consistency between provincial governments in the health, education, environmental protection, and sui generis systems for access and benefit sharing. Enforceability is recommended in the Phase I and Phase II Composite Report which states that:⁶³

Legislation to protect, promote or facilitate the use of traditional knowledge must be enforced and enforceable in order to be effective. While activities to protect and encourage traditional knowledge are often most effective when locally managed, legal restrictions or guarantees in particular must be backed up by adequate enforcement, whether by governments themselves, or by delegating authority (and providing adequate resources) to local or indigenous organisations.

The implementation of national legislation or policy to protect Indigenous traditional knowledge requires overarching international standards without which domestic implementation tends to be ad hoc.

Whilst some countries have advanced framework legislation and consultation processes for the

⁶³ UNEP/CBD/WG8J/3/4

protection of traditional knowledge, legal frameworks for access to genetic resources and its relation with traditional knowledge tend to be ad hoc and for the most part do not provide adequate protection.⁶⁴

Of concern to Indigenous and local communities is that protection and benefit sharing tends to focus on the commercial application of traditional knowledge. There is insufficient focus on the preservation of such knowledge from a cultural perspective and the application of knowledge for biodiversity conservation outside commercial activities.⁶⁵ There are a number of central issues that remain unsolved, such as the role of registers, procedures to grant prior informed consent, and benefit-sharing.⁶⁶

According to the Report of the UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework there are two broad approaches to protecting traditional knowledge: defensive protection; and positive protection.

Positive protection of traditional knowledge could include a declaration of the rights of indigenous and local communities, including their ownership of their TK, or recognition of customary laws in legislation. Defensive protection requires relevant patent applications to include disclosure of the source of genetic resources associated with TK, as well as evidence of PIC and benefit sharing.

Some examples of positive and defensive protection are outlined below.

INTERNATIONAL

The need for an overarching international framework was noted at the 2000 UCTAD meeting of experts which stated:

National sui generis systems by themselves will not be sufficient to protect [traditional knowledge] adequately. There is therefore a need to explore an international mechanisms that might explore minimum standards of an international sui generis system for [traditional knowledge] protection.⁶⁷

An international treaty could provide a basis upon which traditional knowledge could be protected and reflect customary laws of Indigenous and local communities.⁶⁸ Of concern in developing and negotiating a treaty is the specificity of terms that may be inflexible in the context of Indigenous traditional knowledge that is constantly changing.

As noted in the *Report on Indigenous Knowledge* presented at the 6th Session of the Permanent Forum on Indigenous Issues in New York in May 2007 “if customary law were to be completely reflected in an international treaty, this could inhibit the development of customary law.”⁶⁹ Further that the uniformity of

⁶⁴ “Report on Traditional Knowledge” Permanent Forum on Indigenous Issues, Sixth Session, New York, 14-25 May 2007.

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⁶⁷ “UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices” Geneva, Switzerland, 30 October – 1 November 2000 at TD/B/COM.1EM.13/L.1,9 November 2000 at p. 7.

⁶⁸ “Report on Indigenous Knowledge” Permanent Forum on Indigenous Issues, Sixth Session, New York, 14-25 May 2007.

⁶⁹ Ibid

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a treaty may not encompass and reflect the fact that Indigenous peoples, customary laws and traditional knowledge are not homogenous.⁷⁰

[More here on international mechanisms?](#)

REGIONAL MODEL LAW

The purpose of Model Legislation is to provide a starting point for countries wishing to enact legislation for the protection of traditional knowledge and expressions of culture. Countries are free to adopt or adapt the Draft Model Law as they see fit.

The approach taken in Draft Model Law is to protect the rights of traditional owners in their traditional knowledge and expressions of culture and permit tradition-based creativity and innovation, including commercialization thereof, subject to prior informed consent and benefit-sharing.

Pacific Model Law

The *Model Law* establishes procedures whereby consent can be obtained for the non-customary use of traditional knowledge and expressions of culture, including derivative works. It is intended to complement and not undermine intellectual property rights.

The *Model Law* also recognises rights to traditional knowledge and expressions of culture and allows traditional owners to be compensated for the use of their traditional knowledge. It provides for the establishment of national institutions to create and maintain databases on owners as well as permitting the establishment of a national dispute resolution system.

It recognises that a ‘one-size-fits –all’ or universal template to protect expressions of culture is unlikely to be a workable approach given the divergence of national and local priorities, and the legal and cultural environment and the needs of traditional communities. What is needed is a ‘broad and holistic approach’ to issues relating to traditional knowledge to enable the development of policy solutions that work in a complementary manner.⁷¹

Some Pacific Island States, such as Fiji, have implemented the Pacific Model Law into national legislation.

Guidelines for Developing National Legislation for the Protection of Traditional Knowledge and Expressions for Culture Based on the Pacific Model Law 2002 (‘the Guidelines’)

The Guidelines are designed to assist policy makers in Pacific communities in the development of national legislation for the protection of traditional knowledge and expressions of culture. They are based on the Pacific Model Law and a positive development toward implementation of a regional framework for protecting traditional knowledge and expressions of culture. It is envisaged the Guidelines will assist traditional knowledge holders to identify potentially applicable protection mechanisms in the current intellectual property rights regime.⁷²

⁷⁰ Ibid

⁷¹ Forward of Guidelines

⁷² Forward of Guidelines

AOU African Model Law

The “African Model Law” for the protection of the rights of local communities, farmers and breeders, and for the regulation of access to genetic resources has been put forward to African countries as the African *sui generis* regime. This model law serves as a framework and guideline for African countries in the process of formulating and developing national access to genetic resources and the associated traditional knowledge and benefit sharing legislation. African countries are encouraged to make use of the OAU model law while finding appropriate means to protect the traditional knowledge, innovations and practices of indigenous and local community embodying traditional lifestyles relevant to the conservation of biological diversity.⁷³

The Tunis Model Law

Provides for protection of cultural expressions without the requirement for these to be 'fixed' (as required by copyright laws), and provides protection for an indefinite period of time. It also includes a provision for 'moral rights' to 'prevent the desecration and destruction of folklore works'. A number of African and other countries have adopted the Tunis Model Law.

NATIONAL

Recognition of indigenous peoples in national constitutions and negotiated treaties is essential to meaningful self-determination..⁷⁴

Treaty

Treaties between the State and Indigenous groups exist mainly in developed countries with sizable populations (Canada, USA, New Zealand) but are less prevalent in developing countries.⁷⁵

In Canada the Kaska Nation has a treaty with the Government of Canada as well as internal protocols with seven Kaska communities so that there is consistency in protection. In New Zealand where the approach has been described as more ‘holistic’ in comparison, there are 1000 outstanding treaty claims. It has been suggested that a first step in the claims process could include a simple obligation by the State to protect the cultural identity of tribes which would instigate a treaty negotiation process that acknowledges that TK is local and site specific.⁷⁶

In the United States, *The Indian Self-Determination and Educational Assistance Act* and the *Tribal Self-Governance Act* helped to define the sovereign political powers of the Tribes, but many problems remain.⁷⁷

Constitutional Recognition

Legislative recognition of particular Indigenous populations and local communities by national governments without a constitutional mandate tends to be more selective and provide weaker protective measures.⁷⁸

⁷³ UNEP/CBD/WG8J/4/INF/2 Page 63

⁷⁴ African Regional Report

⁷⁵ UNEP/CBD/WG8J/4/INF/15 at pg. 11

⁷⁶ UNEP/CBD/WG8J/4/INF/15 at p. 11

⁷⁷ UNEP/CBD/WG8J/4/INF/7 Page 15

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Several countries have recognized the multicultural nature of the nation in their constitutions (Mexico, Constitutional Amendment of 1995, Bolivia, 1994, Colombia, 1991, Ecuador, 1989, Guatemala, 1985, Nicaragua, 1987, Paraguay, 1992, Peru, 1993 and Venezuela, 1999).

In Africa most of the threats to traditional knowledge are at the national level and imbedded in the national constitutions and other national legal instruments and policy frameworks of African governments which, according to the African regional report, fail to take into account the real interest of African indigenous people and the importance of protecting and promoting the traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the well-being of indigenous people themselves.⁷⁹

Batwa organizations have met with the Constitution Commission to press for their rights in the new constitution, calling for increased representation of Batwa at all administrative levels in the country, inclusion of Batwa in land distribution, recognition of Batwa as a disadvantaged group needing particular attention, and support for Batwa education (ACHPR, 2005).

In Canada Indigenous peoples are accorded Aboriginal and treaty rights under section s.35 of the Constitution.⁸⁰ This has translated to the Canadian Supreme court defining by precedent the extent of Indigenous legal interests natural resources such as forests. In contemporary terms, Aboriginal peoples see their future to be inextricably linked to a strengthened relationship with the land and resource-based economy.

Under the Canadian Constitution in First Nation related cases, the court is required to first ask what is the existing customary law and what is the common law which represents one way of customary law can be recognised beyond tribal boundaries. Customary law is also taken into consideration is native tribunals and courts in many countries.

In Thailand the constitution provides the foundation for Indigenous and local communities participation in natural resources development and biodiversity management.⁸¹

Sui Generis Protection

In many countries, *sui generis* systems (laws within national legal systems) are being developed to protect Traditional Knowledge⁸² “including new stand-alone laws or additions to existing laws relating to biodiversity or specific sectors such as fisheries, forestry or protected areas.”⁸³

Sui generis systems for the protection of traditional knowledge developed at the national level, should adequately recognize the diversity of ownership models present in the customary legal traditions of different Indigenous and local communities.⁸⁴

In order to have *sui generis* systems based on the principles of customary law, it is imperative that the knowledge and use of customary law in local and Indigenous communities remains strong. The following

⁷⁸ Australian Indigenous Knowledge and Libraries at p. 54

⁷⁹ UNEP/CBD/WG8J/4/INF/2 at p. 55

⁸⁰ UNEP/CBD/WG8J/4/INF/7 at p. 29

⁸¹ UNEP/CBD/WG8J/3/6 at para 16

⁸² <http://epress.lib.uts.edu.au/dspace/bitstream/2100/57/1/Libraries+and+Indigenous+Knowledge.pdf>

⁸³ *Biodiversity Access and Benefit-Sharing Policies for Protected Areas: An Introduction* United Nations University Institute of Advanced Studies (UNU/IAS) (2003) at

http://www.ias.unu.edu/binaries/UNUIAS_ProtectedAreasReport.pdf as at 4 November 2006.

