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

Seventh meeting

Montreal, 31 October-4 November 2011

**COMPILATION OF VIEWS ON ELEMENTS OF *SUI GENERIS* SYSTEMS FOR THE
PROTECTION OF TRADITIONAL KNOWLEDGE**

Note by the Executive Secretary

INTRODUCTION

1. As requested by the Conference of the Parties in decision X/41, the Executive Secretary is circulating herewith, for the consideration of participants in the seventh meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions, a compilation of views and comments submitted to the Secretariat as one of the inputs for the deliberations on elements of *sui generis* systems for the protection of traditional knowledge.
2. Submissions have been reproduced in the form and language in which they were provided.

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SUBMISSIONS

A. *Submission from Parties*

Australia

AUSTRALIAN GOVERNMENT RESPONSE TO NOTIFICATION 2011-065 & 2010-210: PROGRAMME OF WORK ON ARTICLE 8(J) AND RELATED PROVISIONS:

NOTE: *No consultation with state and territory governments or Indigenous groups occurred due to the tight deadline for responding to this notification. All information provided below has been drawn from Australian Government agency inputs only.*

- (a) **Information regarding elements of *sui generis* systems relevant to the protection of traditional knowledge they have adopted, including assessments of the effectiveness of such measures, whether they are local, sub-national, national or regional in focus (decision X/41, paragraph 4);**

Indigenous Advisory Committee

An Indigenous Advisory Committee has been established under the Environment Protection and Biodiversity Act 1999 (EPBC Act) to advise the Minister for the Sustainability, Environment, Water, Population and Communities on the operation of the Environment Protection and Biodiversity Act 1999 (EPBC Act), taking into account the significance of Indigenous people's knowledge of the management of land and the conservation and sustainable use of biodiversity; and Indigenous Protected Areas; and provides advice to the department on Indigenous issues as they relate to the role of the department, excluding where an existing statutory committee exists to provide such advice.

The committee addresses issues relating to the EPBC Act. See <http://www.environment.gov.au/indigenous/committees/iac.html> for more information.

Working on Country

Working on Country aims to support Indigenous aspirations in caring for country protect, conserve and manage Australia's environment and heritage values; contribute to Closing the Gap¹ targets by providing a career pathway and opportunity for Indigenous people to enter into employment in the land and sea management sector; and provide nationally accredited training for Indigenous people in land and sea management, in partnership with industry and others

The sort of work that might be funded includes:

- sharing traditional knowledge about country;
- protecting and monitoring threatened and significant plants and animals;
- controlling weeds and feral animals;
- fire management;
- looking after important wetlands and marine areas; and
- protecting Indigenous heritage places.

¹ Closing the Gap is a commitment by all Australian governments to improve the lives of Indigenous Australians, and in particular provide a better future for Indigenous children. Underpinning Closing the Gap is a new way of working across government and of engaging with Indigenous communities. Governments are cooperating to better coordinate their services and funding. Clear responsibilities, specific targets and rigorous reporting will help to keep Governments on track. Engagement and partnership with Indigenous people and communities, building on their ideas, strengths and leadership, will help to find sustainable solutions to long-standing problems. Closing the Gap is a cross-community effort. The corporate, NGO and philanthropic sectors are also important to assisting Indigenous people and communities and contributing to Closing the Gap. See <http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/default.aspx> for more information.

Indigenous Heritage Program

The Indigenous Heritage Program (IHP) is an Australian Government initiative that supports the identification, conservation, and promotion (where appropriate) of Indigenous heritage (landscapes, sites and areas that are particularly important to Indigenous people as part of their customary law, developing traditions, history and current practices). The IHP will provide grants for projects which:

- conserve Indigenous heritage places
- identify Indigenous heritage places
- undertake planning for Indigenous heritage places
- interpret or explain Indigenous heritage places, or
- construct keeping places to house remains and/or objects that require restricted access.

See <http://www.environment.gov.au/heritage/programs/ihp/> for more information.

Indigenous Protected Area Program

The Indigenous Protected Area (IPA) program has been very successful in supporting Indigenous communities to contribute to our national conservation goals, and we are now starting to see anecdotal evidence of broader benefits from this work for the individuals and communities that are taking part. The IPA program, which commenced in 1998/1999 with the declaration of the first IPA at Nantawarrina in South Australia, was expanded under the Australian Government's Caring for Our Country initiative, with \$50 million allocated in 2008/09 over five years to improve and expand IPAs across Australia.

As at February 2011, Australia has 42 declared IPAs, with 40 other Indigenous communities in the process of deciding whether to declare their land as an IPA, and a further 5 Indigenous communities being supported to negotiate co-management arrangements over existing state parks and reserves. IPAs are voluntarily declared by their Indigenous land owners. Every IPA declaration makes an important contribution to Australia's nation-wide network of parks and reserves, the National Reserve System (NRS). Currently, declared IPAs cover over 23.9 million hectares of Indigenous owned lands across every state and territory in Australia, except the Australian Capital Territory. This represents over 25% of the entire Australian NRS, and nearly 20% of all Indigenous owned lands.

