

Draft for peer review

FINALISING TASK 7, 10 AND 12

Note by the Executive Secretary

INTRODUCTION

1. In its decision V/16, the Conference of the Parties to the Convention on Biological Diversity adopted the programme of work on Article 8(j) and related provisions. Further to this matter, in its decision X/43, the Conference of the Parties revised the programme of work and decided to maintain a number of ongoing tasks, including tasks 7, 10 and 12.

2. In order to accomplish these tasks, the Conference of the Parties in decision XII/12 D, paragraph 1, divided the work into five sub-tasks and two phases of work and agreed on an integrated approach to their consideration.

These subtasks include, in Phase I 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 (Task 7);*¹

(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 (Task 7); and*

(iii) *Develop standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge (Task 10).*²

(iv) *Develop a glossary of relevant key terms and concepts,*

They also include in Phase II, a single task on:

(i) *Advancement of the identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices are used;*

3. The adoption of the MO'OTZ KUXTAL³ Voluntary guidelines for traditional knowledge, by decision XIII/18, addresses the sub-tasks (i), (ii) and (iii) of phase I in an integrated way through a single set of guidelines.

4. The fourth sub-task under Phase I (iv), concerning a glossary, is being taken up by the tenth meeting of the Working Group under agenda item 4 (see CBD/WG8J/10/3, *Glossary of key terms and concepts to be used within the context of Article 8(j) and related provisions.*)

1 Sub-task (i) slightly revises task 7(ii) of the original programme of work by changing “prior informed approval” to “prior informed consent or approval and involvement”, in line with the Nagoya Protocol.

2 Sub-task (iii) slightly revises task 10 of the original programme of work by only referring to “unlawful appropriation of traditional knowledge” rather than “unlawful appropriation of traditional knowledge and related genetic resources” as the issue of genetic resources is now addressed by the Nagoya Protocol.

3 Meaning “roots of life” in the Maya language

1 5 The remaining sub-task (of Phase 2), on “*advancement of the identification of the obligations of*
2 *countries of origin and countries of use*”, is further considered in this document in Section II.

3 6. This document also responds, to paragraphs 7 and 8 of Decision XIII/18 of the thirteenth meeting
4 of the Conference of the Parties which invited Parties, other Governments, relevant organizations and
5 indigenous peoples and local communities to submit their views concerning (a) measures to address
6 publicly available traditional knowledge, and (b) best practices to implement “prior and informed
7 consent”, “free, prior and informed consent” or “approval and involvement”, and requested the Executive
8 Secretary, to compile the information for the consideration of the Working Group in order to contribute to
9 the finalization of Tasks 7 and 12 of the revised multi-year programme of work on Article 8(j) and related
10 provisions, as appropriate;

11 7. Accordingly, the Executive Secretary in notification SCBD/SPS/DC/VN/JS/DM/86220 (2017-
12 006) dated 27 January 2017, invited other Governments, relevant organizations and indigenous peoples
13 and local communities (IPLCs) to provide information on three matters,

- 14 (a) Views concerning measures to address publicly available traditional knowledge;
- 15 (b) Views concerning best practices to implement “prior and informed consent”,
16 “free, prior and informed consent” or “approval and involvement”⁴
- 17 (c) Views on the advancement of the identification of the obligations of countries of
18 origin, as well as Parties and Governments where such knowledge, innovations
19 and practices are used.

20 8. Submissions were received from Australia,⁵ Bolivia, Brazil, European Union on behalf of its
21 Member States, Finland, Mexico, Peru, Sweden, Venezuela, as well as the following indigenous
22 organizations: Assembly of First Nations, COICA, Indigenous Women’s Biodiversity Network for Latin
23 American and Caribbean region, and the following NGOs: Conservation International, Forest Peoples
24 Programme, and the Natural Resource Stewardship Circle (NRSC)⁶. They are compiled and made
25 available in the language of submission in CBD/WG/8/J/10/INF/3, and analysed in the next section of the
26 document.

27 9. In considering the finalisation of work on tasks 7, 10 and 12, the Working Group may take into
28 account the related agendas items 3 and 7, regarding the *draft guidelines for the repatriation of traditional*
29 *knowledge* which deals with an overlapping issue of “publicly available traditional knowledge”; and *the*
30 *integration of Article 8(j) and related provisions in the work of the Convention and its Protocols*, which
31 addresses future work, to ensure complementarity and harmony in recommendations arising from the
32 Working Group at its tenth meeting, including any proposals for new work that may be considered within
33 the broader framework of post 2020 arrangements for the Convention.