⁸⁴ <http://www.biodiv.org/doc/meetings/tk/wg8j-04/official/wg8j-04-07-en.doc> at para 19

is a suggested indicative list of potential measures to promote and protect the respect, use and inter-generational transfer of customary law:

- (a) Recognition, accreditation and support (financial and institutional) for traditional knowledge specialists such as practitioners of traditional medicine;
- (b) Promoting awareness of the value of customary law through the media and public relations campaigns, thus encouraging renewed interest and pride in traditional knowledge by community youth;
- (c) Including customary law in formal school curricula;
- (d) Creating tribal educational institutions, from pre-school to university levels;
- (e) Training youth in customary law through local organizations;
- (f) Measures to support women and older segments of the populations;
- (g) Community-based and -controlled codification of customary law;
- (h) Use of modern technologies such as the Internet to improve transmission among regionally disperse communities and stimulate interest by youth.

Customary Law Recognition

Parties to the CBD are also obliged and encouraged to protect and encourage *customary use of biological resources* in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements (Article 10(c))

When considering customary procedures governing access to and consent to use biological resources, the Nunavut Wildlife Act provides a useful example for consideration. The Nunavut Wildlife Act lists the most important Inuit customary law principles relating to biodiversity. Many of these principles exist in other bodies of customary law around the world and some may therefore be considered ‘common principles’ or “norms” of customary law.

Access & Benefit Sharing Legislation

ABS legislation requires provisions for free prior informed consent of the traditional knowledge holding communities in accordance with their customary laws.

Over fifty governments have implemented or are drafting ABS measures to regulate biodiversity research and prospecting, including those of the Andean Pact countries, the Philippines, Brazil, and India, regulating. Through this process key lessons have emerged that include:

- the importance of including a wide range of stakeholders as part of national consultations to develop an ABS measure, including the active involvement of local communities and indigenous peoples;
- the need for effective implementing institutions and clear and transparent regulatory and permitting processes;
- the importance of partnerships and non-monetary benefits arising from the research process, since financial benefits in the form of royalties may not be realised;
- the need to build capacity to address complexity of issues that arise; and,
- the value of collaborating on a regional or international level.⁸⁵

⁸⁵ http://www.ias.unu.edu/binaries/UNUIAS_ProtectedAreasReport.pdf
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The requirement for prior and informed consent of local and indigenous communities has been established by a range of instruments including “constitutional law (Venezuela), national indigenous rights law (Philippines), as well as under laws for the protection of rights over traditional knowledge (Peru) and folklore (Panama).”⁸⁶

In the Philippines Executive Order No. 247 is the first national legislation on ABS to be introduced, and involved extensive public consultation in its formulation.⁸⁷ A group of university scientists and government agencies drafted the legislation to ensure their concerns were incorporated in provisions on scientific capacity building. To ensure the interests of Indigenous and local communities were addressed, an NGO based legal drafter was also involved i.e. through a requirement to obtain local Prior Informed Consent (PIC). The involvement of government agencies helped to ensure the eventual adoption of the regulation.

Bangladesh has passed the Biodiversity and Community Knowledge Protection Act and a number of the specific objectives relate to the protection of traditional knowledge and access and benefit sharing, specifically the need to:

- a) ensure the conservation and sustainable use of biological and genetic resources and related knowledge, culture and practice in order to maintain and improve their diversity as a means of sustaining the life support and healthcare system of the people of Bangladesh;
- b) protect biological and genetic resources and the related knowledge, culture and practice from pollution, destruction and erosion;
- c) protect and support the rights, knowledge, innovations and practices of local and indigenous communities and national scientific and research institutions with respect to the conservation, use and management of biological and genetic resources;
- d) provide an appropriate system of access to biological and genetic resources and related knowledge based upon the Prior Informed Consent of the concerned local or indigenous communities and the State;
- e) promote appropriate mechanisms for a fair and equitable sharing of benefits arising from the use of biological and genetic resources and related knowledge and technologies;
- f) to ensure participation and agreement of concerned communities in making decisions regarding the distribution of benefits which may derive from the use of biological and genetic resources.

In Australia the *Nationally Consistent Approach* (NCA) policy framework guides uniform legislation, policy and practice in the Australia’s jurisdictions regarding access and benefit sharing within which Indigenous traditional knowledge is recognised. The NCA underpins future action by governments when developing, or reviewing, legislative, administrative or policy measures on access and benefit-sharing.

Based on the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* adopted in 2002 by the 6th Conference of the Parties of the Convention on Biological Diversity, the NCA seeks to “ensure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and to ensure that the use and collection of that knowledge results in social and economic benefits to the traditional owners.”

⁸⁶ B. Tobin *Customary law as the basis for Prior Informed Consent of local and indigenous communities* at http://www.ias.unu.edu/binaries2/Tobin_PIC_Customary_Law.doc as at 5 March 2007.

⁸⁷ <http://www.biodiv.org/doc/case-studies/abs/cs-abs-order-ph-en.pdf>

The operation of the access and benefit sharing regime in Australia is elaborated in the *Environment Protection Biodiversity Conservation Act (1999)*(EPBC) and (EPBC) Regulations which regulate bioprospecting.

As part of the regulatory framework there is an Indigenous Advisory Committee established under the EPBC Act that advises the Minister for the Environment and Heritage on the operation of the Act, taking into account the significance of Indigenous people's knowledge of land and the conservation and sustainable use of biodiversity. Access to biological resources on indigenous peoples' land necessitates prior informed consent that must be obtained from access providers who are indigenous land owners. The Minister determines whether 'prior informed consent' is satisfied according to a number of factors, "including the access provider's knowledge of the Regulations and ability to engage in reasonable negotiations with the applicant, the procedures for, and timing of, the negotiations, and whether independent legal advice has been obtained."⁸⁸

Sui Generis Registers / Databases

In the light of the historical destruction of Indigenous knowledge, its current fragile existence, and its threatened future, the preservation of Indigenous knowledge and protection of Indigenous intellectual property rights to ensure proper attribution and use of it now requires the documentation of such knowledge.

Documentation plays an important role in the retention and protection of Indigenous intellectual property⁸⁹ although it is important to bear in mind that "documentation is not enough to maintain the traditional knowledge that benefits biodiversity and sustainability.

The Revised Phase One, And Phase Two Of The Composite Report On The Status And Trends Regarding The Knowledge, Innovations And Practices Of Indigenous And Local Communities Relevant To The Conservation And Sustainable Use Of Biological Diversity recommends to Governments:

that registers developed at local and national levels with the full and effective participation and the prior informed consent of indigenous communities may be useful measures to protect traditional knowledge.⁹⁰

Desire to protect TK from unapproved use has led to the establishment of confidential registers. As a result important sources of prior art including local community registers, indigenous peoples and other confidential registers including the Inuit, BioZulua, and the confidential register under the Peruvian legislation, as well as the oral registers of TK maintained by elders and wise men and women, are effectively excluded from the remit of prior art investigations.

The *Assessment of the advantages and limitations of registers as a measure to protect traditional knowledge* report on registers suggested a "a mix of appropriate initiatives" that can "facilitate the revival and maintenance of traditional knowledge and cultural practices relevant to the conservation and sustainable use of biological diversity" which could include the "establishment of traditional-knowledge registers".

The report examined:

⁸⁸ "New regulations on Bioprospecting in Commonwealth areas" in *Focus* Allens Arthur Robinson, January (2006) at <http://www.aar.com.au/pubs/pdf/env/fobjan06.pdf>

⁸⁹<http://epress.lib.uts.edu.au/dspace/bitstream/2100/57/1/Libraries+and+Indigenous+Knowledge.pdf>

⁹⁰ <http://www.biodiv.org/doc/meetings/tk/wg8j-04/official/wg8j-04-04-en.pdf>

- the terminology surrounding the creation of traditional knowledge databases and the identification of traditional-knowledge registers as one of several kinds of traditional knowledge data-bases;
- general benefits and harms that arise from their creation;
- a functional classification for traditional knowledge databases; issues raised by representatives of indigenous and local communities; and,
- examples from national experiences and indigenous and local communities for compiling data-bases and principles drawn from these.

Registers or databases have been developed by a number of Indigenous communities worldwide. They are generally compiled by communities or community groups for their own benefit and have been found useful for organizing knowledge to enable better protection and improved management of the community resources.

There is variance in the extent to which existing databases and registries protect traditional knowledge and how they operate. There is also variance as to whether the aim of such registers or databases aim is to conserve and disseminate such material for wider public access, or whether they seek to protect and restrict access to it.

As noted in the report on registers some of the purposes of existing databases/registers are:

- (a) Maintenance and preservation of traditional knowledge by virtue of recording and documenting it;
- (b) Protection against the inappropriate granting of intellectual property rights by providing evidence of prior art;
- (c) Raise awareness of communities with respect to the values of traditional knowledge;
- (d) Encourage long-term conservation and promotion of natural resources and their related traditional knowledge;
- (e) Provide information to interested parties who may be interested in obtaining information available in the registry, in exchange for a fee;
- (f) To be used as part of a legislative system for the assertion of intellectual property rights over traditional knowledge (e.g. a national *sui generis* system to protect indigenous and local knowledge).

In Australia *The Gupapuyŋu Legacy Project at the Galiwin'ku Indigenous Knowledge Centre* involved the Yolŋu from Arnhem Land pursuing the digital recovery of Indigenous knowledge and material collected or removed from the community.

The project identifies Gupapuyŋu clan material housed in various collections and maps these into Yolŋu systems for knowledge management at the local level. As well, contemporary performances and ceremonies are recorded and stored locally to preserve extant cultural knowledge for the future.