The IPA initiative works closely with the Government's Working on Country (WOC) initiative which provides wages for Indigenous Rangers. Each declared IPA is actively managed by its Indigenous owners through partnerships with Government and, in some cases, with the private and non-government sector. IPA rangers conduct land and cultural management activities on their traditional lands and undertake training to build their skills and capacity.

The IPA program is successful because it builds on and values the knowledge, passion and commitment that Indigenous communities have for their land. It helps to build pride and self respect for those involved as well as contributing economic benefit to traditional communities, social cohesion of these communities and the ongoing education of children through the intergenerational transfer of traditional ecological and cultural knowledge. In addition, the IPAs are delivering important ecosystem services for all Australians by protecting the unique natural and cultural values of these often remote locations. See <http://www.environment.gov.au/indigenous/ipa/index.html> for more information.

Australia's Biodiversity Conservation Strategy (2010-2030)

Australia's Biodiversity Conservation Strategy (2010-2030) calls for increased Indigenous engagement, recognising Indigenous peoples play a significant role in biodiversity conservation in Australia. Indigenous people hold title over a large and increasing proportion of Australia's lands and waters, and are also the guardians of traditional ecological and cultural knowledge of Australia's natural environments. The strategy considers that increasing Indigenous engagement through employment, partnership and participation and promoting the two-way transfer of knowledge will lead to both increased opportunities for Indigenous peoples and improved outcomes for biodiversity.

National Arts and Crafts Industry Support

The National Arts and Crafts Industry Support (NACIS) program provides direct funding support to Indigenous art centres and industry support and advocacy organisations. The program's overall objectives are to assist art centres to become stronger and to build a more sustainable Indigenous visual arts industry. To achieve these objectives, NACIS funding assists organisations to:

- strengthen governance and business management practices in the industry
- provide opportunities for artists to maintain, develop and extend their professional art practice
- provide opportunities for arts workers to develop professional skills and experience
- The NACIS program is part of a coordinated Australian Government approach to develop the Indigenous visual arts sector that is outlined in the Indigenous Art Centres Strategy and Action Plan.

See <http://www.arts.gov.au/indigenous/NACIS> for more information.

Indigenous Culture Support Program

The Indigenous Culture Support (ICS) program supports the maintenance and continued development of Indigenous culture at the community level. ICS funds activities that encourage culturally vibrant Indigenous communities and contribute to the cultural wellbeing of Indigenous individuals and communities. The program supports activities that:

- maintain Indigenous culture through community involvement;
- support new forms of Indigenous cultural expression;
- increase public awareness of Indigenous culture, including through the presentation and exchange of culture; and
- support the sustainable development of community organisations involved in cultural activities.

See <http://www.arts.gov.au/indigenous/ICS> for more information.

Maintenance of Indigenous Language and Records Program

The Maintenance of Indigenous Languages and Records (MILR) program addresses the steady erosion and loss of Australia's estimated 250 original Indigenous languages by providing support for the maintenance and revival of these languages. The MILR program supports a broad range of projects, including documentation and recording of Indigenous languages and the development of language resources and language databases to assist with the development and delivery of programs through language centres. It also supports greater coordination between language organisations, activities that promote Indigenous languages in the wider community and innovative projects using multimedia and new technologies. See <http://www.arts.gov.au/indigenous/MILR> for more information.

Indigenous Broadcasting Program

The Indigenous Broadcasting Program (IBP) supports Indigenous community radio broadcasting and provides funding support to address the broadcasting needs of Indigenous people living in remote, regional and urban areas of Australia. It supports the production and broadcasting of radio programs promoting Indigenous languages and helps to maintain a flow of information to Indigenous Australians on how to access essential services like housing, health, legal support, and education. The IBP aims to:

- support the operations of Indigenous owned and controlled community radio broadcasting services, including Remote Indigenous Broadcasting Services (RIBS);
- support the development and broadcast of programming that focuses on the promotion of local Indigenous culture and languages;
- enhance Indigenous broadcasting services by supporting national representation that serves and develops the sector's capacity;
- support broadcasting services that are able to inform and educate Indigenous Australians on accessing the range of health, legal, education and housing services available to them.

See <http://www.arts.gov.au/indigenous/broadcasting> for more information.

- (b) **Regional measures that have been taken to protect traditional knowledge, innovations and practices of indigenous and local communities relevant to biological diversity that is held across national boundaries, including *sui generis* systems that are being developed or have been developed and/or implemented, including evidence regarding the effectiveness of such measures (decision X/41, paragraph 5);**

Desert Knowledge Cooperative Research Centre: a Case Study of Traditional Knowledge Research and Brokerage

The Desert Knowledge Cooperative Research Centre was funded from 1 July 2003 to 30 June 2010. The work of the DKCRC continues under Ninti One Limited, which is a management company for the new Cooperative Research Centre for Remote Economic Participation (CRC-REP) and the Australian Feral Camel Management Project. The Desert Knowledge CRC was a \$91 million, 7-year enterprise. The Australian Government CRC Program (Department of Innovation, Industry, Science and Research) invested \$20.7 million, and the remaining support was provided by Centre and Associate partners.

