

**Convention on  
Biological Diversity**

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Distr.  
GENERAL

UNEP/CBD/WG8J/9/INF/1/Add/1  
12 September 2015

ENGLISH ONLY

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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

Ninth meeting

Montreal, Canada, 4-7 November 2015

Item 4 of the provisional agenda\*

**AN ANALYSIS OF THE SUBMISSIONS RECEIVED, CONCERNING  
SUBTASKS (I), (II), (III) AND (IV)**

*Note by the Executive Secretary*

**INTRODUCTION**

1. In decision XII/12 D, on how tasks 7, 10 and 12 could best contribute to work under the Convention and to the Nagoya Protocol, the Conference of the Parties requested the Working Group to:

- (i) Develop guidelines for the development of mechanisms, legislation, or other appropriate initiatives to ensure that private and public institutions interested in using such knowledge, practices and innovations obtain the prior informed consent or approval and involvement of indigenous and local communities.
- (ii) Develop guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure that indigenous and local communities obtain a fair and equitable share of benefits arising from the use and application of their knowledge, innovations and practices;
- (iii) Develop standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge; and
- (iv) Following a gap analysis,<sup>1</sup> develop a glossary of relevant key terms and concepts to be used within the context of Article 8(j) and related provisions;

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\* UNEP/CBD/WG8J/9/1.

<sup>1</sup> Refer to decision X11/12 D, paragraph 5.

2. To assist the Working Group in its work, the Conference of the Parties, in decision XII/12 D, paragraph 4, invited Parties, Governments, relevant international organizations and indigenous and local communities to submit their views,<sup>2</sup> including information on community protocols, model clauses, best practices, experiences and practical examples for the prior informed consent or approval and involvement processes for access to the knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity, and in paragraph 5 requested the Executive Secretary to compile and analyse these views taking into account the relevant work in related international processes. A compilation of views regarding these matters is made available as information document UNEP/CBD/WG8J/9/INF/1.

3. An analysis of the submissions received<sup>3</sup> relevant to prior informed consent or approval and involvement together is contained in section I of the present document. An analysis of the submissions received<sup>4</sup> relevant to the equitable sharing of benefits and mutually agreed terms is made available as section II. Finally, section III contains an analysis of information received of relevance to reporting and preventing the unlawful appropriation of traditional knowledge. Regarding subtask (iv), to develop a glossary of relevant terms and concepts, no additional terms were received regarding this matter.

4. The submissions collated in UNEP/CBD/WG8J/9/INF/1 and the analysis in this document in UNEP/CBD/WG8J/9/2/Add.1 may contribute to the development of guidelines as contained in UNEP/CBD/WG8J/9/2 (on prior informed consent or approval and involvement), UNEP/CBD/WG8J/9/2/Add.1 (Benefit Sharing), UNEP/CBD/WG8J/9/2/Add.2 (Unlawful Appropriation/Unauthorised Access), and UNEP/CBD/WG8J/9/2/Add.3 (Glossary).

## I. AN ANALYSIS OF VIEWS RECEIVED CONCERNING PRIOR INFORMED CONSENT OR APPROVAL AND INVOLVEMENT<sup>5</sup>

### A. Submissions from Parties

5. **Australia** recognizes prior informed consent (PIC) for access to and use of the knowledge, innovations and practices of Indigenous communities relevant to the conservation and sustainable use of biological diversity, within current national programmes such as *Working on Country* and *Indigenous Protected Areas*. Recognition of PIC is occurring as part of project planning and implementation. This includes the development of ‘two-way’ (Indigenous and western scientific) approaches to land management, the exchange of ideas and practices within cultural burning forums such as ‘*Firesticks*’, and potentially through improved engagement with the National Environment Science Program on topics including Indigenous livelihoods, monitoring and evaluation.

6. **Bolivia** is developing actions under the Convention and of relevance to the Nagoya Protocol, for the registration of traditional knowledge, innovations and practices based on the consent of the relevant communities. There is ongoing work to adjust processes for prior informed consent to take into account associated genetic resources.

7. **Brazil** recognizes the importance of the development of community plans and protocols for traditional knowledge and has advanced work on these through the adoption and recognition of a variety of community protocols including the *Biocultural Community Protocol for Cerrado Raízeiras*; the *Biocultural Community Protocol of Extractive Reserve Riozinho do Afrísio*; and the community protocol of the Bailique communities. The three protocols aim to protect the traditional knowledge of the respective communities. In Brazil, there are also community protocol initiatives by Wajãpi and

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<sup>2</sup> Refer notification SCBD/MPO/AF/JS/VF/84296 (2015-012) dated 5 February 2015.