The Yolŋu people have also established the *Garma Cultural Studies Institute (GCSI)*. The Institute aims to '[s]ustain and extend Yolŋu intellectual traditions and knowledge systems; develop partnerships and collaborative relationships with places of learning, other Indigenous peoples and the wider community; and, expand human knowledge in a spirit of mutual respect and tolerance'.

Also in Australia the *Kuku Thaypan Traditional Knowledge Recovery Project* has involved Indigenous clans in Cape York who have long been faced with the problem of how to save what little remains of their traditional knowledge.

The database currently spans topics as diverse as animals, history, plants, spirituality, people, ceremony, skills and techniques and country. The country section is broken down into story places, traditional /...

management and natural resources, to name a few, and the ethnobotany component covers the medicinal, food, craft and spiritual use of plants as well as their interrelationships with the environment, seasons or animals.

In terms of environmental management, traditional knowledge involved in bora and lagoon management plans.⁹¹

*The Honey Bee network*⁹²

Honey Bee is a knowledge centre/network pooling solutions developed by people from different sectors throughout the world and creating links not only between people but also between formal and informal science.

The Honey Bee supported the principle of prior and informed consent before the Convention on Biological Diversity came into existence.⁹³

Honey Bee has collected over 36,000 examples of contemporary innovations and outstanding examples of the use of traditional local knowledge in the sustainable management of natural resources through various collaborators and now through National Innovation Foundation (NIF). These innovations are shared with local communities and individuals in over 75 countries through the Honey Bee newsletter which is being issued in eight different languages (English, Hindi, Gujarati, Tamil, Kannada, Malayalam and Telugu). SRISTI (Society for Research and Initiatives for Sustainable Technologies and Institutions), a global NGO based in India, was set up in 1993 to provide back up support to Honey bee network. Several NGOs, such as SEVA, Pritvi, Pedes and many others have joined hands to sustain this voluntary network.

Some considerations that may be drawn regarding the use of traditional knowledge databases and registers are.⁹⁴

- (a) Traditional-knowledge databases relevant to the conservation and sustainable use of biological diversity have diverse functions;
- (b) The creation of traditional-knowledge databases present positive and negative incentives to indigenous and local communities that have demonstrated ambivalence to their creation and maintenance;
- (c) The creation of traditional-knowledge registers for the purposes of defensive publication of traditional knowledge as prior art for the pre-emption or invalidation of patents or the positive registration of traditional knowledge rights have provided both some promising and some troubling experiences for indigenous and local communities;
- (d) Traditional-knowledge databases, non-IPR-related traditional-knowledge registers and other traditional-knowledge databases are numerous and also present conflicting incentives to and impacts on indigenous and local communities;
- (e) The design and implementation of traditional-knowledge databases reflect numerous legal and policy issues that should be addressed as part of integrated measures for the development and promotion of traditional knowledge databases relevant to the goals of the Convention on Biological Diversity; and
- (f) The development of policy and law related to traditional-knowledge databases should be flexible, adaptable to the particular circumstances of different indigenous and local communities, based on

⁹¹ <http://www.nrm.gov.au/state/qld/publications/case-studies/kuku-thaypan.html>

⁹² http://r0.unctad.org/trade_env/test1/meetings/tk2/honeybee.pdf

⁹³ (Australian Indigenous Knowledge and Libraries at p. 49)

⁹⁴ UNEP/CBD/WG8J/4/4 Page 5

a fundamental respect for the customary laws and cultural integrity of indigenous and local communities, and be based on the principle of free, prior informed consent (FPIC).

- (g) National governments should repatriate the traditional knowledge of indigenous and local communities stored in national databases, and encourage the repatriation of traditional knowledge stored in private and corporate databases.⁹⁵

“It is important to note that legal measures for the protection of traditional knowledge should focus on the protection of traditional knowledge rather than the protection of register technologies. Database protection approaches do not necessarily protect the item of knowledge themselves, and rapid advances in digital technology make such protection vulnerable.”⁹⁶ (paraphrase)

Reform of Intellectual Property Legislation

The Phase I and Phase II Composite Report recommended that National Governments and international bodies should consider *sui generis* measures within intellectual property systems to protect the knowledge of indigenous and local communities. These measures include:

- the adoption of disclosure of origin or other measures that can reduce the burden on indigenous and local communities to document their knowledge;
- changes in evidentiary requirements to include oral and visual materials; and,
- and the use of confidential and unpublished materials, as evidence of prior art.

Principles of customary law should be incorporated into intellectual property and other regimes to protect against exploitation of traditional knowledge and to encourage its promotion and use with the free and prior informed consent of the knowledge holders.⁹⁷

In the Phillipines the *Indigenous Peoples Rights Act* (Republic Act 8371), 1997) recognises, protects and promotes indigenous cultural communities and peoples, creating an ad hoc commission for that purpose. The Act determines that indigenous communities and peoples have a right to their traditions and customs and to the restitution of intellectual property taken without their consent. They are entitled to full ownership, control and protection of their cultural and intellectual rights (regarding genetic resources, seeds, medicinal plants, arts, designs and so on). Access to, and use of, their knowledge will be permitted only with their prior informed consent (PIC).

In New Zealand positive steps are being taken to examine ways in which existing systems of intellectual property right protection might be modified to strengthen the legal protection of Maori cultural and intellectual property from wrongful exploitation, and also, to strengthen the process and profile of existing laws to offer greater coverage to Maori businesses who might want to develop products at a tribal level. This has resulted in the inclusion of a number of provisions in draft legislation designed to address Maori concerns regarding the inappropriate use of Maori imagery and text as trade marks. These provisions include a mechanism for informed consent.⁹⁸

Decision 486 Andean Community

The laws in Brazil, Costa Rica and the Andean community are regarded as having pioneered the use of IK defensive protection. Decision 486 of the Andean community on a Common Regime on Industrial

⁹⁵ UNEP/CND/WG8J/4/4 at p. 6

⁹⁶ UNEP/CBD/WG8J/4/4 at p. 6

⁹⁷ UNEP/CBD/WG8J/4/INF/7

⁹⁸ <http://www.biodiv.org/doc/world/nz/nz-nr-abs-en.doc>

property has established as general principle that a condition of granting a patent is that biological inheritance (and related TK) of the regions indigenous communities is safeguarded.⁹⁹

Under the Andean Law patent applications for biotechnological inventions need to provide national intellectual property authorities with evidence that genetic resources and Indigenous Knowledge incorporated in the invention were legally accessed according to regional legislation. If the patent is granted and information subsequently confirms that resources and IK were illegally obtained, the national authority may declare it invalid.

Guatemala

Guatemalan law also seeks to preserve and promote the wider use of its traditional knowledge by placing expressions of national culture, including for example medicinal knowledge under the protection of the state which cannot by law be sold or be subject of any remuneration. Different types of models are being developed at the national level, seeking to adapt legislation and practice to local needs.

Environmental Protection Legislation

The general objective of the Akwe:Kon Voluntary Guidelines is to provide advice on the incorporation of cultural, environmental, including biodiversity related concerns and social considerations of indigenous and local communities into impact assessment procedures.

The Guidelines are part of a package of international instruments aimed at preventing adverse impact of unsustainable development on sacred sites, and lands and waters traditional occupied and/or used by indigenous and local communities.¹⁰⁰

In Australia the Environment Protection and Biodiversity Conservation Act recognises the “special knowledge held by Indigenous persons about biological resources” and there are guidelines for natural resource management that recognise “Indigenous peoples have “links to the land and sea that are historically, spiritually and culturally strong and unique.”

In Canada the *Environmental Assessment Act* 1992 calls for recognition of “Aboriginal traditional knowledge...in conducting an environmental assessment.”¹⁰¹

In South Africa the *National Environmental Management Act* 1998 prescribes that environmental decision makers take into consideration all forms of knowledge, including traditional knowledge.¹⁰²

Legislation to Promote and Protect Health Care Systems

The use of traditional medicine facilitates intergenerational transfer of knowledge, experiences and observations, and results in a health system that is tribally and culturally specific, but also continuously changing and strongly influenced by social, economic and political factors.

⁹⁹ (SciDevNet).

¹⁰⁰ UNEP/CBD/WG8J/4/INF/14 Page 5

¹⁰¹ s. 16(1)

¹⁰² s.2(2)(g)

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As noted in the Phase I and Phase II Composite Report efforts to develop health programmes specifically for Indigenous peoples that take into consideration their cultural characteristics are inadequate. Failure to develop such programmes results in under-nourishment as a consequence of indigenous and local communities having modified their natural environments and lost their traditional source of feeding, while communities that are relatively isolated have better levels of nutrition.

The Draft Declaration on the Rights of Indigenous Peoples developed by the working group includes important provisions concerning intellectual property rights. Article 24 states that:

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

Conservation efforts are necessary to protect biodiversity, but also to meet the health needs of local and Indigenous communities. The use and harvesting of traditional medicinal plants and herbs can result in a decline in the availability of the plant or herb population, particularly when local use is combined with large scale export for trade. For this reason a number of medicinal plants have become rare and it has become necessary and imperative to put them under protection.

Health indicators are needed to measure and monitor the state of retention of traditional biodiversity-related knowledge without which it cannot be adequately assessed.¹⁰³

In the Phillipines the Traditional and Alternative Medicine Act 1997 defines traditional medicine as “the sum total of knowledge, skills and practice on health care, not necessarily explicable in the context of modern, scientific philosophical framework, but recognised by the people to help maintain and improve their health towards the wholeness of their being, the community and society, and their interrelations based on culthe *Republic Act 8423 (1997)* established the Institute of Traditional and Alternative Health Care (PITAHC) to enhance traditional healthcare throughout the country by promoting and validating the use of traditional medicine and practices. A development fund has also been created to support the overall activities of the Institute.

In Africa there are two systems of medicine that co-exist: one based on traditional medicine and the use of biodiversity, and the other dominant western approaches to healthcare that utilize pharmaceutical products.¹⁰⁴ Numerous countries are integrating traditional medicine into their official healthcare programmes whereby an estimated 80 % of the African population use traditional medicine for their health needs, including those who also visit modern health facilities.

In Ecuador national protection of traditional medicine is protected in its national constitution.