The DKCRC was a research and brokerage institution that linked researchers with 28 partners. Research efforts focused on creating useful outcomes with commercial application for desert people, communities and our partners. Partners and interested parties all benefitted from the commercialisation of the research, accessing new intellectual property (IP) and the sharing of the extensive knowledge common to all desert regions. The DKCRC contributed to developing the following broad outcomes in the national interest:

- Sustainable livelihoods for desert people based on new natural resource and service enterprise opportunities that are environmentally and socially appropriate.
- Remote desert communities that are more sustainable to support the presence of desert people, as a result of facilitating access to more attractive services that are delivered more efficiently.
- Thriving desert economies that are based on unique desert knowledge and which are more self-sufficient.
- Increased social capital of desert people, their communities and service agencies.

Please see <http://www.desertknowledgecrc.com.au/home> for more information and CRC outputs.

Australian Government's Indigenous Art Centre Strategy and Action Plan

The Australian Government's *Indigenous art centre strategy and action plan* is a co-ordinated government approach aimed at building a strong and sustainable Indigenous visual arts sector, characterised by a stable and profitable base of Indigenous art centres, producing and distributing works of artistic excellence. The objectives will be achieved through closer cooperation between Commonwealth, State and Territory funding agencies and results will be sought in the following areas:

1. Stabilised funding
2. Business management
3. Employment and training
4. Professional art practice
5. Community capacity and maintenance of culture
6. Data collection and

See <http://www.arts.gov.au/indigenous/NACIS> for more information.

- (c) **Views through case studies on how statutory laws and customary laws interact with regard to the protection of traditional knowledge, innovations and practices (decision X/41, paragraph 7);**

Nil input

- (d) **National laws, legislation, policies, programme and other relevant information regarding the protection of traditional knowledge (decision X/40, B, paragraph 3);**

Nanaga Mai Arung “Dream Shield” Project: a Case Study of Traditional Knowledge Protection

IP Australia launched in late 2010 the Nanaga Mai Arung “Dream Shield” project (see http://www.ipaustralia.gov.au/resources/dream_shield.shtml). This information kit advises traditional knowledge holders to consider issues such as prior informed consent and benefit sharing when protecting aspects of their traditional knowledge with a patent or plant breeder’s right.

Dream Shield is a guide for Australian Aboriginal and Torres Strait islanders to protecting designs, brands and inventions. The guide has case studies, including a story where traditional knowledge was used to develop a patentable invention. The guide advises holders of traditional knowledge considering using the IP system to consider the complex legal and cultural issues relevant to protecting traditional knowledge, including PIC, ABS and customary law. Specifically, the guide advises traditional knowledge holders to consider the following questions:

- Who should give proper consent?
- Are they fully informed and aware of all the issues?
- Have they been given enough time to make a reasonable decision?
- Also, what legal rights and economic benefits are relevant to Indigenous people when developing a commercial agreement?

National Land and Sea Conference

The National Land and Sea Conference supports Indigenous Australians involved in land and sea management. The conference brings together Indigenous traditional owners and leaders, community organisations and people who work in the environmental conservation industry, key stakeholders and industry partners from around Australia. It facilitates delegates to share knowledge and experiences and exchange ideas for sustainable natural resource and cultural heritage management. The most recent conference was held in Broken Hill in November 2010. It focused on finalising the framework of the national Caring for Country strategy. See <http://www.caringforcountry.com/public/?p=1> for more information.

China

CHINA GOVERNMENT RESPONSE TO NOTIFICATION 2011-065 & 2010-210: PROGRAMME OF WORK ON ARTICLE 8(J) AND RELATED PROVISIONS:

I. The Conservation of Traditional Knowledge

China is through the enactment of laws and regulations, development and planning strategies and other forms to promote the protection of traditional knowledge. Regional Ethnic Autonomy (amended in 2001), is the basic law for implementing Regional Ethnic Autonomy System which is provided in Constitution. According to this law, excellent traditional culture in the country shall be inherited and development. In recent years, China has promulgated and implemented the laws and regulations such as *Patent Law* (amended in 2000), *Trademark Law* (amended in 2001), *Copyright Law* (amended in 2001), *Copyright Collective Management Regulations*(2004), *audio-visual products regulations* (2002), *Regulations on Protection of New Varieties of Plants* (1997), *Customs Protection of Intellectual Property Rights* "(2003), *special sign regulations* (1996), etc. to ensure the protection of the inventions and patents in Chinese medicine and minority medicine. Chinese government also attaches great importance to the motions regarding the establishment the Law of Traditional Knowledge which proposed by National People's Congress representative, related legislative research has been conducted within the country. At present, Yunnan, Guizhou, Guangxi, Fujian, Jiangsu, Zhejiang and Ningxia have approved their regional Intangible Cultural Heritage Protection Regulations, respectively. In February, 2011, Intangible Cultural Heritage Protection Law is promulgated in the country, address that the variety of traditional culture expressions of cultural heritage components which inherited in the people of all generations, and the items and places associated with these traditional culture expressions shall be protected, the law will be implemented in June. In addition to these existing laws and regulations, China is under the elaboration of *Regulations on the Protection of genetic resources*, to provide specific provisions for access to genetic resources and benefit-sharing, and the establishment of access to genetic resources and traditional knowledge and benefit sharing system.