<sup>3</sup> In response to notification SCBD/MPO/AF/JS/VF/84296, dated 5 February, 2015 and compiled and analysed as requested in decision XII/12, D, paragraphs 4 and 5.

<sup>4</sup> In response to Notification SCBD/MPO/AF/JS/VF/84296, dated 5 February, 2015 and compiled and analysed as requested in decision XII/12, D, paragraphs 4 and 5. .

<sup>5</sup> Subtask 1 (decision XII/12 D).

Munduruku indigenous peoples to meet the prior informed consent and consultations processes, required by the ILO 169.

8. Brazil believes that community protocols are an efficient mechanism to empower knowledge owners and to ensure the prior informed consent for access and use of their knowledge. Brazil emphasizes that the promotion of community protocols should be encouraged by Parties to the Convention and its Nagoya Protocol, including through bilateral and regional cooperation, capacity-building initiatives and the facilitation of regional workshops. Parties should also be encouraged to share their information on community protocols through appropriate mechanisms.

9. Based on the Brazilian experience on prior informed consent (PIC) and on the development of community protocols and model contractual clauses, community protocols should include the following basic information:

- i. Community identity;
- ii. Community history;
- iii. Community territoriality;
- iv. Resources used (may include seasonality and management practices);
- v. Social organization;
- vi. Relations with other institutions;
- vii. Relationship, level of knowledge and accessibility to public policies.

10. Brazil emphasizes that adoption of community protocols, including model contractual clauses should be voluntary as each indigenous and local community needs to assess whether they are relevant to their particular situation.

11. In its submission concerning *approval and involvement* **Canada** uses case studies to explain approval and involvement processes, in action, in the Canadian context. In the Canadian context, Governments work with indigenous communities to build enduring relationships of mutual benefit, over time. Some of the examples provided include: Co-Management Committees under the Inuit Impact and Benefit Agreement for National Wildlife Areas and Migratory Bird Sanctuaries, Wildlife Management Boards, such as for the Polar Bear Harvest, and Management of the Porcupine Caribou Herd and Parks Canada.

12. One of Environment Canada's core activities under the Inuit Impact and Benefit Agreement is the administration and coordination of nine Area Co-Management Committees associated with its 13 conservation areas. The Area Co-Management Committees are based in the communities closest to the protected areas. The Area Co-Management Committees consist of six members, three of whom are appointed by the relevant Regional Inuit Association and three by Environment Canada. All Area Co-Management Committee members except one are beneficiaries of the Nunavut Land Claim Agreement and are appointed from the relevant adjacent communities; the Vice-Chair of the Area Co-Management Committee is an employee of Environment Canada's Canadian Wildlife Service. Each Area Co-Management Committee is tasked with the development of a management plan for their protected area, providing advice to the Minister of the Environment on a variety of matters, including permitting, and other functions set out in the Inuit Impact and Benefit Agreement. The committees meet in person at least once per year.

13. The Inuit Impact and Benefit Agreement further sets as a co-management objective that decision-making for Migratory Bird Sanctuaries and National Wildlife Areas is substantially informed and influenced by *Inuit Qaujimajatuqangit* (traditional knowledge). The Inuit Impact and Benefit Agreement also indicates that, "in formulating their advice to the Minister, Area CoM Committees shall carefully consider Inuit Qaujimajatuqangit (TK) brought forward by any member" and that in all

significant policy decisions (affecting National Wildlife Areas or Migratory Bird Sanctuaries) the Minister shall carefully consider Inuit Qaujimagatuqangit (TK) documented and presented to the Minister by an Area Co-Management Committees.

14. Additionally, Parks Canada recently produced a Resource Guide entitled *Promising Pathways: Strengthening Engagement and Relationships with Aboriginal Peoples in Parks Canada Heritage Places*. This guide was developed to help support and strengthen engagement and relationship building with Aboriginal peoples in national parks, national historic sites, and national marine conservation areas across Canada. This guide is fundamental to all Parks Canada's future work moving forward.