In Australia in the Northern Territory, traditional medical knowledge is recognized in a limited way through the use of Aboriginal Health Workers under the Health Practitioners and Allied Professionals Registration Act 1985 who “act as a bridge between traditional healers, indigenous communities and conventional medical practitioners.”¹⁰⁵

Legislation underpinning Indigenous Educations Systems

(insert here...)

¹⁰³ <http://www.biodiv.org/doc/meetings/tk/wg8j-03/official/wg8j-03-04-en.pdf> at para 55

¹⁰⁴ UNEP/CBD/WG8J/4/INF/2 at p. 18

¹⁰⁵ “Report on Traditional Knowledge” Permanent Forum on Indigenous Issues, Sixth Session, New York, 14-25 May 2007 .

Use of Contracts and Protocols

In the absence of adequate legislative protection there are soft law options such as protocols, contracts or codes of conduct to regulate the sharing of traditional knowledge with those outside the community.¹⁰⁶ These soft law options provide a mechanism through which ABS can be realised in practice¹⁰⁷ and achieve the principles of prior informed consent and mutually agreed terms.

As Nakata argues:

Where legal mechanisms to protect [Indigenous knowledge] have not yet been developed to deal with the intersection between customary law and Western intellectual property law, protocols are important ways to guide appropriate practice.¹⁰⁸

Assuming Indigenous peoples right to share their knowledge on their own terms is formally recognised, the extent to which they share equitably in the commercial value of their knowledge will depend on:

- (1) the degree to which they are fully informed about the potential value of their knowledge and about the legal consequences of any agreements they may make with outsiders;
- (2) the extent to which they possess the institutional capacity at the community level to engage in effective negotiations as well as the financial resources to take legal action when necessary to enforce their rights; and,
- (3) the extent to which effective and affordable legal remedies exist at the national and international level.

There is evidence that protocols need to be localised to deal with the specific needs and requirements of local groups and that technology needs to be able to support these protection regimes.

In Australia a number of access and benefit sharing protocols or ‘guidelines’ have been successfully developed locally over the past decade “with aims of accountability, responsibility, sustainability, understanding and trust, and better communication” in the context of commercialisation of Indigenous knowledge and practices.¹⁰⁹ Protocols such as those established by the Central Land Council, the Desert Knowledge Cooperative Research Centre and the Songman Circle of Wisdom (outlined below), embody the principles of ABS.

The *Central Land Council* has negotiated four protocols concerning research: photography, film, recording and media; environment and conservation activities; and anthropological work. The protocols have jurisdiction over native title lands in central Australia and include provisions for PIC, participation of Aboriginal people, benefit sharing, recognition of ‘Aboriginal cultural and intellectual property rights, ethics approval, and publication and dissemination of research outcomes.’¹¹⁰

The *Desert Knowledge-Cooperative Research Centre (DK-CRC)* has developed an ‘Indigenous Intellectual Property Protocol (‘IIPP’)’ which is a policy document in three sections: purpose, philosophy

¹⁰⁶ UNEP/CBD/WG8J/4/INF/7 at p. 7

¹⁰⁷ (Raven ILB)

¹⁰⁸ M. Raven “Protocols & ABS: Recognising Indigenous Rights to Knowledge in Australian Bureaucratic Organisations” in *Indigenous Law Bulletin* June/July (2006), Vol. 6, Issue 20 at p. 14 citing Nakata et al.

¹⁰⁹ Raven at 14

¹¹⁰ *Ibid* at 14

and practices. The IIPP “seeks to share the benefits through allowing an amount from the total commercialisation revenue of the Centre equal to the Company’s Participating Share to be allocated to a separate account administered by Indigenous trustees.

Known as the ‘Songman Protocol’ the *Songmans Circle of Wisdom* is a protocol that recognises the parallel legal systems, consent, confidentiality, planning, operational implementation and certification. It sets up a process of certification for quasi-trademarks or geographical indicators. “Rather than waiting for other organisations to create the boundaries for the relationship based on using, commercialising or sharing Indigenous knowledge, the Songman Protocol creates the parameters through which other organisations and corporations can access the knowledge and product.

Due to the early stage of developing protocols very little critical analysis has been undertaken on their implementation. The recognition of Indigenous rights to knowledge needs to be achieved simultaneously through legal recognition of rights, and through a changing of peoples understanding and behaviour of the use, ownership and management of Indigenous knowledge. Protocols may prove to be effective tool through which to achieve this aim.”¹¹¹

¹¹¹ M. Raven “Protocols & ABS: Recognising Indigenous Rights to Knowledge in Australian Bureaucratic Organisations” in *Indigenous Law Bulletin* June/July (2006), Vol. 6, Issue 20 at p. 15.

INCENTIVE MEASURES AS WELL AS OTHER MECHANISMS AND MEASURES THAT SUPPORT THE RETENTION AND USE OF KNOWLEDGE, INNOVATIONS AND PRACTICES OF INDIGENOUS AND LOCAL COMMUNITIES EMBODYING TRADITIONAL LIFESTYLES RELEVANT TO THE CONSERVATION AND SUSTAINABLE USE OF BIOLOGICAL DIVERSITY.

MEASURES AND MECHANISMS TO MITIGATE THE CONSEQUENCES OF ACTIONS ARISING FROM PERVERSE INCENTIVES LEADING TO THE DECLINE OF KNOWLEDGE, INNOVATIONS AND PRACTICES EMBODYING TRADITIONAL LIFESTYLES RELEVANT FOR THE CONSERVATION AND SUSTAINABLE USE OF BIOLOGICAL DIVERSITY.

BACKGROUND

INCENTIVE MEASURES

- Measures to maintain access to land and waters
- Measures to promote participation in decision-making
- Measures to strengthen Indigenous Institutional capacity
- Measures enhancing the economic base of communities
- Measures to strengthen intergenerational transmission
- Measures concerning sustainable use of natural resources
- Land management & conservation measures

MITIGATING PERVERSE INCENTIVES

BACKGROUND ON INCENTIVE MEASURES

Incentive measures include the adoption of economic and social measures that act as incentives for the conservation and sustainable use of biological diversity. Economic incentives are not necessarily the most effective or desired option, as noted in the *Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity*.¹¹²

A number of incentive measures are being implemented mostly in the development of sui generis negotiations, as well as poverty reduction strategies, access to benefit sharing strategies, tax exemptions, and collaborative research projects. These measures are providing strong motivation or incentive for “Indigenous peoples, local communities, governments and corporations to investigate collaborative approaches to conservation and economic development on the basis of the use of traditional biodiversity-related knowledge”.¹¹³

According to Decision VI/15 on ‘incentive measures one of the characteristics of ‘incentive measures’ is the need for clear targets and indicators to measure their success. That is:

to the extent feasible incentive measures should have targets that are specific, measurable, time-driven, and based on an analysis of their effects. The successful monitoring and evaluation of their impacts is an important factor in ensuring the ultimate success of incentive measures.”

¹¹² UNEP/CBD/WG8J/3/4

¹¹³ Langton and Nakata at p. 57

Whilst this quantification may be problematic in the context of ‘knowledge’ there is a need for incentive measures that protect and promote traditional knowledge, incentive measures, tailored to secure the survival of traditional knowledge within and beyond this current generation, need to be developed urgently to encourage the use of biodiversity-related traditional knowledge innovations and practices.¹¹⁴

Article 11 of the *Convention on Biological Diversity* prescribes that parties to the convention shall:

as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.

The *Subsidiary Body on Scientific, Technical and Technological Advice* (SBSTTA) in reviewing the work on incentives under the CBD encourages:

the development of mechanisms, including policy, legal and institutional measures in full consultation with representatives of indigenous and local communities that ensure the fair and equitable sharing of benefits arising from positive incentive measures so that indigenous and local communities that maintain customary sustainable use systems are appropriately recognised and rewarded for biodiversity conservation and sustainable use.

Annex I of Decision VI/15 outlines elements that should be taken into consideration in the design and implementation of incentive measures for the conservation and sustainable use of biological diversity. In general terms incentive measures should be designed to address the conservation and sustainable use of biological diversity, while taking into account:

- a. Local and regional knowledge, geography, circumstances and institutions;
- b. The mix of policy measures and structures in place including sectoral considerations;
- c. The need to match the scale of the measure to the scale of the problem;
- d. The measures' relationship to existing international agreements.¹¹⁵

Measures to maintain Access to Land and Waters

The importance of land tenure, and control over decision-making and resources of lands, as an incentive measure is highlighted in the *Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity* which states that:

guarantee or access to traditional territories is possibly one of the best examples of incentive measures and capacity building, as it acts as an incentive for involvement (providing what people want most) and builds the capacity of participants (by providing land upon which to subsist and thrive).”¹¹⁶

Measures and Mechanisms to recognize Indigenous land tenure and access to lands, and expeditious resolution of lands claims are discussed in detail in Section X above.

Measures to Promote Participation in Decision Making

¹¹⁴ UNEP/CBD/WG8J/4/INF/2 Page 58

¹¹⁵ UNEP/CBD/WG8J/4/4 para 97

¹¹⁶ UNEP/CBD/WG8J/3/4 at p. 7

[Decision VI/15](#) on ‘incentive measures’ emphasises the importance of designing and implementing incentive measures in reaching the objectives of the CBD, especially in regard to the sustainable use of biological diversity.

Decision VI/15 also calls for the participation of Indigenous Peoples and local communities in the development and implementation of incentive measures, including capacity-building arrangements.

Annex I of Decision VI/15 provides *Proposals for the Design and Implementation of Incentive Measures* and prescribes that “in order to ensure that incentive measures are developed in a manner that is participatory and promotes effective policy integration and stakeholder participation, processes should be established to...facilitate dialogue with relevant stakeholders including indigenous and local communities and representatives of civil society.”¹¹⁷

The Composite Report recommends that Indigenous participation in planning and decision making processes should become fully participatory¹¹⁸ because “policies, strategies and laws are only as good as the process through which they are developed.”¹¹⁹ This applies internationally, regionally, nationally and locally across all sectors.