In addition to the legislative protection of traditional knowledge, Chinese

government has introduced various policies and strategies to actively promote the protection of traditional knowledge.

1. Strengthen the traditional knowledge associated with genetic resources protection. In 2007, China promulgated the *Outline of National Biological Species Resources Protection and Utilization Plan (2006-2020)*. The conservation and utilization of traditional knowledge associated with genetic resources is one of the 12 priority areas, the outline also prioritizes the investigation, catalog and conservation as priority actions and projects. In 2010, China promulgated the *China Biodiversity Conservation Strategy and Action Plan (2011-2030)*, proposed to establish access and benefit-sharing systems and mechanisms for genetic resources and associated traditional knowledge as one of the priority areas, to ensure prior informed consent is approved and mutually agreed terms is established for the access and utilization of traditional knowledge.

2. Strengthen the traditional intellectual property protection. *The Outline for the Development of Chinese medicine modernization* formulated in 2002 had been devoted to provide for the protection of intellectual property rights of Chinese medicine. In 2008, China promulgated the *Outline of National Intellectual Property Strategy*, indicated that the laws and regulations system regarding genetic resources, traditional knowledge, folklore and Geographical indications is going to be improved within the next 10 years. Outline also proposed key tasks such as improve the traditional knowledge protection systems for intellectual property, such as support the collation and transmission of traditional knowledge, strengthen the conservation, development and utilization for traditional crafts, etc.

3. Increase the protection of intangible cultural heritage. In 2005, China issued the *Views on Strengthening the Protection of Intangible Cultural Heritage* to enhance the implementation of China's intangible cultural heritage protection. In addition, China also announced the namelist of a Intangible Cultural Heritage, have positive affections on protection of the intellectual property of some geographical indications products.

B. Submission from relevant organizations

Natural Justice

SUBMISSION

At the recent 10th COP to the CBD, indigenous peoples, local communities and NGOs successfully lobbied for the inclusion of reference to “community protocols”, a community-led instrument that Natural Justice and other communities and NGOs have been developing. The Nagoya Protocol now states under the heading *Traditional Knowledge Associated with Genetic Resources*:

“1. In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources...

3. Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of:

(a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge...”

The recognition of community protocols in international law marks a turning point in the approach's development. Governments are now required to support the development of community protocols, with an emphasis on gender representation, and to take them into consideration in matters relating to traditional knowledge.

A biocultural community protocol is a community-led instrument that promotes participatory advocacy for the recognition and support for ways of life based on the customary and sustainable use of biodiversity, according to standards and procedures set out in customary, national, and international laws and policies.

Without overstating their potential, we feel they can help communities to use their rights towards the aims inherent in the above decisions, namely:

- To notify others of *sui generis* systems
- To enhance the interaction of customary and statutory laws
- To protect TK
- To support the bottom up implementation of the MYPOW on 8j
- To support community led-conservation and customary uses of natural resources under Article 10c of the Convention, and
- To enhance communities' involvement in ecosystem management, ecosystem services and protected areas.

Specifically, community protocols are a useful tool for communities in situations where there is a gap between the biocultural rights they are gaining at the international level, and the local realities of their daily interactions with national implementing agencies and other stakeholders.

1.1 Rights: The Gap Between Policy and Practice

Communities are securing increasingly important biocultural rights under international law² such as multilateral environmental agreements,³ human rights instruments,⁴ United Nations (UN) agencies' policy documents, and International Union for Conservation of Nature (IUCN) resolutions.

The concept of biocultural rights builds on traditional resource rights⁵ to describe a subset of third-generation (solidarity) rights that support communities whose lives are inextricably linked with local ecosystems and whose ways of life involve the customary and sustainable uses of natural resources.

Yet the harsh paradox is that even when hard-fought negotiations result in communities' rights being enshrined in law, their local effects are often muted because of the complex socio-political contexts within which communities live.⁶ For example, Linda Siegele *et al.* (2009) detail a plethora of rights relating to communities across a range of hard and soft law instruments.⁷ Their exhaustive review illustrates the scale of communities' rights agreed at the international level. However, their telling conclusion is that "good policy is just a starting point – good practice is more difficult to achieve."⁸ Similarly, Lorenzo Cotula and James Mayers (2009) highlight the gap between what is "on paper" and what happens in practice in the context of local land tenure and projects on reducing emissions from deforestation and forest degradation (REDD)⁹. They underscore the fact that despite a growing international recognition of communities' rights to self-determine their futures and manage their natural resources,¹⁰ international rights are far from a panacea against local disempowerment or the denial of procedural and substantive justice. This manifests itself in communities routinely being denied substantive and procedural rights at the local level, leading to forms of social and environmental injustice that fuel the loss of biocultural diversity.¹¹ There is widespread agreement among practitioners that enshrining rights at the international and national level must be augmented by improved use of rights at the local level.