15. Finally, on 9 February 2015, regarding Canada's 2020 Biodiversity Targets, Canada announced national biodiversity goals and targets for 2020. One of the targets of Canada on Aboriginal Traditional Knowledge (Target 15) reads: "By 2020, Aboriginal traditional knowledge is respected, promoted and, where made available by Aboriginal peoples, regularly, meaningfully and effectively informing biodiversity conservation and management decision-making." The preamble of the 2020 Biodiversity Goals and Targets for Canada highlights that:

*Implementation of the goals and targets will rely on meaningful, full and effective participation of Aboriginal peoples, including First Nations, Inuit and Métis peoples. In this respect, while Aboriginal traditional knowledge and customary use of biological resources are specifically highlighted under targets 12 and 15, the traditional knowledge, innovations and practices of Aboriginal communities are relevant for implementing all of Canada's biodiversity goals and targets, as is protecting and encouraging customary use of biological resources compatible with their conservation and sustainable use.*

16. **Ecuador** reports that the Ecuadorian Institute for Intellectual Property (IEPI), through its Traditional Knowledge Unit, has initiated a pilot project on a system for registration of traditional knowledge and associated genetic resources. As part of this process, there have been several workshops to provide guidance on prior informed consent, mutually agreed terms and the fair and equitable sharing of benefits. In relation to prior and informed consent processes for access to registered traditional knowledge, a formal letter is sent by the potential user to the highest authority of the community in question, which is often a community assembly. Through this project, the MAE (environmental ministry) has established a computerized registration system which will in due course allow for the input of field information directly into information collections. The registry is being used by the Tsáchila indigenous community, which is working on a project about traditional medicinal plants, in conjunction with one of the universities in the country, as well as the Cofan community, which have developed a roadmap of various activities related to their traditional knowledge and associated genetic resources.

17. In relation with this work, the SENE CYT<sup>6</sup> will be developing a *sui generis* system for the conservation and legal protection of traditional knowledge associated with genetic resources and traditional cultural expressions within the Organic Code of Social Economy of Knowledge (COESC), in which the collective rights of indigenous peoples and nations over their traditional knowledge are recognized. The *sui generis* system will also take into account: the establishment of community protocols including biocultural protocols and registries for traditional knowledge, the customary uses of such knowledge, processes for the free, prior and informed consent of the rightful knowledge owners, including measures to address publically available traditional knowledge, as well as arrangements for the fair and equitable benefit sharing for benefits arising from the use of traditional knowledge, and finally cross-border compliance measures for traditional knowledge shared across borders. Ecuador is also issuing guidance concerning the Protocol for Research on traditional knowledge, which will provide guidance and incentives for research on traditional knowledge, as well as respect for and compliance with the collective rights of indigenous peoples and local communities peoples holding such knowledge.

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<sup>6</sup> Refer: <http://www.educacionsuperior.gob.ec/>

18. **Finland** notes that the Government is engaged in the preparatory process related to the ratification of the Nagoya Protocol, which also requires addressing requirements of prior and informed consent. The Government proposal to ratify the Nagoya Protocol will be discussed by the Finnish Government and Parliament during 2015.

19. **Honduras** promotes the Miskito Biocultural Protocol as a possible national model. The recognition of the protocol also is linked to a governmental Bill on Consultation and Prior Informed Consent in the Framework of the REDD+ Project. The Biocultural Protocol of the Miskito People was developed by MASTA, as a representative organization of the Miskito people, with the support of IUCN, Natural Justice and the German Cooperation Agency. The biocultural protocol consists of seven steps: (i) first contact; (ii) agreement on the process; (iii) discussion of relevant information; (iv) decision making; (v) negotiation between communities and stakeholders; (vi) consent agreements, (vii) implementation and monitoring. The submission from Honduras also addresses the role of PIC of IPLCs in establishing and managing protected areas.

20. **India** has enacted comprehensive legislation, the Biological Diversity Act in 2002 to give effect to the provisions of the Convention on Biological Diversity, including those relating to access and benefit-sharing. The Act is being implemented through a three-tier institutional mechanism at the national, State (province) and local levels: the National Biodiversity Authority (NBA) located at Chennai, the State Biodiversity Boards (SBBs) constituted by the State Governments, and the local Biodiversity Management Committees (BMCs) set up by the institutions of self-government in their respective areas. The NBA and SBBs are required to consult the concerned BMCs on matters relating to use of biological resources and associated knowledge within their respective jurisdictions. This mandatory consultation of BMCs by NBA and SBBs ensures formalization of prior informed consent by the communities through involvement of BMCs in the decision-making process. The three-tiered institutional mechanism provided for in the Act is in line with the decentralized governance structure provided for the Indian Constitution.

21. One of the main functions of the BMCs is to prepare People's Biodiversity Registers (PBRs) in consultation with the local people in their jurisdiction. PBR is a comprehensive database recording people's traditional knowledge associated with biological resources of that area. In India, about 1900 PBRs have been documented so far in different States (provinces) by involving local people, tribal communities, academics, research institutes, NGOs, etc.

