

CBD GUIDELINES

Mo' OTZ KUXTAL GUIDELINES



Convention on
Biological Diversity

Mo' otz Kuxtal

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



Convention on
Biological Diversity

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Mo'otz Kuxtal Voluntary Guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge. Montreal, 9 p. (CBD Guidelines Series).

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Image: This image is from Northland, New Zealand, also known as Aotearoa (the Māori name for New Zealand.) It is a waharoa (carved gateway) to Ruapekapeka Pa, the work of a team of master carvers overseen by Te Warihi Hetaraka. The central figure represents Te Ruki Kawiti, the chief architect of the pā and the leader of the warriors who defended it. He is flanked by Māori chiefs who stood alongside him in the defence of Ruapekapeka Pā.

Image credit: Cover photo taken by Ms. Viviana Figueroa. Special thanks to Ms. Te Tui Shortland and the He Puna Marama Trust.

Foreword

The international community has recognized the close and traditional dependence of many indigenous peoples and local communities on biological resources, notably in the preamble to the Convention on Biological Diversity. There is also a broad recognition of the contribution that traditional knowledge can make to both the conservation and the sustainable use of biological diversity – two fundamental objectives of the Convention – and of the need to ensure the equitable sharing of benefits arising from the utilization of traditional knowledge. For this reason, Parties to the Convention undertook, in Article 8(j), to respect, preserve and maintain traditional knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and to promote their wider application with the approval and involvement of the holders of such knowledge. Thus, access to traditional knowledge, innovations and practices is subject to the prior informed consent of the holders of such knowledge.

Traditional knowledge, innovations and practices are valuable not only to those who depend on it in their daily lives, but to modern industry, research, agriculture and animal husbandry. Most indigenous peoples and local communities inhabit areas where the vast majority of the world's genetic resources are found. Many of them have cultivated and used biological resources in a sustainable way for thousands of years. By doing so, they have developed a wealth of knowledge linked with the conservation and sustainable use of biological resources. Traditional knowledge has led to the development of unique species of plants and animals. Many widely used products, such as plant-based medicines, health products and cosmetics, are derived from traditional knowledge. Traditional knowledge may also provide valuable information to researchers and others regarding the specific properties and value of genetic resources and their potential use.

However, research and other activities that require access to the traditional knowledge, innovations and practices of indigenous peoples and local communities have been a source of concern to these communities.

Additionally, potential users of traditional knowledge have expressed a desire for certainty and legal clarity regarding the access and use of traditional knowledge.

To address this concern in a manner that avoids any inconsistencies with the Nagoya Protocol, avoids duplication and overlap of work undertaken in other international forums, and takes into account relevant developments, the Conference of the Parties decided to develop guidelines for the development of mechanisms, legislation or other appropriate initiatives for prior informed consent or approval and involvement of indigenous peoples and local communities and for fair and equitable benefit-sharing as well as guidelines for the reporting and prevention of unlawful appropriation. This decision led to the adoption of the Mo' otz Kuxtal Voluntary Guidelines in December 2016.

The Mo'otz Kuxtal Voluntary Guidelines were named by representatives of indigenous peoples in Mexico in November 2016. Mo'otz Kuxtal¹ means “roots of life” in the Maya language.

The Mo'otz Kuxtal Voluntary Guidelines provide a framework for guiding Parties, other Governments, relevant organizations and indigenous peoples and local communities in building fair partnerships and fostering positive engagement between the potential users and the holders of traditional knowledge. It is a tangible tool in keeping with the greater emphasis now placed by Parties to the Convention on practical results with a view to developing, by 2020, a post-2020 global biodiversity framework and achieving Target 18, on traditional knowledge, of the current Strategic Plan for Biodiversity 2011-2020.²

I invite all concerned to use and promote the Voluntary Guidelines for Traditional Knowledge, together with other related complementary principles and guidelines, including:

- The **Tkarihwaí:ri Code of Ethical Conduct** to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation of Biological Diversity and the global Plan of Action on the Customary Sustainable Use of Biological Diversity;
- The **Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge** of Indigenous Peoples and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity;
- The Voluntary **Glossary of Key Terms and Concepts** within the context of Article 8(j) and related provisions;³

Please also share with us your experiences in using the Voluntary Guidelines, including any community protocols, model contractual clauses, best practices and practical examples linked to their implementation.