² Siegele, L., D. Roe, A. Giuliani, and N. Winer, 2009. "Conservation and Human Rights, Who Says What?", pages 47-76 in Campese, J., T. Sunderland, T. Greiber, and G. Oviedo (eds.), 2009. *Rights-based Approaches: Exploring Issues and Opportunities for Conservation*. CIFOR and IUCN: Bogor, Indonesia.

³ United Nations Convention on Biological Diversity and United Nations Framework Convention on Climate Change, for example.

⁴ United Nations Declaration on the Rights of Indigenous Peoples, for example.

⁵ Posey, D., & G. Dutfield, *Beyond intellectual property : toward traditional resource rights for indigenous peoples and local communities*, IDRC, Canada, 1996.

⁶ For example, see Nelson, F., 2010. "Conservation and Citizenship: Democratizing Natural Resource Governance in Africa", 233-242 *Policy Matters 17*, IUCN, Malaysia.

⁷ Siegele, L., D. Roe, A. Giuliani, and N. Winer, 2009. "Conservation and Human Rights, Who Says What?", pages 47-76 in Campese, J., T. Sunderland, T. Greiber, and G. Oviedo (eds.), *Rights-based Approaches: Exploring Issues and Opportunities for Conservation*. CIFOR and IUCN: Bogor, Indonesia.

⁸ Siegele *et al.*, 2009, page 69.

⁹ Cotula, L., and J. Mayers, 2009. *Tenure in REDD – Start-point or afterthought?* Natural Resource Issues No. 15. International Institute for Environment and Development (IIED): London, UK, page 23.

¹⁰ For example, see Morel, C., 2010. "Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya". *Housing and ESC Rights Law Quarterly*, 7(1). Last accessed July 14, 2010, at: <http://www.cohre.org>; and Morel, C., 2010. "Conservation and Indigenous Peoples' Rights: Must One Necessarily Come at the Expense of the Other?", p174-180 in *Policy Matters 17*, IUCN, Malaysia.

¹¹ Maffi, L., and E. Woodley, 2010. *Biocultural Diversity Conservation: A Global Sourcebook*. Earthscan: UK.

In efforts to secure their rights over natural resources and traditional knowledge and protect their ways of life, communities continue the international struggle for the recognition of their rights across a number of legislative and policy frameworks.¹² These include:

- CBD: access and benefit sharing (ABS) and programme of work on protected areas (PoWPA) – notably WG8j is crosscutting;
- UN Framework Convention on Climate Change (FCCC): REDD and climate adaptation;
- UN Convention to Combat Desertification (CCD): marginal lands issues;
- UN Committee on Genetic Resources for Food and Agriculture (CGRFA) under the Food and Agricultural Organization (FAO): farmers' rights and livestock keepers' rights;
- World Intellectual Property Organization (WIPO) Intergovernmental Committee: cultural heritage;
- IUCN World Parks congresses: Indigenous and community conserved areas.

However, international advocacy must be augmented by the improved exercise of rights at the local level. The “rights-based approaches”¹³ movement is searching for and working to develop approaches that integrate legal empowerment with endogenous processes, that allow communities to define and communicate self-determined future plans for the future of their biocultural heritage to others, and provide a means to advocate for respect of their ways of life.

1.2 Local Communities, Biocultural Diversity and the Law

Indigenous peoples' and local and mobile communities' diversity of worldviews, cultures, and ways of life are helping to conserve and sustainably use the world's biological diversity.¹⁴ Biological diversity cannot be seen as separate from cultural and linguistic diversity, as “the diversity of life in all its manifestations ... are interrelated (and likely co-evolved) within a complex socio-ecological adaptive system.”¹⁵ The multiplicity of interrelated knowledge, innovations, practices, values, and customary laws¹⁶ are embedded within mutually supporting relationships between land, natural resource use, culture, and spirituality.¹⁷ This connectivity underpins communities' dynamic worldviews and understandings of the laws of nature.¹⁸

Within this context, communities face a number of inter-related challenges when engaging with positive (State) legal systems. Three in particular have ramifications for communities seeking to assert their rights to self-determination and well-being:

¹² For example, see the latest round of the Interregional Negotiating Group of the *Ad Hoc* Open-ended Working Group on Access and Benefit Sharing, held September 18-21, 2010, in Montreal. Last accessed September 22, 2010, at: <http://www.iisd.ca/biodiv/absing>.

¹³ Campese et al., 2009.

¹⁴ Maffi and Woodley, 2010.

¹⁵ Maffi, L., 2010. “What is Biocultural Diversity”, pages 3-12 in Maffi and Woodley, 2010, page 5.