22. **New Zealand** has addressed issues relevant to access to knowledge, innovations, and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity through various national arrangements including the Treaty of Waitangi settlement processes, as well as legislative processes. The New Zealand submission contains illustrative examples of how these matters are approached in New Zealand.

23. In order to meet the provisions of ILO Convention No. 169 which **Norway** has ratified, the Norwegian Government and the Sami Parliament reached agreement on the "Procedures for Consultations between the State Authorities and the Sami Parliament of 11 May 2005" (PCSSP).

24. The PCSSP has several objectives. First of all, the procedures are intended to contribute to the practical implementation of the State's obligations to consult indigenous peoples under international law. Secondly, agreement shall be sought between the State authorities and the Sami Parliament whenever consideration is being given to legislative and administrative measures that may directly affect Sami interests. The third objective is to facilitate the development of a partnership perspective between State authorities and the Sami Parliament that contributes to the strengthening of Sami culture and society. Finally, the intention is to develop a common understanding of the situation and of the developmental needs of Sami society.

25. The scope of the agreement is extensive. The obligation to consult the Sami Parliament may include all tangible and intangible forms of Sami culture, including music, theatre, literature, art, media,

language, religion, cultural heritage, immaterial property rights and **traditional knowledge**, research, land ownership, rights to use lands, matters concerning land administration, biodiversity and nature conservation amongst other matters.

26. The PCSSP also contains general provisions concerning the consultation procedures. The consultations shall be undertaken in good faith, with the objective of achieving agreement to the proposed measures. Furthermore, the state authorities shall as early as possible inform the Sami Parliament about the commencement of relevant matters that may directly affect the Sami, and identify those Sami interests and conditions that may be affected. After the Sami Parliament has been informed on relevant matters, the Parliament shall notify the state authority as soon as possible as to whether or not further consultations are required. The Sami Parliament may also independently identify matters which in its view should be subject to consultation. In cases where the state authorities and the Sami Parliament agree that further consultations are to be held, they shall seek to agree on a plan for such consultations. Sufficient time shall be allocated to enable the parties to carry out genuine and effective consultations and political consideration of all relevant proposals.

27. In the development of the Norwegian legislation on biodiversity (the nature management act), which was presented to the Parliament in April 2009, extensive consultations with the Sámediggi (Sami Parliament) on matters of their interest were performed. The Sámediggi unanimously approved the draft provisions.

28. Under the Norwegian Nature Diversity Act, the Government and other public authorities have a duty to ensure that traditional knowledge is taken into account. In the context of the Nature Diversity Act, it is important that the TK holders themselves can decide to what extent traditional knowledge is to be made known and how it is used. In the case of Sami traditional knowledge, there may also be cultural and linguistic barriers that makes gathering of such knowledge difficult. Such challenges have to be addressed in the best possible way if TK is to be considered in decision-making processes.

29. An amendment to the Nature Diversity Act on Traditional Knowledge associated with genetic resources was adopted by Parliament in June 2013 in order to be able to ratify the Nagoya Protocol.

Nature Diversity Act § 61 a – Unofficial translation into English:

*Authorities shall facilitate respect and safeguarding of the interests of indigenous peoples and local communities when traditional knowledge associated with genetic resources that is developed and preserved by indigenous and local communities is accessed and utilized.*

*The King may issue a regulation stipulating that access to and utilization of traditional knowledge associated with genetic resources requires **prior informed consent** from the indigenous peoples or local community, including rules on sanctions and remedies against misappropriation of such traditional knowledge associated with genetic resources. This could also be applied to traditional knowledge associated with genetic resources that is developed, transferred and preserved by indigenous peoples and local communities in another state, provided that the national legislation of that state requires prior informed consent for access to or utilization of traditional knowledge associated with genetic resources.*

30. **Peru** has developed systems and practices in protecting traditional knowledge, which contribute to better conditions for negotiating equitable sharing of benefits arising from access and use of traditional knowledge, as well for monitoring of the misappropriation of traditional knowledge. The Directorate of Inventions and New Technologies of INDECOPI (DIN-INDECOPI) is the competent authority in Peru, for the protection of collective knowledge related to biological resources. Peru continues to make progress on the registration of traditional knowledge through an in-situ registration process, which constitutes in itself a *sui generis* system for the protection of traditional knowledge.