*Cristiana Paşca Palmer, PhD
Executive Secretary*

1 Pronounced “mo-ots koosh-tal”.

2 Target 18 reads: “By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels”.

3 Other relevant principles and guidelines relevant to indigenous peoples, local communities and their traditional knowledge can be found at: <https://www.cbd.int/guidelines/>

Introduction

The Mo' otz Kuxtal⁴ Voluntary Guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge were adopted by the Conference of the Parties to the Convention on Biological Diversity at its thirteenth meeting, in December 2016. These guidelines have been developed pursuant to decision XII/12 D on how tasks 7, 10 and 12 of the multi-year programme of work on the implementation of Article 8(j) and related provisions could best contribute to work under the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

The programme of work on Article 8(j) and related provisions is the main instrument that the Parties to the Convention on Biological Diversity have given themselves to fulfil the commitments in Article 8(j) to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity, to promote their wider application with the approval and involvement of the holders of such knowledge, and to encourage the equitable sharing of the benefits arising from the utilization of traditional knowledge.

The Mo' otz Kuxtal Voluntary Guidelines for Traditional Knowledge will provide Parties and Governments with guidance on the development of mechanisms, legislation, administrative and policy measures or other appropriate initiatives to ensure that potential users of knowledge, innovations and practices that are held by indigenous peoples and local communities obtain the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of these indigenous peoples and local communities, in accordance with national legislation, and that these indigenous peoples and local communities obtain a fair and equitable share of benefits arising from the use and application of such traditional knowledge. The Voluntary Guidelines will also provide guidance on the reporting and prevention of unlawful appropriation of traditional knowledge relevant for the conservation and sustainable use of biological diversity.

4 Pronounced “mo-ots koosh-tal”, meaning “roots of life” in the Maya language.

Parties and other Governments are invited to apply the Mo'otz Kuxtal Voluntary Guidelines in a manner that is consistent with the national law of the country where the traditional knowledge is being accessed and to give due importance to the customary laws, community protocols and practices of indigenous peoples and local communities. While these guidelines do not apply to traditional knowledge associated with genetic resources under the Nagoya Protocol, they may be used as an input, where appropriate, for the development of specific instruments under the Protocol.

The application of the Mo'otz Kuxtal Voluntary Guidelines has the potential to contribute significantly to the achievement of the objectives of the Convention on Biological Diversity with respect to traditional knowledge, as set out in its Article 8(j) and related provisions, and to the implementation of the Nagoya Protocol.

Mo' otz Kuxtal⁵

Voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of indigenous peoples and local communities⁶ for accessing their knowledge, innovations and practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge

I. PURPOSE AND APPROACH

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

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

⁵ Meaning “roots of life” in the Maya language.

⁶ The use and interpretation of the term “indigenous peoples and local communities” in these Guidelines should refer to decision XII/12 F, paragraph 2 (a), (b) and (c).

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

3. Nothing in these guidelines should be construed as changing the rights or obligations of Parties under the Convention.
4. The guidelines should be applied in a manner that is consistent with the national law of the country where the traditional knowledge is being accessed and give due importance to the customary laws, community protocols and practices of indigenous peoples and local communities.
5. These guidelines do not apply to traditional knowledge associated with genetic resources under the Nagoya Protocol.

II. GENERAL PRINCIPLES

A. *Access to traditional knowledge*

6. Access to traditional knowledge of indigenous peoples and local communities should be subject to “prior and informed consent”, “free, prior and informed consent” or “approval and involvement” depending on national circumstances, of the traditional holders of such knowledge.