¹⁶ This is also referred to as ‘collective biocultural heritage’, which is the knowledge, innovations, and practices of Indigenous peoples and local and mobile communities that are “collectively held and inextricably linked to traditional resources and territories, local economies, the diversity of genes, varieties, species and ecosystems, cultural and spiritual values, and customary laws shaped within the socio-ecological context of communities.” This definition was developed at a workshop of research and Indigenous partners of the project on Traditional Knowledge Protection and Customary Law that was held in Peru in May, 2005. See Swiderska, K., 2006. *Banishing the Biopirates: A New Approach to Protecting Traditional Knowledge*, Gatekeeper Series 129. IIED: London. Also see IIED, 2010. “Protecting community rights over traditional knowledge”. Last accessed August 24, 2010, at: <http://www.iied.org/natural-resources/key-issues/biodiversity-and-conservation/protecting-community-rights-over-tradition>.

¹⁷ See, for example, Descola, P., 1992. “Society of Nature and the Nature of Society”, pages 107-157 in Kuper, A. (ed.), *Conceptualizing Society*. European Association of Social Anthropologists, Routledge: London.

¹⁸ See, for example, Davidson-Hunt, I., and F. Berkes, 2003. “Learning as You Journey: Anishinaabe Perception of Social-ecological Environments and Adaptive Learning”. *Conservation Ecology*, 8(1): 5-26; and Alexander, M., P. Hardinson, and M. Arhen, 2009. *Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law, CBD Information Document prepared for the 7th Meeting of the Ad Hoc Open-ended working Group on Access and Benefit Sharing*. UNEP/CBD/WG-ABS/7/INF/5, page 9.

A. Laws compartmentalize the otherwise interdependent aspects of biocultural diversity by drawing legislative borders around them and addressing them as distinct segments. While communities manage integrated landscapes,¹⁹ the State tends to view each resource and associated traditional knowledge through a narrow lens, implementing corresponding laws through agencies that separately address, for example, biodiversity, forests, agriculture, and Indigenous knowledge systems.²⁰ The result is that communities' lives are disaggregated in law and policy, which effectively fragments their claims to self-determination into specific issue-related sites of struggle.

B. Law affects the very nature of whom or what is defined as 'community'. In general, people have a variety of ways of establishing who is a member of a family or community and who is an outsider. Communities may define themselves in a number of different ways and in different contexts, based on multiple factors such as heritage, ethnicity, language, geographical proximity, and shared resources or knowledge.²¹ State law, however, is insensitive to local, adaptive conceptions of community and tends to impose an over-generalized and homogeneous classification as a static and rigidly defined entity. This contradicts local realities and can further divide and weaken local institutions and social structures.²² However, this challenge can be overcome by using the law as the basis for adding a new dimension to local constructions of community that progresses the right to self-determination. All communities are dynamic and issues of self-definition and fluid identity are neither new to traditional communities nor inherently destructive to their social structures. The critical determinant is whether they are able to engage adequately with legal and policy processes to avoid potential negative impacts of change and drive positive developments according to their own values and priorities.²³

C. Positive law (both international and State) may conflict with the customary laws that govern communities' sustainable use of natural resources.²⁴ For example, the understanding of 'property' under positive law is based on the private rights of a person (human or corporate) to appropriate and alienate physical and intellectual property. In contrast, communities' property systems tend to emphasize relational and collective values of resources.²⁵ Furthermore, the implementation of positive law tends to overpower and contravene customary law. A system that denies legal pluralism²⁶ has direct impacts on communities' lives, for example, by undermining the cultural practices and institutions that underpin sustainable ecosystem management.²⁷ While recognition of communities' customary laws and traditional

¹⁹ Watson, A., L. Alessa, and B. Glaspell, 2003. "The Relationship Between Traditional Ecological Knowledge, Evolving Cultures, and Wilderness Protection in the Circumpolar North". *Conservation Ecology*, 8(1): 2-15.

²⁰ For example, in many countries, genetic resources are dealt with by separate departments from traditional knowledge.

²¹ Agrawal, A., and C. C. Gibson, 1999. "Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation". *World Development*, 27(4): 629-649.

²² Bosch, D., 2003. "Land Conflict Management in South Africa: Lessons Learned from a Land Rights Approach". Last accessed August 4, 2010, at: <http://www.fao.org/docrep/006/j0415t/j0415t0a.htm>.

²³ Cotula, L., and P. Mathieu (eds.), 2008. *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa*. IIED: London, page 10.

²⁴ Cotula and Mathieu, 2008, page 11.

²⁵ Tobin, B., and E. Taylor 2009. "Across the Great Divide: A Case Study of Complementarity and Conflict Between Customary Law and TK Protection Legislation in Peru". *Initiative for the Prevention of Biopiracy*, Year IV: 11, page 10. Such systems have been described as "...commonly characterized by collective ownership (where the community owns a resource, but individuals may acquire superior rights to or responsibilities for collective property), and communal ownership (where the property is indivisibly owned by the community)." See Tsosie, R., 2007. "Cultural challenges to biotechnology: Native American cultural resources and the concept of cultural harm". *Journal of Law, Medicine & Ethics*, 35: 396, cited in Tobin and Taylor, 2009, page 36.

²⁶ This type of system could be referred to as legal monoculture.