31. In **Sweden**, in 2014, the EU-regulation for the implementation of the Nagoya protocol (EU reg. 511/2014) entered into force, focusing on user obligations. To date, no national action has been taken in Sweden regarding access and benefit sharing measures related to traditional knowledge held by national

IPLCs. The Swedish Sami Parliament and Naptek have collaborated regarding a Sami policy concerning árbediehtu (Sami traditional knowledge), but it is yet to be finalized.

32. In 2014 the Swedish Sami Parliament and Naptek co-published a booklet in traditional Sami on self-determination aiming at contributing to revitalization of the Sami ways of thinking related to governance of traditional knowledge and biodiversity, which is of relevance since it is a part of the process to re-establish customary practices of knowledge exchange.

33. When expressing its view, the Swedish Sami Parliament stresses that one of the most important aspect for accessing traditional knowledge is **FPIC (free prior informed consent)**.

#### **B. Submission from relevant organizations**

*International Indigenous Forum on Biodiversity (IIFB), Note on Prior Informed Consent/Approval and Involvement, July 21, 2015.*

34. In their submission, the IIFB notes there has been very little discussion of comparative meaning of these two phrases<sup>2</sup> used in the Nagoya Protocol, “prior informed consent” or “approval and involvement”. In the article by Morgera et al. (2014), it is emphasized that “approval and involvement” was used in the negotiation of the Nagoya Protocol because it was contained in the CBD as entered into force, that prior informed consent or approval and involvement (PIC/AI) had been used as a common paired phrase in numerous COP decisions, and it gives countries flexibility in the implementation of both the CBD and the Nagoya Protocol.

35. However, it is the recollection of the IIFB, is that in the discussions of PIC/AI there was a large consensus towards adopting PIC as the common concept, but that one country strongly insisted that PIC was a reserved term of art in their national context and therefore insisted on the additional of “approval and involvement” and that both terms be retained.

36. It is the position of the IIFB that it would be unusual and would lead to high legal uncertainty for indigenous peoples and local communities and users of TK and associated GR to have two standards within the Convention, one higher and one lower concerning this matter of access. It is the collective recollection of the IIFB that during COP-5 in Nairobi, these two phrases were under intense negotiation in the Article 8(j) decisions in relation to the original 8(j) programme of work, general principles and obligations, and related to participatory mechanisms and benefit sharing.<sup>8</sup> Although there was strong support for PIC, the compromise solution was to use “prior informed consent or prior informed approval” in the general principles of the programme of work. The IIFB recollection is that the objection was not based on the insistence on the language of the original Article 8(j), but on domestic issues with the use of a reserved term.

37. It is the opinion of the IIFB, that the use of “prior informed consent or prior informed approval” reflects an understanding of the equivalence of the two phrases, and the IIFB discerns no legal consequence between the use of “consent” versus “approval”, the latter being used to provide for a national accommodation in the consensus decision. The further uses of “prior informed approval” in the decision reinforce our understanding that the contention was not about the original language of Article 8(j). The use of “prior informed approval” by the COP in consensus decisions, suggests no Party has issues with IPLCs making decisions about access in advance of, or prior to, access to their traditional

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<sup>7</sup> Morgera, Elisa; Tsioumani, Elsa; Buck, Matthias (2014). Unravelling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-sharing to the Convention on Biological Diversity. Brill. The Concept of Community PIC concerning Genetic Resources. Article 6, 2. The Concept of Community PIC concerning Genetic Resources, 2a. Approval and Involvement. Pp. 152 ff.

<sup>8</sup> COP 5 Decision V/16: Programme of Work on the Implementation of Article 8(J) and Related Provisions of the Convention on Biological Diversity, I. General; Principles para 5; II. Tasks of the First Phase of the Programme of Work, Element 1 Participatory mechanisms for indigenous and local communities, Task 1; Element 4 Equitable sharing of benefits, Task 7.

knowledge,<sup>9</sup> without being informed, or having to be made with the consent/approval of indigenous peoples and local communities.

38. The IIFB therefore suggests that the solution could be found in a draft decision stipulating that the phrases “prior informed consent” and “approval and involvement” to be equivalent in meaning with any ambiguities resolved in favour of the highest level of protection of the two phrases in order to create legal certainty. This would be in the manner recently adopted for “indigenous peoples and local communities” as a replacement phrase for “indigenous and local communities” adopted by the Parties at COP-12 in Pyeongchang, Republic of Korea.

#### *Natural Justice*

39. **Natural Justice** is an international NGO with extensive local-level experiences in the development of Biocultural Community Protocols (BCPs) and their use as a tool for the protection of traditional knowledge (TK), negotiating with potential users, and for articulating and implementing equitable sharing of benefits. BCPs can be viewed as a primary locally-based *sui generis* system for the protection of traditional knowledge. They usually enshrine processes for prior and informed consent.