However options to participate in the decision-making processes at the national, regional, and local levels are in many cases weak or non-existent. Full participation and responsibility in the decision-making process regarding the management of resources must be promoted.¹²⁰

The *Convention on the Elimination of All Forms of Racial Discrimination* requires States parties to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent”. The Human Rights Commission has found that respect for Article 27 of the International Covenant on Civil and Political Rights includes “measures to ensure effective participation of members of minority communities in decisions which affect them.”

The International Indigenous Forum on Biodiversity has stressed the need for parties to ensure more effective consultation, participation of indigenous peoples and ensure the right of indigenous peoples to free prior informed consent in order to more fully develop useful strategies to protect Indigenous knowledge.¹²¹

In the recommendations for further cooperation on incentive measures, states are asked to involve Indigenous Peoples and local communities in meaningful policy dialogue for the design and use of incentive measures for conservation and sustainable use of biodiversity. (Decision VI/15)

Specifically the cultural, subsistence and commercial value of biodiversity is recognised in [Decision VI/15](#) and the need for incentive measures to be designed that support the socio-economic development needs of Indigenous peoples and local communities.

A third of reporting countries have established national, sub-regional and/or regional indigenous and local community biodiversity advisory committees,

¹¹⁷ Decision VI/15 at Annex I para 9.

¹¹⁸

¹¹⁹ A. Yupari, L. Jaramillo, R. K. Lojenga, S. Briceno & R. Sanchez “UNTAD’s Biotrade Initiative: Some Considerations on Access, Benefits Sharing and Traditional Knowledge” in *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* UNCTAD at p. 330.

¹²⁰ UNEP/CBD/WG8J/4/4 Page 8

¹²¹ *4th Working Group on Article 8(j) and Related Provisions* in Granada the Opening Statement, IIFB, 23 January 2006.

/...

however there is limited support to assist indigenous and local communities in drafting their own development and biodiversity conservation plans.¹²²

Measures to promote Capacity Building

Decision VI/15 on incentive measures recommends “community institutional structures should be developed to make indigenous and local communities equal partners in the implementation of incentive measures”.¹²³ This may involve recognising and/or strengthening existing institutional arrangements or establishing new ones, as necessary, for the conservation and sustainable use of biological diversity, and in the context of article 8(j), the retention and use of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles.

The Phase I and Phase II Composite Report notes that:

in all types of mechanisms and measures used to promote traditional knowledge, as well as cultural, social and economic well-being, it seems that capacity-building is crucial. This involves a significant commitment to building the educational, governance, management and professional capacity of indigenous and local communities. It is also important to building the strength, infrastructure and capacity of indigenous and local institutions, such as governance structures, research bodies, economic structures, health care systems and education systems.

The capacity and infrastructure of Indigenous communities need to be strengthened so that Indigenous peoples can remain within their communities, self-govern effectively and protect traditional knowledge in a suitable way.¹²⁴ Indigenous institutions, research organizations, political structures, and communities need support to conduct their own activities in relation to Article 8(j). It is important to have an approach that reaffirms and supports local knowledge, strengths, and values, when possible and appropriate, instead of using outside expertise.

Community institutional structures should be developed to make indigenous and local communities equal partners in the design and implementation of incentive measures.¹²⁵ This also requires assistance with developing legal and administrative capacity to manage, monitor and enforce incentive measures.¹²⁶

In the strengthening or establishment of institutions, policies should discourage agencies and projects from imposing pre-conceived organisational models on communities, and employ capacities through the preferential use of indigenous and community experts, and supports the application of local knowledge, skills and technologies in natural resource management.¹²⁷

Universities, and other training institutions dedicated to the cause of the further transmission of traditional knowledge should be established with the full and effective involvement of indigenous communities. Elders and traditional healers and other holders of traditional bodies of knowledge could then play a crucial role in such undertakings as teachers, lecturers and even as traditional researchers.¹²⁸ Indigenous peoples must be involved in impacts of research, both for their own benefit and for the benefit of the non-indigenous population, given their extensive knowledge of landscapes.¹²⁹

¹²² UNEP/CBD/WG8J/4/2 at para 11-12

¹²³ Annex I at para 28

¹²⁴ UNEP/CBD/WG8J/4/INF/2 Page 44

¹²⁵ [Decision VI/15](#)

¹²⁶ Decision VI/15 at Annex I at para 32

¹²⁷ UNEP/CBD/WG8J/4/INF/7

¹²⁸ African Regional Report

¹²⁹ UNEP/CBD/WG8J/4/INF/7 Page 26

For example the proposed United Nations University International Institute on Traditional Knowledge could make an effective contribution to efforts to addressing the threats to TK and indigenous communities. Pilot activities of the Institute to commence in April 2007 are:

- Exploring the the role of TK in local communities adapting to climate change;
- Promoting awareness about traditional knowledge for water management;
- Developing an information service about international policy developments.

“The Netherlands Organisation for International Cooperation in Higher Education (NUIFFIC’s) Indigenous Knowledge Unit in cooperation with UNESCO’s Management of Social Transformations Programme (MOST) has identified a number of projects that demonstrate “best Practice Using Indigenous Knowledge”. These are the projects that illustrate the use of IK in developing cost-effective and sustainable survival strategies for poverty alleviation and income generation (e.g.) indigenous land use systems. (paraphrase and shuffle around)

Measures to Promote Socio-Economic Development

Decision VI/15 on incentive measures recommends capturing value for Indigenous and local communities. To this end the “value of biological diversity for subsistence, cultural or commercial purposes should be recognised and incentive measures designed so that, to the extent possible, they support the social and economic development needs of indigenous and local communities.”¹³⁰

Biodiversity cannot be conserved by keeping people poor even if historically biodiversity survived largely under such conditions.”¹³¹ Livelihood diversification is integral in the process of creating economic incentives for the maintenance, preservation and application of traditional knowledge systems.¹³²

The difficulty in utilizing resources on indigenous lands, and utilizing traditional knowledge in a in such a way that generates revenue and some level of economic independence is that governments often assert their sovereign rights over natural resources by legislation.¹³³ Access to resources need to be increased so that Indigenous communities can build their own resource generating streams.¹³⁴

A prerequisite of biodiversity conservation, and with that the traditional knowledge associated with biodiversity, is the economic benefits that people derive from their resources. These economic benefits will serve as an incentive for effective and proper management and use of biodiversity taking into account the traditional knowledge, innovations and practices that relates to the use and management of such resources.¹³⁵

To ensure that communities derive economic benefits from the resources under their custodianship, the issue of market access needs to be considered. Market access for the goods and services coming from local and indigenous communities based on their traditional knowledge innovations, and practice, is essential. It has been argued that “in some cases community members do often not have an idea of the true economic value of their goods and services, or the resources embodied in their lands.”¹³⁶ For example, in the context of eco-system services such as bio-banking.

¹³⁰ Decision VI/15 at Annex I at para 21

¹³¹ UNEP/CBD/WG8J/4/INF/2 Page 53

¹³² UNEP/CBD/WG8J/4/INF/2 Page 54

¹³³ UNEP/CBD/WG8J/4/INF/7 Page 23

¹³⁴ UNEP/CBD/WG8J/4/INF/7 at p. 7

¹³⁵ UNEP/CBD/WG8J/4/INF/2 Page 53

¹³⁶ UNEP/CBD/WG8J/4/INF/2 Page 53

Economic development, particularly that reliant on natural resource extraction must be reconciled with Indigenous peoples' ability to maintain their languages and culture through the use, retention and practice of traditional knowledge. Local subsistence activities need to be supported as well as economic alternatives at local levels. Most biodiversity-related knowledge of indigenous peoples is related to and sustained by everyday practices and these need to be maintained and encouraged."¹³⁷ This will support the long term protection and conservation of biological diversity.¹³⁸

The Canadian Royal Commission on Aboriginal Peoples recommended that interim measures be taken to use natural resources for Aboriginal economic and cultural development. The commission also recommends expanding the range of benefits derived from resource development in areas of traditional use and Treaty areas, in order to achieve a more equitable distribution of economic benefits from such activities.

As noted in the Composite Report "Indigenous communities, as distinct peoples, hold their own concepts of development, based on their own values, aspirations, needs and priorities, and that these concepts are often different from other parts of the national population."

"The Netherlands Organisation for International Cooperation in Higher Education (NUIFFIC's) Indigenous Knowledge Unit in cooperation with UNESCO's Management of Social Transformations Programme (MOST) has identified a number of projects that demonstrate "best Practice Using Indigenous Knowledge". These are the projects that illustrate the use of IK in developing cost-effective and sustainable survival strategies for poverty alleviation and income generation (e.g.) indigenous land use systems. (paraphrase and shuffle around)

In Australia the the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Women's Council Aboriginal Corporation is made up of traditional Aboriginal women who hold an immense and unique knowledge of appropriate harvesting methods of natural resources in Central Australia.¹³⁹

Based in Alice Springs, the NPY is playing an important role in developing natural resource industries based on traditional knowledge.

The NPY aims to:

- establish a sustainable seed and bush food collective
- support capacity building in communities and promote the use of sustainable native plants in existing local Aboriginal nurseries
- preserve traditional knowledge of land management practices
- enable Aboriginal women to improve their quality of life through economic gains.

The native bushfoods picked by the women are sold to Outback Bushfoods. Foods harvested include acacia seeds for bread and damper, and bush tomatoes (which are proving to be a popular commodity in community stores).

NPY Council members will continue to harvest bushfoods thereby ensuring a continuation of the traditional land management practices that are needed to sustain the environment.

¹³⁷ UNEP/CBD/WG8J/4/4 Arctic Report at p. 9

¹³⁸ UNEP/CBD/WG8J/4/INF/7 Page 23

¹³⁹ http://www.budget.gov.au/2002-03/budget_ministerial/Environment/html/ea-01.html
/...

Measures for Intergenerational transmission of Traditional Knowledge

UNESCO has sought to maintain the vitality of local knowledge within communities in the context of its Local and Indigenous Knowledge Systems (LINKS) by strengthening ties between elders and youth in order to reinforce the transmission of indigenous knowledge and know-how.