²⁷ Sheleef, L., 2000. *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*. Frank Cass: London, England, and Portland, Oregon.

authority over resources is progressing in some jurisdictions,²⁸ the challenge of legal pluralism goes beyond the mere co-existence of legal regimes, wherein customary law is applicable only to Indigenous peoples within their territories. Instead, meaningful legal pluralism requires “incorporation directly or indirectly of principles, measures and mechanisms drawn from customary law within national and international legal regimes for the protection of traditional knowledge.”²⁹

These three challenges, among others, highlight the fact that the imposition of international and national environmental laws, which are inherently fragmentary and based on static misperceptions of local realities, has the potential to undermine the interconnected and adaptive systems that underpin biocultural diversity. The implementation of such laws compounds these challenges by requiring communities to engage with disparate stakeholders³⁰ according to a variety of disconnected regulatory frameworks, many of which may conflict with their customary laws and traditional governance structures. Communities thus face a stark choice:

- to spurn these inherently limited frameworks (something which is a virtual impossibility considering the ubiquitous nature of State law); or
- to engage with them at the potential expense of becoming complicit in the disaggregation of their otherwise holistic ways of life and governance systems.

If the latter is chosen, the resultant challenge is for communities to draw upon and further develop appropriate means to effectively engage with State and international legal and policy frameworks, specifically in ways that accord with their biocultural heritage, support their integrated systems of ecosystem management, are commensurate with their customary laws, and recognize traditional forms of governance. In the absence of such approaches, the very act of using rights can be disempowering and disenfranchising.³¹

1.3 What are Biocultural Community Protocols and How Do They Respond to the Issues Above?

Biocultural community protocols³² are gaining recognition as a locally-rooted rights-based approach that integrates legal empowerment with endogenous processes. Although each is adapted to its local context, *a biocultural community protocol is a community-led instrument that promotes participatory advocacy for the recognition and support for ways of life based on the customary and sustainable use of biodiversity, according to standards and procedures set out in customary, national, and international laws and policies.* They allow communities to define and communicate self-determined plans for the future of their biocultural heritage to others, and provide a means to advocate for respect of their ways of life. In this sense, biocultural community protocols are community-specific declarations on the right to diversity.³³ Their value lies in the *process* that communities undertake to develop them, in *their diversity of forms*, and in their *future uses*.

²⁸ Van Cott, D., 2000. “A Political Analysis of Legal Pluralism in Bolivia and Colombia”. *Journal of Latin American Studies*, 32: 207-234.

²⁹ Tobin, B., 2009. “Setting Traditional Knowledge Protection to Rights: Placing Human Rights and Customary Law at the Center of Traditional Knowledge Governance”, pages 101-115 in Kamau, E., and G. Winer (eds.), *Genetic Resources, Traditional Knowledge and the Law. Solutions for Access and Benefit Sharing*. Earthscan: UK, page 111. This is arguably a huge challenge and most States are a long way from incorporating Indigenous worldviews into legal and policy frameworks.

³⁰ Examples include government agencies, conservation and development NGOs, private sector companies, and researchers.

³¹ This is also supported by anecdotal evidence by public interest lawyers such as Fatima Hassan (former senior attorney, AIDS Law Project, South Africa) who argues that even when ordinary people do use the law and engage legal systems, the process is often both disempowering because of the asymmetrical “lawyer-client” relationship and dehumanizing because of the Kafkaesque nature of legal proceedings.

³² For a fuller description see Bavikatte, K., and H. Jonas (eds.), 2009. *Biocultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy*. Natural Justice and UNEP. For their application in the context of livestock keepers rights, see Köhler-Rollefson, I., 2010. *Biocultural Community Protocols for Livestock Keepers*. Lokhit Pashu-Palak Sansthan: Rajasthan, India.

³³ Natural Justice and partners are working to develop this concept.

A. Process: The development of a biocultural community protocol is embedded in a process of localized change by the communities themselves: from within. This process is called endogenous development. It is local people, with their own resources, values, worldviews, knowledge and organisations who drive endogenous development.³⁴ This does not mean that communities are isolated from the outside world and the opportunities that may be available there. Outside agencies such as NGOs can strengthen, support, catalyze, or enhance endogenous development. Whereas participatory approaches have become broadly recognised, many of these approaches experience difficulties in overcoming an implicit materialistic and western bias. Endogenous development seeks to overcome this bias by making peoples' worldviews and livelihood strategies the starting point for development. Endogenous development begins with local livelihood strategies, values, institutions, and resources. As an endogenous process, the development of a community protocol provides communities a framework with which to learn about their rights in the context of their worldviews, lives, and customary laws. A biocultural approach to the law empowers communities to engage with it from a more holistic perspective.