40. Since 2011, Natural Justice and its partners have been implementing a global initiative on Biocultural Community Protocols with support from a number of donors. The Initiative supports networks of indigenous peoples and community-based organizations with:

- Participatory documentation and development of BCPs
- Using BCPs as the basis for constructive engagement with external actors
- Building legal capacity of in-country lawyers and advocates
- Peer learning, analysis and exchange of experiences
- Development and dissemination of good practice guidance and lessons

41. The range of objectives of the BCPs supported by the Initiative is as broad as the local realities facing the communities involved, and not all are centrally concerned with TK and benefit-sharing. However the wealth of experiences and lessons learned through the various processes can significantly inform best practice in the development and use of BCPs as a basis for obtaining the prior informed consent (PIC) of indigenous peoples and local communities (IPLCs) for the access and use of their knowledge, practices and innovations, and for the fair and equitable sharing of benefits arising from that use.

42. In conclusion, Natural Justice emphasizes that processes for obtaining PIC should identify and respect the appropriate representatives and customary institutions of IPLCs, and should take into account IPLC’s own decision-making processes, customary laws and procedures. The same hold true for the development of appropriate Benefit Sharing mechanisms. IPLCs should be able to decide which institutions are mandated to negotiate and receive benefits, and how these benefits will be distributed.

43. Determining how to properly obtain prior informed consent from specific IPLCs and how to negotiate benefits will therefore depend upon the customary practices of each particular community. Especially in the case of TK, there might be customary norms about how this knowledge is kept, to whom it may be transferred, and under which conditions. Certain forms of TK have spiritual significance and might even be considered secret, in which case the appropriate traditional authorities should be able to withhold the consent for access to such knowledge. At the same time, it is desirable to involve a broad range of sectors within the community in PIC processes and the sharing of benefits, including women, youth and marginalized groups.

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<sup>9</sup> As per Article 8(j) “knowledge, innovations and practices”

44. While the above-mentioned elements of good process for PIC and benefit-sharing are widely accepted and recognized, including through the Nagoya Protocol, the operationalization often remains a challenge. Government agencies, researchers and private companies are not always aware of the existing customary rules and norms of communities, and may not know who is entitled to give PIC, or who should negotiate and receive benefits. The cultural and spiritual values of the community regarding their resources and TK are also often misunderstood or ignored. At the same time, many IPLCs are not always aware of their rights to PIC and benefit-sharing under international and national law, and/or lack the capacity to assert these rights.

#### *The Sami Parliament*

45. **The Sami Parliament** regards prior and informed consent as fundamental. They emphasize in their submission that users of traditional knowledge must have the consent of the relevant indigenous peoples.

## **II. FAIR AND EQUITABLE SHARE OF THE BENEFITS ARISING FROM THE USE AND APPLICATION OF TRADITIONAL KNOWLEDGE**

46. The Secretariat received eleven submissions from Parties. They are from: Australia, Bolivia, Canada, Ecuador, Finland, Honduras, India, New Zealand, Norway, Peru and Sweden and Natural Justice, a relevant non-governmental organization. Below is an analysis of the views provided.

47. **Australia** supports the implementation of tasks 7, 10 and 12 in an integrated manner that is mutually supportive of the Nagoya Protocol and is not inconsistent or duplicative.

48. **Bolivia** has developed a Mechanism for Management of Genetic Resources to avoid the commercialization of genetic resources. This mechanism is within the framework Law of Mother Earth and Holistic Development for Living Well-Law 300 (15 October 2012). This mechanism has three pillars: participation and social control for the transparent management of genetic resources; inventory, registration and protection issues of genetic resources and associated traditional knowledge, access mode and distribution of profits based on non-commodification and solidarity and complementarity between States and Peoples.

49. In its submission concerning *benefit* **Canada** explains that in the Canadian context, Governments work with indigenous communities to build enduring relationships of mutual benefit, over time. Some of the examples provided include: Co-Management Committees under the Inuit Impact and Benefit Agreement for National Wildlife Areas and Migratory Bird Sanctuaries, Wildlife Management Boards, such as for the Polar Bear Harvest, and Management of the Porcupine Caribou Herd and Parks Canada.