7. In the context of “prior and informed consent” or “free, prior and informed consent” or “approval and involvement”:

(a) *Free* implies that indigenous peoples and local communities are not pressured, intimidated, manipulated or unduly influenced and that their consent is given, without coercion;

(b) *Prior* implies seeking consent or approval sufficiently in advance of any authorization to access traditional knowledge respecting the customary decision-making processes in accordance with national legislation and time requirements of indigenous peoples and local communities;

(c) *Informed* implies that information is provided that covers relevant aspects, such as: the intended purpose of the access; its duration and scope; a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks; personnel likely to be involved in the execution of the access; procedures the access may entail and benefit-sharing arrangements;

(d) *Consent or approval* is the agreement of the indigenous peoples and local communities who are holders of traditional knowledge or the competent authorities of those indigenous peoples and local communities, as appropriate, to grant access to their traditional knowledge to a potential user and includes the right not to grant consent or approval;

(e) *Involvement* refers to the full and effective participation of indigenous peoples and local communities, in decision-making processes related to access to their traditional knowledge. Consultation and full and effective participation of indigenous peoples and local communities are crucial components of a consent or approval process;

8. “Prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, should be implemented within a context of full respect for indigenous peoples and local communities. Respect for indigenous peoples and local communities means a continual process of building mutually beneficial, ongoing arrangements between users and holders of traditional knowledge of indigenous peoples and local communities, in order to build trust, good relations, mutual understanding, intercultural spaces, knowledge exchanges, create new knowledge and reconciliation and includes the full and effective participation of indigenous peoples and local communities, taking into account national legislation and customary laws, community protocols and practices of indigenous peoples and local communities and should underpin and be an integral part of developing a relationship between users and providers of traditional knowledge.

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

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

11. Granting “prior informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, to users of traditional knowledge, unless otherwise mutually agreed, merely allows temporary use of such traditional knowledge for the purpose for which it was granted.

B. Fair and equitable sharing of benefits

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

13. Benefit-sharing could include a way of recognizing and strengthening the contribution of indigenous peoples and local communities to the conservation and sustainable use of biological diversity, including by supporting the intergenerational transmission of traditional knowledge.

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

C. Reporting and preventing unlawful appropriation

15. Tools for preventing and reporting on unlawful appropriation and use of traditional knowledge should be established.

16. Where tools and measures are not in place, Parties should take appropriate actions so that traditional knowledge is accessed in accordance with the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of the holders of that traditional knowledge, to ensure that mutually agreed terms have been established.

III. PROCEDURAL CONSIDERATIONS FOR “PRIOR AND INFORMED CONSENT” OR “FREE, PRIOR AND INFORMED CONSENT” OR “APPROVAL AND INVOLVEMENT”, DEPENDING ON NATIONAL CIRCUMSTANCES, AND MUTUALLY AGREED TERMS FOR BENEFIT-SHARING

A. Relevant authorities and other elements

17. Consent or approval and the establishment of mutually agreed terms for fair and equitable sharing of benefits may be required at different levels, depending on national circumstances and the diverse internal organization of various indigenous peoples and local communities, and may include:

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

B. Respect for community protocols and customary law

18. Community protocols and customary law of indigenous peoples and local communities can play a role in processes for access to traditional knowledge and the fair and equitable sharing of benefits arising from the use of such knowledge. They can contribute to legal certainty, transparency and predictability concerning processes for obtaining “prior and informed consent” or “free, prior and informed

consent” or “approval and involvement”, of indigenous peoples and local communities and for establishing mutually agreed terms for benefit-sharing, in accordance with national legislation.

19. *Community protocols* is a term that covers a broad array of expressions, articulations, rules and practices generated by communities to set out how they expect other stakeholders to engage with them. They may reference customary as well as national or international laws to affirm their rights to be approached according to a certain set of standards. Articulating information, relevant factors, and details of customary laws and traditional authorities helps other stakeholders to better understand the community’s values and customary laws. Community protocols provide communities an opportunity to focus on their development aspirations vis-a-vis their rights and to articulate for themselves and for users their understanding of their bio-cultural heritage and therefore on what basis they will engage with a variety of stakeholders. By considering the interconnections of their land rights, current socio-economic situation, environmental concerns, customary laws and traditional knowledge, communities are better placed to determine for themselves how to negotiate with a variety of actors.⁷

20. Community protocols may contain but are not limited to information about:

- (a) Community identity;
- (b) Community history;
- (c) Community territoriality;
- (d) The use of culturally important practices relevant to the conservation and sustainable use of biological diversity; social organization and decision-making processes (which are often collective decision-making procedures at the community level).