B. Form: Biocultural community protocols can vary in how they are documented and shared. Depending on the community and the stakeholders with whom they are engaging, community protocols could consist of, among other things, written documentation, 3-dimensional models or GPS/GIS maps, illustrations, videos, photographs, performing arts, or a combination of means.³⁵ The document itself has been highlighted as being meaningful to a community, as something about which to be proud.³⁶

C. Using the Protocol: Community protocols assist communities to establish a firm foundation for the future management of their natural resources by setting out their values and customary resource governance procedures. Protocols also provide a vehicle for articulating communities' procedural and substantive rights to, among other things, be involved in decision-making according to the principle of free, prior and informed consent, develop the specific elements of projects that affect their lands, and ensure that they are involved in the monitoring and evaluation of such projects. This provides clarity to the drivers of external interventions such as protected areas, ABS agreements, REDD projects, and payment for ecosystem services schemes, and can help communities gain recognition for, among other things, their territorial sovereignty, community-based natural resource management,³⁷ *sui generis* laws, sacred natural sites,³⁸ and globally important agricultural heritage systems. In this regard, biocultural community protocols assist communities to bridge the gap between the customary management of their biocultural heritage and the external management of their resources, the latter of which is mandated by positive legal frameworks. They also help communities to minimize the power asymmetries that often characterize government-community relations and promote a more participatory and endogenous approach to the future governance of their territories, natural resources, biodiversity, and traditional knowledge. They allow a community to be proactive within frameworks and in relation to agencies to who they have normally been reactive.

³⁴ ETC COMPAS, 2007. Learning Endogenous Development, Practical Action, UK.

³⁵ On the value of mapping, see Taylor, J., 2008. "Naming the Land, San Counter-mapping in Namibia's West Caprivi". *Geoforum*, 39: 1766–1775.

³⁶ Köhler-Rollefson, 2010.

³⁷ Ryan, S., K. Broderick, Y. Sneddon, and K. Andrews, 2010. *Australia's NRM Governance System. Foundations and Principles for Meeting Future Challenges*. Australian Regional NRM Chairs: Canberra.

³⁸ Wild, R., and C. McLeod (eds.), 2008. *Sacred Natural Sites: Guidelines for Protected Area Managers*. IUCN: Gland, Switzerland.

1.4 The Raika Biocultural Community Protocol

In response to their exclusion from the Kumbalgarh Forest, the Raika pastoralists of Rajasthan, India, developed a protocol to communicate the fullness of the forest's meaning to their lives and the implications of their exclusion to their livelihoods, traditional knowledge, and the surrounding biodiversity and genetic resources.³⁹ Specifically, they set out:

- *Values*: their biocultural values and explain how they have developed and preserved unique breeds of livestock and the traditional knowledge associated with them, and how their pastoral lifestyle has co-evolved with the forest ecosystem that they have traditionally conserved and sustainably used;
- *Customary laws*: The Raika detail the customary decision-making process that underpins the provision of free, prior and informed consent to any actions that might impact their grazing rights, animal genetic resources, and associated traditional knowledge;
- *National laws*: They draw on their description of their ways of life to detail their rights under Indian law⁴⁰ and call upon the National Biodiversity Authority to recognize and ensure the *in situ* conservation of their local breeds and associated traditional knowledge, and ensure that their free, prior and informed consent is obtained according to customary law before any decisions are taken relating to their genetic resources or associated traditional knowledge; and
- *International laws*: They conclude by calling on the Secretariat of the Convention on Biological Diversity and the Food and Agriculture Organization of the United Nations to recognize the contributions of their knowledge, innovations, and practices to the conservation and sustainable use of plant and animal genetic diversity in Rajasthan.

Overall, the Raika's protocol is a holistic response to a singular and fragmentary act of government that was undertaken without recourse to the integrated reality of their biocultural heritage.

1.5 Asian Consultations on Biocultural Community Protocols

Natural Justice and COMPAS (in collaboration with the UNDP-supported Community Knowledge Service) partnered to host two consultations in June and July 2010 in Bangalore, India, and Avissawella, Sri Lanka.⁴¹ They provided an opportunity for community members, and representatives of community-based organisations (CBOs), NGOs, government agencies, and funders to discuss biocultural community protocols. The participants made a number of important points about the benefits of biocultural community protocols, many of which are covered above. They also highlighted a number of potential weaknesses and dangers, including:

- Community protocols are not a panacea;
- The process of developing a protocol could be abused by certain parties either from outside or from within the community;
- Such processes may further entrench or perpetuate existing power asymmetries at the local level such as the exclusion of women and youth in decision-making mechanisms;
- Biocultural community protocols may become another top-down imposition by the development industry; and
- There is a great need to ensure community-based monitoring and evaluation of the approach.⁴²

As a response to the consultations Natural Justice and partners are working to establish best practice in the development and use of biocultural community protocols through two regional initiatives, in Africa and Asia. Natural Justice will make available to the CBD Secretariat and Parties the outcomes of the work, which will be fed into the IGC on ABS, WG on 8j and related provisions, SBSTTA and COP 11.

³⁹ The Raika Biocultural Protocol and other protocols are available at www.naturaljustice.org, 2010.

⁴⁰ Biological Diversity Act 2002, Biological Diversity Rules 2004, Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, and the National Policy for Farmers 2007.

⁴¹ Jonas, H., and H. Shrumm, 2010. Exploring Biocultural Community Protocols in the Sri Lankan Context: A Report of an International Consultation and Training-of-Trainers Workshop on Biocultural Community Protocols in Avissawella, Sri Lanka. Natural Justice, 2010.

⁴² Jonas and Shrumm, 2010, pages 14-16.