50. One of Environment Canada's core activities under the Inuit Impact and Benefit Agreement is the administration and coordination of nine Area Co-Management Committees associated with its 13 conservation areas. The Area Co-Management Committees are based in the communities closest to the protected areas. The Area Co-Management Committees consist of six members, three of whom are appointed by the relevant Regional Inuit Association and three by Environment Canada. All Area Co-Management Committee members accept one are beneficiaries of the Nunavut Land Claim Agreement and are appointed from the relevant adjacent community; the Vice-Chair of the Area Co-Management Committee is an employee of Environment Canada's Canadian Wildlife Service. Each Area Co-Management Committee is tasked with the development of a management plan for their protected area, providing advice to the Minister of the Environment on a variety of matters, including permitting, and other functions set out in the Inuit Impact and Benefit Agreement. The committees meet in person at least once per year.

51. The Inuit Impact and Benefit Agreement further set as a co-management objective that decision-making for *Migratory Bird Sanctuaries and National Wildlife Areas* is substantially informed and influenced by *Inuit Qaujimagatuqangit* (traditional knowledge). The Inuit Impact and Benefit Agreement also indicates that, *in formulating their advice to the Minister, Area CoM Commtees shall*

*carefully consider Inuit Qaujimagatuqangit (TK) brought forward by any member and that in all significant policy decisions (affecting National Wildlife Areas or Migratory Bird Sanctuaries) the Minister shall carefully consider Inuit Qaujimagatuqangit (TK) documented and presented to the Minister by an Area Co-Management Committees.*

52. **Ecuador** reports that the Ecuadorian Institute for Intellectual Property (IEPI), and the SENECHYT<sup>10</sup> is developing a *sui generis* system for the conservation and legal protection of traditional knowledge associated with genetic resources and traditional cultural expressions within the Organic Code of Social Economy of Knowledge (COESC), in which the collective rights of indigenous peoples and nations over their traditional knowledge are recognized. It will also take into account: the establishment of community protocols and processes for arrangements for the fair and equitable benefit-sharing.

53. **Finland** notes that the Government is engaged in the preparatory process related to the ratification of the Nagoya Protocol, which also requires addressing requirements of benefit-sharing.

54. **Honduras** promotes the Miskito Biocultural Protocol as a possible national model. The recognition of the protocol also is linked to a governmental Bill on Consultation and Prior Informed Consent in the Framework of the REDD+ Project. The Biocultural Protocol of the Miskito People was developed by MASTA, as a representative organization of the Miskito people, with the support of IUCN, Natural Justice and the German Cooperation Agency. The biocultural protocol consists of seven steps: (i) initial contact; (ii) agreement on the process; (iii) discussion of relevant information; (iv) decision making; (v) negotiation between communities and stakeholders; (vi) consent agreements, (vii) implementation and monitoring.

55. **India** has enacted comprehensive legislation, the Biological Diversity Act in 2002, to give effect to the provisions of the Convention on Biological Diversity, including those relating to access and benefit-sharing. Upon approval by the Authority, a written agreement including Mutually Agreed Terms is then executed between National Biodiversity Authority (NBA) and the applicant. The agreement consists of obligations of the user/provider, details of the biological resources to be accessed, benefit-sharing component to be paid by the users, conditions to transfer the biological resources and obtaining IP Rights, monetary and/or non-monetary modes of benefit-sharing.

56. **New Zealand** has addressed issues through various national arrangements including the Treaty of Waitangi settlement processes, as well as legislative processes. The New Zealand submission contains several illustrative examples of how these matters are approached in New Zealand, such as the Marine and Coastal Area [Takatai Moana] Act 2011: This bill represents a significant change in the legal regimen for the ownership and management of coastal areas around New Zealand. The assumption of Crown ownership and management of the coastal marine area was overturned and the common coastal and marine area is deemed to be owned by no one. The Act recognizes protected customary rights. Although holders of protected customary rights do not have title over the land, they can delegate or transfer such rights in accordance with tikanga (traditional custom), and derive commercial benefits from such rights, including in commercial aquaculture. Holder of customary marine title can also exclude the public from wahi tapu (e.g. areas such as sacred burial grounds or battle sites).

57. **Norway** notes that the Government is developing traditional knowledge regulations under section 61a of the Natural Diversity Act as a follow-up of the obligations in the Nagoya Protocol; with include traditional knowledge associated with genetic resources and access and benefit-sharing. An inter-ministerial working group has been established to develop the regulation. An expert-group made up of stakeholder organizations such as the Sami Parliament, advises the working group in the process.

58. **Peru** has developed systems and practices in protecting traditional knowledge, which contribute to better conditions for negotiating equitable sharing of benefits arising from access and use of traditional knowledge, as well for monitoring the misappropriation of traditional knowledge. The Directorate of

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<sup>10</sup> Refer: <http://www.educacionsuperior.gob.ec/>

Inventions and New Technologies of INDECOPI (DIN-INDECOPI) is the competent authority in Peru for the protection of collective knowledge related to biological resources.