UNESCO is piloting activities aimed at maintaining the dynamism of local knowledge within local communities in such areas as the Solomon Islands.¹⁴⁰

Education Systems

Education systems must be reformed to allow Indigenous values to be promoted and encourage inter-generational transfer of traditional knowledge as well as traditional education.¹⁴¹ What is required across regions is a full acknowledgement of this issue, and responses that enable traditional knowledge to be taught within or alongside education systems and reduce the pressure for children to move away from their people or community for extended periods of time.¹⁴²

In recent times, greater efforts are being made to develop curriculum more in tune with indigenous peoples, but without the Indigenous peoples in full control of indigenous education, training and decision-making processes these efforts are not as effective as they could be.¹⁴³

Indigenous and local communities need to be involved in education programme design and implementation with a view to respectfully incorporating traditional knowledge and knowledge holders. This will improve education systems as potential mechanisms and measures to assist in the retention and use of traditional knowledge¹⁴⁴

The *Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity* recommended that:

- **Where appropriate, indigenous knowledge should be integrated into formal, local or national systems of education, which are directed towards local or indigenous communities; and,**
- **Incorporation of indigenous and traditional knowledge into mainstream formal education can both ensure that indigenous people educated within such systems do not lose touch of their traditional knowledge and practices, and can increase familiarity with, and respect for, such knowledge among non-Indigenous public.**
- **Parties offer appropriate education and training to indigenous and local communities that can enable sustainable development while being compatible with their traditions**
- **Parties to the Convention ensure education and training programmes should be established, by or with close involvement of local and Indigenous communities, with the purpose of passing on traditional knowledge and appropriate education to members of the community.**
- **educational institutions be established in areas populated by indigenous peoples that are accessible to their children, and reduce the migration of people out of communities to access infrastructure such as education facilities.**¹⁴⁵

¹⁴⁰ UNEP/CBD/COP/8/7

¹⁴¹ UNEP/CBD/WG8J/4/INF/7

¹⁴² UNEP/CBD/WG8J/4/INF/4 Page 41

¹⁴³ UNEP/CBD/WG8J/4/INF/7 Page 25

¹⁴⁴ (UNEP/CBD/WG8J/4/4 at p. 15)

¹⁴⁵ <http://www.biodiv.org/doc/meetings/tk/wg8j-03/official/wg8j-03-04-en.pdf> at para

Strategies, policies, and programmes have been designed to implement a more culturally sensitive education for indigenous peoples. Some countries also approved general provisions in laws and constitutions to support this new approach. Although there is no specific legislation regarding the inclusion of traditional knowledge in the curricula, the inclusive approaches to the design and development have led to significant consideration of traditional knowledge as part of the curricula.

UNESCO and the UNHCHR sponsored an expert seminar on Education in Paris in October 2004, attended by indigenous educators, educational experts, UN staff and the UN Special Rapporteur on Education and Indigenous Peoples, the report of which recommended States should take corrective measures including:¹⁴⁶

1. Institute special measures to address racism and bias in the educational system;
2. Involve Indigenous Peoples in educational design and development;
3. Include indigenous culture, history, values and traditions in educational programs;
4. Research and address special needs of Indigenous women and children,
5. Involve Indigenous educators in design and teaching; and
6. Evaluate bilingual and multicultural approaches to education.

In New Zealand the general education system needs to provide opportunities for Maori education as alternative learning institutions and to enhance Maori throughout mainstream education. Although the ability to learn about matauranga Maori throughout all levels of the education system has significantly strengthened over the past five years “the significant shift in empowering Maori with their own cultural knowledge is largely happening through Maori initiated, owned and managed tertiary providers”.¹⁴⁷

The Canadian Taskforce Report recommended:

- the development of educational resources in Indigenous languages, and the creation of language teacher training.
- Indigenous control over education curriculum. Indigenous control over education is still weak in North America. For example, the Newfoundland and Labrador government has repeatedly refused Innu requests to change their school year to allow their youth to go inland during the winter to help with hunting and trapping.

In Vanuatu the current Education Master Plan (2000-2010) recognises the shortfalls of the Western education system, and consequently, there are now opportunities to incorporate traditional knowledge into national education. The key to the new curriculum is to teach in the vernacular language which was realized after World Bank funding for the initiative.¹⁴⁸

In Bolivia, Guatemala, and Ecuador Multicultural Bilingual Education is regarded as a “most dynamic area of the educational system”.¹⁴⁹ In Brazil multicultural education is a constitutional right (e.g., Constitution of Brazil in 1988).

Latin American countries have implemented Multicultural Bilingual Education programmes in various ways and with different levels of success. Some have become official programmes, while others are privately funded, with the strong support of indigenous organizations. For instance,

¹⁴⁶ See E/CN.4/2005/88/Add.4 15 December 2004 for conclusions and findings.

¹⁴⁷

¹⁴⁸ Pacific Regional Report

¹⁴⁹ Latin American Regional Report citing Abram, 2004.

Ecuador, Peru, Bolivia, Mexico, and Guatemala have Multicultural Bilingual Education as part of their national educational systems. In Brazil, Colombia, and Chile, legislation recognizes the rights of indigenous peoples to set their autonomous programmes, which are recognized as official programmes.

In Paraguay, the state supports the teaching of Guarani language among the native and mestizo populations. Honduras, Panama, El Salvador, and Argentina are about to approve intercultural bilingual education. Ecuador, Guatemala, Costa Rica, and Colombia have also private indigenous educational projects, but without official recognition by the State.¹⁵⁰

Mexico started to implement a Multicultural Education Programme in 1997 and passed a law of linguistic rights in 2003. However, this programme is quite recent and the government is working on the inclusion of ethnic contents into the national curriculum, in consultation with indigenous peoples.¹⁵¹

In Bolivia, where the majority of the population is indigenous, educational reforms started only in 1993, after the Indigenous March of 1990. The set of reforms included a new Education Law, establishing Intercultural Bilingual Education and promoting indigenous participation in the implementation of the Education Reform (Law 1565).¹⁵²

In Mexico the Inter-cultural University of Mexico was created with the aim of promoting a process of revaluation and revitalization of indigenous cultures and language, with a holistic approach to education, where traditional knowledge is integrated with other types of knowledge. The programmes are oriented towards both indigenous and non-indigenous students, with the aim of building bridges and providing alternatives to indigenous youth to return to their villages and apply their knowledge.¹⁵³

The African Regional Report on Threats to Traditional Knowledge recommends that the challenge is not to preserve traditional knowledge, because it has a dynamic nature, but rather to identify those elements in traditional knowledge (and traditional lifestyles) that are worth keeping and to look for ways to integrate these elements with new knowledge, insights and ways of living based on modern scientific methods.¹⁵⁴ According to the report most Namibians are of the view that it is desirable for the Ovahimba to send their children to modern schools and by children are then able to “defend their rights better using their knowledge of the mainstream development agendas to defend their case and using the national language to argue their case both at national levels and at international levels.” There is, according to this approach, a place for the traditional Ovahimba way to co-exist with the new ways.¹⁵⁵

Language Preservation, Revitalisation and Retention Incentives

Indigenous and local communities have expressed the need to preserve, use and revitalize Indigenous languages as a chief vehicle for cultural and knowledge transmission.¹⁵⁶ The survival and vitality of indigenous and local languages are pivotal to maintaining entire bodies of cultural and biological knowledge.¹⁵⁷

¹⁵⁰ Latin American Regional Report on Threats citing Abram, 2004...

¹⁵¹ Ibid citing Schmelkes, 2003.

¹⁵² UNEP/CBD/WG8J/4/INF/5 Page 34

¹⁵³ UNEP/CBD/WG8J/4/INF/5 Page 34

¹⁵⁴ UNEP/CBD/WG8J/4/INF/2 Page 64

¹⁵⁵ UNEP/CBD/WG8J/4/INF/2 Page 64

¹⁵⁶ <http://www.biodiv.org/doc/meetings/tk/wg8j-04/official/wg8j-04-04-en.pdf>

¹⁵⁷ (IUCN Chapter 6 at p. 3)

As noted in the Composite Report “although loss of indigenous languages occurs at the local level it is often the result of national policies of assimilation or integration, which do not adequately value diverse indigenous languages or as a direct result of government service delivery in the dominant language only.”¹⁵⁸

The Canadian Taskforce on Aboriginal Languages and Cultures

The Canadian Task Force on Aboriginal Languages and Cultures (‘the Taskforce Report’) undertook lengthy consultations, field research and analysis of legislative and policy trends surrounding language and culture revitalization in Canada. The final report “A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures (2005)”¹⁵⁹ documented the “fundamental connectedness between language retention, traditional knowledge preservation and the overall well-being of Indigenous nations – socially, economically, psychologically and spiritually.”

The Taskforce Report recommended actions aimed at personal, local and national levels, in particular that the link between language retention and the maintenance of traditional knowledge. Primarily that revitalization of languages is a way to heal and reconnect with the land.¹⁶⁰

To combat against language and culture loss on this front, it recommended that governments engage in nation-to-nation negotiations with Indigenous peoples on resource-sharing, environmental sustainability and the protection of traditional knowledge. If links to the land are to continue or be revitalized, communities need significant rights over their traditional lands and need to meaningfully participate in policies and activities that affect their knowledge of the land or the wellbeing of the land.

Specifically the Taskforce Report recommended:

- Indigenous peoples must also be part of government planning for implementation of the *Convention on Biological Diversity*;¹⁶¹
- language revitalization initiatives should be promoted with full participation of Indigenous peoples;¹⁶²
- There must be a strong concerted effort to translate traditional value systems and concepts into a new language. This point is important in communities where the language is already lost, or perhaps beyond the point of repair;
- At the local level, resources are needed to help in the creation of immersion programs (for both youth, adults and perhaps young children in the form of Maori style language nests);
- At a national level, there is a recognized need for a National Language Organisation that can help coordinate, support and fund language-retention initiatives;
- Governments [s]upport resource development, including lifestyles that foster language retention, by financially supporting:...First Nation, Inuit and Métis people who choose to live a traditional lifestyle, as well as supporting initiatives to teach youth the skills to live traditionally or on the land.