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

- (a) Conserve biodiversity;
- (b) Sustainably use plants and animal biological resources;
- (c) Manage and benefit from local biodiversity;
- (d) Use, protect and benefit from traditional knowledge;

⁷ Refer to <http://www.unep.org/communityprotocols/protocol.asp> and http://www.unep.org/delc/Portals/119/publications/Community_Protocols_Guide_Policymakers.pdf

(e) Provide guidance on how to obtain “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, to access traditional knowledge;

(f) Ensure environmental and other laws are implemented according to customary laws, in accordance with national legislation;

(g) Address sustainable development on their lands.

IV CONSIDERATIONS RELATED TO ACCESS TO TRADITIONAL KNOWLEDGE AND FAIR AND EQUITABLE SHARING OF BENEFITS

22. Benefits may include monetary and non-monetary benefits, fairly and equitably shared with the indigenous peoples and local communities’ holders of the knowledge.

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

(a) Partnership and cooperation should guide the process of establishing mutually agreed terms to ensure the fair and equitable sharing of the benefits arising from the utilization of traditional knowledge with and among the holders of that traditional knowledge;

(b) Community protocols, which may provide guidance from the community perspective on the fair and equitable sharing of benefits;

(c) The benefits obtained from the use of traditional knowledge, innovations and practices, including results of research, should, as far as possible, be shared where appropriate and in line with mutually agreed terms with the relevant holders of the traditional knowledge in understandable and culturally appropriate formats, with a view to building enduring relationships, promoting intercultural exchanges, knowledge and technology transfer, synergies, complementarity and respect;

(d) In developing mutually agreed terms, Parties, other Governments, and others seeking access to traditional knowledge should ensure that the holders of that traditional knowledge can negotiate on a fair and equitable basis and are fully informed about any proposals including potential opportunities and challenges in order to make informed decisions;

(e) The “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances and mutually agreed terms, should constitute a legal contract between the indigenous peoples and local communities and the corresponding parties to the contract;

(f) In developing mutually agreed terms, those seeking to use traditional knowledge could undertake to renegotiate if the use varies significantly from the original purpose, including on possible commercialization of the traditional knowledge within national legislation and/or contract requirements;

(g) The “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, and mutually agreed terms, should contain agreed mechanisms for grievance and redress to address non-compliance with its provisions.

Possible mechanisms for benefit-sharing

24. Mechanisms for benefit-sharing may vary depending upon the type of benefits, the specific conditions and national legislation in the country where the traditional knowledge was originally accessed, the content of the mutually agreed terms and the stakeholders involved. The benefit-sharing mechanism should be flexible as it should be determined by the partners involved in benefit-sharing and will vary on a case-by-case basis.

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

V. REPORTING AND PREVENTING UNLAWFUL APPROPRIATION

26. These guidelines are voluntary by their nature; however, Parties and other Governments may wish to consider incentives or other ways to promote the use of the guidelines in the development of mechanisms, legislation or other appropriate initiatives to encourage private and public institutions, interested in using traditional knowledge to obtain the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of the indigenous peoples and local communities that hold the traditional knowledge and establish mutually agreed terms for benefit-sharing for accessing or using their traditional knowledge.

27. Compliance measures that also support the obtaining of “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of indigenous peoples and local communities for access to the traditional knowledge that they hold and benefit-sharing with indigenous peoples and local communities for use of the traditional knowledge that they hold could include:

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

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

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

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

28. Parties and other Governments may wish to consider:

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

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

(c) Encouraging indigenous peoples and local communities to resolve differences internally according to customary law or alternate dispute resolution processes in cases of disputes concerning access to and use of their traditional knowledge. Additionally, the competent national authority could play a facilitating role in alternative dispute resolution.

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