59. **Sweden** informs that the benefit-sharing can be both monetary and non-monetary. When it comes to access and benefit-sharing in academia, it is likely that benefit-sharing includes sharing scientific understandings derived from access to traditional knowledge, with the local communities involved. Several different activities have been tested regarding how best to report research findings back to the communities, as one way of benefit sharing.

#### *Natural Justice Organization*

60. **Nature Justice** emphasizes that processes for benefit-sharing mechanism should identify and respect the appropriate representatives and customary institutions of IPLCs, and should take into account IPLC's own decision-making processes, customary laws and procedures. IPLCs should be able to decide which institutions are mandated to negotiate and receive benefits, and how these benefits will be distributed. Determining how to properly negotiate benefits will therefore depend upon the customary practices of each particular community. Especially in the case of traditional knowledge, there might be customary norms about how this knowledge is kept, to whom it may be transferred, and under which conditions. Natural Justice considers that biocultural protocols (BCPs) can function as instruments of dialogue and of interface between customary systems of indigenous peoples and local communities and "external" legal and policy frameworks to facilitate dialogue. They can clarify who in the community (which local institution) can give prior informed consent (PIC) for the access to resources and traditional knowledge, and under what conditions. They can also convey to external stakeholders or potential users of traditional knowledge, the traditional values, systems and decision-making process that the community respects and follows in relation of their resources and knowledge. BCPs can be therefore serving as the starting point for negotiation between communities and researchers or private companies, and as a tool for promoting mutual understandings with Governments.

### **III. VIEWS AND INFORMATION RECEIVED REGARDING UNLAWFUL APPROPRIATION OF TRADITIONAL KNOWLEDGE**

61. Views and information regarding how tasks 7, 10 and 12 could best contribute to work under the Convention and the Nagoya Protocol were received from 12 parties, one indigenous organization and one non-governmental organization.<sup>11</sup> However, only a small number of submissions addressed the issue of "unlawful appropriation", which is also referred to in various submissions as unauthorized access and misappropriation. Of particular note is the IUCN Study, Analysis of Claims of 'Unauthorized Access and Misappropriation of Genetic Resources and Associated Traditional Knowledge', which is made available to assist the Working Group under "other documents".<sup>12</sup>

62. Of note, approaches by various Governments differ greatly. Canada for instance attaches importance to co-management committees<sup>13</sup> which ensure that traditional knowledge is respected, valued and applied correctly. Peru mentions that it has *sui generis* legislation, which among other goals, addresses the misappropriation of traditional knowledge. Bolivia and Ecuador are exploring a registration system for traditional knowledge in its efforts to stop misappropriation of traditional knowledge. India and Malaysia have advanced registration systems for traditional knowledge (traditional knowledge digital

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<sup>11</sup> Australia; Bolivia; Brazil; Canada; Ecuador; Finland; Honduras; India; New Zealand; Norway; Peru; Sweden; Natural Justice and the Sami Parliament.

<sup>12</sup> IUCN Study - Analysis of Claims of 'Unauthorized Access and Misappropriation of Genetic Resources and Associated Traditional Knowledge'.

<sup>13</sup> Area Co-Management Committees consist of six members, three of whom are appointed by the relevant Regional Inuit Association and three by Environment Canada.

data-base and Peoples Biodiversity Registers) and made the secure database available to patent offices in order to stop misappropriation of traditional knowledge. Some Parties such as Brazil and Honduras are recognizing and promoting the development of bio-cultural community protocols, as local *sui generis* systems, which among other goals, can assist in stopping the misappropriation of traditional knowledge.

63. The Swedish Sami Parliament emphasizes that guaranteeing prior informed consent for access and use of their knowledge is the most important tool against misappropriation. Norway mentions that it is important for indigenous decision makers themselves to decide what extent traditional knowledge is to be made known and how it is used.

64. Under the Nature Diversity Act § 61 a of Norway, the King may issue a regulation stipulating that access to and utilization of traditional knowledge associated with genetic resources requires prior informed consent from the indigenous peoples or local community, *including rules on sanctions and remedies against misappropriation of such traditional knowledge* associated with genetic resources. This could also be applied to traditional knowledge associated with genetic resources that is developed, transferred and preserved by indigenous peoples and local communities in another state, provided that the national legislation of that state requires prior informed consent for access to or utilization of traditional knowledge associated with genetic resources.

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