In Africa in Southern Algeria Tuareg language classes that use Tifinagh characters are fast disappearing. A positive development in the region has been the launch of a Tuareg section within the national Amazigh radio channel broadcasting from Algiers.¹⁶³ In North Africa Tamazight (the amazigh language) is used in primary schools.(ACHPR, 2005).

¹⁵⁸ UNEP/CBD/WG8J/4/4 at p. 16

¹⁵⁹ UNEP/CBD/WG8J/4/INF/7 Page 11

¹⁶⁰ UNEP/CBD/WG8J/4/INF/7 Page 23

¹⁶¹ Taskforce at p. 74-5

¹⁶² UNEP/CBD/WG8J/4/INF/7

¹⁶³ (Radio Tassil in Illizi and Radio Ahaggr in Tamanrasset).
(The Indigenous World 2005-428,429)

In Morocco, the ban on the Amazigh language has been lifted after 40 years enabling the language to be introduced into schools. Also the prohibition on giving children Amazigh names which threatened the very identity of Amazigh people has also been lifted and a registry system has been changed to allow for the registration of Amazigh names (ACHPR, 2005).

Community Mapping Projects

Given that a significant proportion of Indigenous knowledge is directly related to land, community based mapping projects have been established within a number of Indigenous communities to delineate and document the native customary land boundary and assist in the preservation of communities traditional knowledge relating to their customary land.

Once documented, a ‘community map’ can be used as a tool for negotiation and resolving disputes between the community and outside parties or within the community itself and to strengthen the community’s land, fishing and hunting claims. Community maps can also be applied as a tool for community-based resource management. To date they have been used to identify sites or landscape features of cultural significance, to document flora and fauna distribution and Indigenous biodiversity knowledge and to provide input to land, forest and fire management, conservation and planning.¹⁶⁴

Community Mapping projects are being undertaken in Australia, Malaysia, Indonesia, Phillipines, Cambodia, Mozambique and Ecuador.”¹⁶⁵

Measures to Support Women in Indigenous and Local Communities

In the National Reports no country described mechanisms implemented specifically to promote the participation of women of Indigenous and local communities in the Convention on Biological Diversities programme of work, although several countries have general measures to promote the equal participation of women in decision-making and capacity building projects.¹⁶⁶

Measures to promote the participation of women in Indigenous and local communities include....

Participation in Managing Natural Resources as Incentives

Influence over decisions concerning natural resource management and the quality of the environment in which Indigenous and local communities live is directly tied to the social, cultural and economic future of those communities. Indigenous peoples should be actively involved in natural resource management projects from design to implementation, management and evaluation.

The Programme of Action for the 2nd Decade recommended that:

programmes to strengthen synergies between indigenous knowledge and science should be developed to empower indigenous peoples in processes of biodiversity governance and

¹⁶⁴ Langton and Nakata Indigenous Knowledge and Libraries at p. 98

¹⁶⁵ Langton and Nakata Indigenous Knowledge and Libraries at p. 98

¹⁶⁶ UNEP/CBD/WG8J/4/2 at para 18

assessment of impacts on territories, as part of the intersectoral project of UNESCO on Local and Indigenous Knowledge Systems.

Environmental Planning

In Sweden the Sami have volunteered environmental plans for each local Sami Community which constitute part of the work to implement the national environmental quality objectives.¹⁶⁷

(insert more here on collaborative land and resource management incentives.)

Natural Resource Use

Forestry

It is generally the case that forest policies and legislation are designed without, or with very little, participation of Indigenous and local communities. In the Revised Phase I and Phase II Composite Report it is noted that "very few countries have included considerations regarding forest related traditional knowledge in their forest policies. There are critical problems of overlapping of logging concessions with traditional territories, as well as problems of illegal logging in indigenous and local communities' lands."¹⁶⁸

Decision VI/22 expresses the need for action to ensure conservation of biological diversity, the sustainable use of its components, and fair and equitable sharing of the benefits arising out of utilization of genetic resources, and arising from the utilization of traditional knowledge, innovations and practices from indigenous and local communities, in accordance with Article 8(j) and related provisions, of all types of forests, considering the need for urgent action for forests that are ecologically significant and/or most important for biological diversity on national and regional scales and according to national priorities, where forest biodiversity loss or threats of loss are significant or of great concern, and in areas with greatest potential for conservation, sustainable use and benefit-sharing;

In Canada the *Canadian National Forest Strategy* recognizes the implications of the definition, recognition of the implications of the definition, recognition and exercise of Aboriginal and Treaty rights for forest management.

This awareness has developed at the international level, in the federal government, in provincial governments, within the forest industry and among individual Aboriginal communities although much remains to be done to translate this into forest management regimes and practices.

The implementation of mechanisms for participation, benefit-sharing, and preservation and maintenance of traditional knowledge and practices, is considered fundamental in Canada for improving sustainable forest management. For example, it is argued that the conjunction of modern technology and traditional forest practices could improve the performance in the forest sector and provide the means to local and indigenous communities to participate in the market, while maintaining their own cultural patterns.

However, the value of forest-related traditional knowledge has only recently been recognized in political fora, and remains largely a conceptual and theoretical issue, while mechanisms for their preservation and use in forest management are still under discussion.¹⁶⁹

¹⁶⁷ UNEP/CBD/WG8J/4/2 at para 20

¹⁶⁸ <http://www.biodiv.org/doc/meetings/tk/wg8j-04/official/wg8j-04-04-en.pdf> at para 38

¹⁶⁹ . UNEP/CBD/WG8J/4/INF/5 Page 36

Fisheries

The Program for Indigenous Fisheries and Traditional Biodiversity Related Knowledge¹⁷⁰ focuses on research into Australian and Asia-Pacific Indigenous coastal communities and their historic and present use of natural resources, traditional and modern involvement in natural resource management, Indigenous knowledge of natural systems and valuable traditional knowledge of medicinal plants and customs.

The Program has linkages with the International Indigenous Biodiversity Forum, advising the United Nations Convention on Biological Diversity; Australian Biodiversity Advisory Committee; Conservation, Biodiversity and World Heritage Advisory Committee; Great Barrier Reef Marine Park Authority; Indigenous Working Group on Traditional Knowledge and the Implementation of Article 8(j) of Convention on Biological Diversity; Environment Australia; New South Wales Fisheries and New South Wales National Parks and Wildlife Service.

Protected Areas

In Australia the National Reserve System (NRS) aims to establish and effectively manage a comprehensive, adequate and representative system of terrestrial protected areas, and specifically by:

Providing incentives for indigenous people to participate in the NRS through voluntary delcration of protected areas on their lands and support for greater involvment of Indigenous people in the management of existing statutory protected areas.¹⁷¹

Indigenous land owners manage 13.9 milion hectares of land as protected areas. This includes lands purchased through the NRS for this purpose, but also encompasses the voluntary contribution of Indigenous owned lands to be managed as protected areas.

The success of Indigenous Protected Areas in Australia hinges on capacity building support and links to initiatives to address Indigenous disadvantage if biodiversity outcomes are to be achieved.¹⁷²

The IPA Programme is regarded as a vehicle for facilitating the transfer of traditional knowledge and engaging young people in positive educational experiences centred on the equitable exchange of western science and traditional knowledge.¹⁷³

Certainly the cost effectiveness of Indigenous Protected Areas in Australia must be emphasized in comparison to the cost of the government maintaining biodiversity in state managed protected areas. This raises issues or resourcing, outlined below in the section on ‘mobilisation of financial and technical resources’.

(more examples from other regions....)

See also “Protected Areas” above.

MITIGATING PERVERSE INCENTIVES

(not entirely clear what to incorporate here....the opposite to incentive measures?)

¹⁷⁰ http://www.scu.edu.au/schools/esm/index.php?page_id=38&menu=13_52

¹⁷¹ *The National Reserve System: 2006 Evaluation by Brian Gilligan* at p. 2

¹⁷² B. Gilligan *National Reserve System Programme: 2006 Evaluation* at p. 6.

¹⁷³ (<http://www.deh.gov.au/indigenous/publications/pubs/ipap-evaluation.pdf>)

In tandem with the developments of incentive measures is the need to identify and mitigate against perverse incentives that contribute to the decline of biodiversity, and the decline of traditional knowledge, innovations and practices.

Perverse incentives include:

unsustainable behavior that destroys biodiversity, often as unanticipated side effects of policies designed to attain other objectives. Such “policy failures” can include government subsidies or other measures, which fail to take into account the existence of environmental externalities, as well as laws or customary practice governing resource use.¹⁷⁴

Perverse incentives can include education models that on the one hand achieve the millennium development goals, but on the other preclude traditional knowledge and thwart intergenerational transfer of knowledge, innovations and practice. Similarly conservation models can result in loss of traditional knowledge based on a pure ecology approach that excludes the meaningful participation of Indigenous and local communities.

The Addis Abba Guidelines propose practical measures to promote the sustainable use of biodiversity. Practical principle 3 is that international, national policies, laws and regulations that distort markets which contribute to habitat degradation or otherwise generate perverse incentives that undermine conservation and sustainable use of biodiversity, should be identified and removed or mitigated.

The identification of perverse incentives can be achieved through a study to identify and evaluate the respective and mutually reinforced impacts of any underlying pressures. Specifically, the study would identify threats generated by social or economic forces or by the institutional framework.¹⁷⁵ The Article 8(j) Regional Reports on Threats to Traditional Knowledge have identified perverse incentives in some detail.

In the context of traditional knowledge and biodiversity conservation and sustainable use, perverse incentives include:

- Inadequate incorporation and recognition of traditional knowledge in the practical application of the precautionary principle i.e. in the environmental impact assessment process;
- Education systems that preclude traditional knowledge and obstruct the intergenerational transfer of knowledge through formal western education systems;
- Health care systems that promote western medicine without actively encouraging use of traditional medicines and traditional healers;
- Unsustainable trade of plants used for traditional medicines;
- Management of protected areas that preclude meaningful involvement of indigenous peoples with support and respect for traditional knowledge in the context of land and resource management;

Education Systems as perverse incentives

¹⁷⁴ <http://www.biodiv.org/incentives/incentives.shtml>

¹⁷⁵ (Decision VI/15)

Formal education that excludes and marginalizes traditional knowledge creates a major obstacle to the retention and use of traditional knowledge, and acts as a perverse incentive to the retention of traditional knowledge.¹⁷⁶

The Millennium Development Goals establish targets to ensure all children go through formal education systems which can be problematic for Indigenous peoples because formal education systems are often seen as obstacles to the retention and use of traditional knowledge because of their “continuing cultural exclusivity and the historical experience of imposed education systems as vehicles for assimilation.”¹⁷⁷

It was noted in the Arctic Regional Report that the reason that education systems were often seen as obstacles to the retention and use of traditional knowledge was due mainly to their continuing cultural exclusivity and the historical experience of imposed education systems as vehicles for assimilation. The policies and programmes were and continue to be developed by others and largely imposed upon indigenous and local communities. In the past, they were often used to assimilate indigenous children and/or to alienate them from their families and cultures.

Precautionary Principle to Encompass Indigenous Perspectives

Indigenous peoples are frequently ignored in “precautionary” decision making that is based only on the science available to policy and decision-makers. Applications of the precautionary principle should be based on understanding of indigenous and traditional knowledge as well as scientific information.¹⁷⁸

The precautionary principle has often been used as a rationale to support conservation interventions which are detrimental to indigenous people’s aspirations to use wildlife and biological resources to support livelihoods. Precautionary conservation interventions are likely to be more effective when indigenous and local people are involved in the decision-making process and in management. Many traditional and local people reliant on biological resources are likely to be supportive of a precautionary approach to resource management, when their needs and viewpoints are included in the process, particularly where communities have been negatively affected by resource degradation.¹⁷⁹

In making judgements and decisions based on the precautionary principle, the costs and the benefits of both action and inaction should all be taken into account. These costs and benefits should not be limited to conservation, but should include livelihood, socio-economic, food security and relevant “intangible” costs and benefits.¹⁸⁰

(more here on perverse incentives. Ideas?)

¹⁷⁶ UNEP/CBD/WG8J/4/11

¹⁷⁷ UNEP/CBD/WG8J/4/4

¹⁷⁸ Fourth Regional Session for Asia of the Global Biodiversity Forum, South-East Asia Manila, The Philippines June 20th-23rd 2004.

¹⁷⁹ http://www.pprinciple.net/publications/PP%20Workshop%20Report_Manila%20GBF.pdf

¹⁸⁰ http://www.pprinciple.net/publications/PP%20Workshop%20Report_Manila%20GBF.pdf

MOBILISATION OF FINANCIAL AND TECHNICAL RESOURCES SHOULD BE PROMOTED TO SUPPORT THE DESIGN AND IMPLEMENTATION OF MECHANISMS AND MEASURES TO SUPPORT RETENTION OF KNOWLEDGE, INNOVATIONS AND PRACTICES EMBODYING TRADITIONAL LIFESTYLES RELEVANT FOR THE CONSERVATION AND SUSTAINABLE USE OF BIOLOGICAL DIVERSITY.

BACKGROUND

INTERNATIONAL MOBILISATION

- Programme of Action for the 2nd Decade
- COP Financial Mechanism
- Millenium Development Goals
- International Aid: IMF, World Bank, private philanthropy, UNDP

REGIONAL MOBILISATION

NATIONAL / LOCAL MOBILISATION

BACKGROUND

Financial and technical resources are required for the implementation of Article 8(j) to cover the national costs emerging from implementation of Article 8(j)¹⁸¹ Parties to the convention need to ensure there is secure funding to implement legislation, incentive measures and policies concerned with biodiversity and associated traditional knowledge.

Government funding is one prong of financial resource mobilisation that must be underpinned by the participation of Indigenous local communities and capacity building objectives. However of equal importance is the financial resource mobilization via economic development opportunities initiated by Indigenous and local communities through access and benefit sharing regimes, based on the principles of PIC and MAT.

Resources are required to educate children and adults in a manner that incorporates traditional knowledge into curricula, governance training for indigenous institutions, and tools for managing and developing registers and databases of traditional knowledge that are controlled by Indigenous and local communities, where appropriate. Lands may require fencing to prevent illegal dumping and public access, active and costly programmes to control noxious weeds and feral animals, technology to undertake GIS mapping of landscapes to gain a better understanding of the potential of landscapes for purposes determined by Indigenous peoples.

INTERNATIONAL MOBILISATION

¹⁸¹ UNEP/CBD/WG8J/4/4

Programme of Action of the 2nd Decade

It is recommended that:

- there should be increased provision of technical and financial resources to build the capacity of indigenous peoples, government institutions and the United Nations system to address indigenous issues. Such provision should include the establishment of funds for international cooperation and funds for indigenous peoples in United Nations country offices. A process should be developed to facilitate the channelling of funds directly to indigenous peoples' organizations at the community level.

COP Financial Mechanism

The Convention on Biodiversity contains numerous mechanisms and provisions to assist developing country parties to implement the convention. An important aspect of these commitments is the financial resources provided. Article 5 of the Convention provides that Parties shall cooperate either directly or through competent international organizations.

The financial mechanism plays an important role in addressing the capacity building needs of indigenous and local communities. In Decision IV/8, paragraph 4(d), the COP requested the financial mechanism to give special emphasis to the following programme priorities to fund initiatives by eligible Parties within biodiversity projects, other specific benefit-sharing activities such as support for entrepreneurial developments by Indigenous and local communities, facilitation of financial sustainability of projects promoting the sustainable use of genetic resources and appropriate targeted research components.

Millennium Development Goals

The Interagency Support Group on Indigenous Issues has recommended that if the MDGs are to be achieved special attention must be placed on indigenous peoples.¹⁸² Specifically, "efforts are needed at the national, regional and international levels to achieve the MDGs with the full participation of indigenous and local communities and without interfering with their development paths and holistic understanding of their needs."¹⁸³

Such efforts must take into account the multiple levels and sources of discrimination and exclusion that indigenous peoples face.¹⁸⁴

It is essential that the linkages between the implementation of the MDGs and the promotion of traditional knowledge be explored and strengthened.¹⁸⁵

REGIONAL MOBILISATION

The Programme of Action for the 2nd Decade recommended that "in an effort to systematize and build capacity, regional focal points on indigenous issues should be designated in all agencies, funds and programmes with regional offices that are mandated to follow up on the implementation of recommendations of the Permanent Forum and the objectives of the Second Decade. The Regional Programme on Indigenous Peoples in Asia of the United Nations Development Programme should be further strengthened, and its other Regional Bureaux should also develop such programmes."

(other ideas?)

¹⁸² (UNDP, 2004)

¹⁸³ (Inter-Agency Support Group on Indigenous Issues, 2004).

¹⁸⁴ (Inter-Agency Support Group on Indigenous Issues, 2004).

¹⁸⁵ African Regional Report

NATIONAL / LOCAL MOBILISATION

Resources for Capacity Building

Decision VI/15 on incentive measures recommends that funding should be ensured for capacity building. It also recommends that adequate funding should be available to ensure the effective management, monitoring and enforcement of incentive measures.¹⁸⁶

It is clear from the regional reports on threats to traditional knowledge that migration of Indigenous peoples from their communities into urban and semi-urban areas is a significant threat. Therefore access to technical and financial resources that enable Indigenous peoples to maintain access to their lands, and access and benefit sharing of the biological resources within those lands is the primary means by which traditional knowledge can be maintained and transmitted intergenerationally.

Incentive measures in support of local infrastructure such as community based education systems, traditionally based health systems, and localized conservation initiatives require financial and technical resources. (See above under “incentive measures”).

Governments should facilitate capacity-building initiatives particularly those intended to improve good governance, improve research skills, and increase avenues for accessing human and financial capital.¹⁸⁷ This includes scientific and technical capacity, as well as capacity related to administrative, educational, training and communications issues.¹⁸⁸

The conference of the Parties in Decision V/26 recognised that key capacity building needs include:

- a) assessment and inventory of biological resources as well as information management;
- b) contract negotiation skills;
- c) legal drafting skills; and,
- d) means for the protection of traditional knowledge associated with genetic resources.

Resources for Equitable Access and Benefit Sharing

The United Nations University Institute of Advanced Studies (UNU/IAS) has recommended that “capacities within local and indigenous communities should be developed to promote their ability to participate in ABS strategies and to develop ABS arrangements.”

In Australia, under the *Environment Protection and Biodiversity Conservation Act* traditional owners of land are to be provided with resources to enable them to seek independent legal or other advice in negotiations over possible access and benefit sharing agreements.

Decision XXXX reiterates that the Parties to the Convention need to revise their policies and legislation that affect Indigenous peoples and ensure there is secure funding to implement legislation regarding biodiversity and traditional knowledge. This issue of financial resource mobilisation is discussed in Section X below.

¹⁸⁶ Decision VI/15 at Annex I para 31 & 35.

¹⁸⁷ African Report on Threats

¹⁸⁸ Decision VI/5

Resources for Managing Protected Areas

Funding shortages and limitations in human skills and institutional capacity are some of the most consistently cited obstacles to effective protected area management.¹²

Expenditure by developing countries on protected areas is significantly less than that of developed countries, with an average of US\$157 per km² compared with US\$2,058 per km² in developed countries.^{13¹⁸⁹}

An important aspect of the question of cost effectiveness is how well the IPA Programme makes use of the skills and knowledge of Indigenous people to manage the lands. For example, the WWF submission on page 4 states:

If we were to consider this issue in purely economic terms, the cost of dedicating long-term funding to an Indigenous people's cultural and natural resource management employment program on country would be substantially cheaper than having to buy in external expertise and fly them in to (often) remote areas to *undertake the necessary fire, feral and weed management activities needed to reduce the ongoing threats to biodiversity across the Indigenous estate. (Review at p. 35)*

¹⁸⁹ http://www.ias.unu.edu/binaries/UNUIAS_ProtectedAreasReport.pdf
/...