34 I. AN ANALYSIS OF THE INFORMATION RECEIVED

35 10. The following section provides an analysis of the information received in response to the three
36 aforementioned issues.

37 *Measures to Address Publicly Available Traditional Knowledge*

38 11. It is important to note that views concerning publicly available traditional knowledge (TK) were
39 also received in the context of the development of the guidelines for the repatriation of traditional
40 knowledge. These should be taken into account to ensure complementarity and coherence in the draft

4 Decision XIII/18, paras. 7-8.

5 and the Great Barrier Reef Marine Park Authority

6 Refer to: <http://nrsc.fr/> which is a NGO and secretariat supporting the Cosmetics and Beauty Industry

1 recommendations arising for the Working Group at its tenth meeting, concerning “publically available
2 traditional knowledge”.

3 12. Some submissions received advocate the development of community protocols as mechanisms
4 that promote transparency in activities related to the access and use of traditional knowledge. Community
5 protocols can assist the competent authorities in the administrative and judicial processes for acts
6 affecting the rights of indigenous peoples to their traditional knowledge and assist in identifying and
7 reporting on matters affecting the rights of indigenous peoples to their traditional knowledge, and increase
8 transparency with respect to the public and/or private activities.⁷ However it was not clear in the
9 submission received how community protocols could address traditional knowledge that is publically
10 available.

11 13. Other submissions promote proactive measures to stop traditional knowledge from entering the
12 public domain, such as national laws against misappropriation or misuse⁸ of traditional knowledge that
13 require scientific publications, databases and cultural inventories to recognise traditional knowledge and
14 the original holders. One Party⁹ promoted a national law that guarantees indigenous peoples’ and local
15 communities’ the right to have indicated the origin of access to associated traditional knowledge in all
16 publications, uses, developments and other disseminations. The same Party also reported a national law in
17 place that requires ongoing commercial use of publically available traditional knowledge to be taxed on
18 gross sales and resulting funds deposited into a monetary fund created for the development of Indigenous
19 Peoples.¹⁰ A number of Parties indicated they supported the Mo’otz Kuxtal Voluntary Guidelines for
20 Traditional Knowledge as guidance on proactive measures for traditional knowledge however these
21 guidelines to not overtly address traditional knowledge in the public domain *per se*.

22 14. However, some submissions noted that there is lots of publicly available traditional knowledge
23 and that it would be impossible to restrict or regulate its use.¹¹

24 15. Indigenous peoples and local communities emphasized in their submissions that traditional
25 knowledge that is publicly available is also incorrectly referred to, as being in the public domain. From a
26 legal perspective, “traditional knowledge in the public domain” is traditional knowledge possibly written
27 down and published, after a prescribed period of legal protection (such as copyright) that becomes free
28 availability. Therefore not all traditional knowledge that is publically available may be in the public
29 domain. This type knowledge and information has originated in the cultures of indigenous peoples and
30 local communities, and are deposited in bibliographic collections, databases or data collections *ex situ*
31 centres of ethnobotany by researchers and may have been obtained with or without the free, prior and
32 informed consent of those IPLCs. Even in such cases where traditional knowledge has been written down
33 and attributed to researchers, though such mechanisms as copyright laws, IPLCs as the origin source,
34 believe that they maintain rights over their TK as the original holders of that knowledge. These nuances
35 of legal and ethical ownership are important considerations in determining how to address traditional
36 knowledge that is publically available.

37 16. In their submissions, IPLCs maintain that publically available TK should recognize the original
38 holders of that knowledge and their right to a fair and equitable share of benefits through mutually agreed
39 terms for its ongoing use. They also recommend that States should establish appropriate mechanisms to
40 enforce compliance with and safeguard the right of indigenous peoples to benefit from their TK
41 regardless of whether it is publically available or not.

7 Bolivia

8 Note that the Mo’otz Kuxtal Voluntary Guidelines for Traditional Knowledge uses the term “unauthorised access” as opposed
the misappropriation or misuse.

9 Peru

10 Peru

11 Mexico, EU, USA

1 17. In relation to traditional knowledge that is publicly available, IPLCs suggest that there are at least
2 two options that could be considered. They are:

3 (i) For indigenous peoples and local communities, in their own communities to establish
4 repositories and register for IPLCs traditional knowledge; and/or

5 (ii) Competent public bodies establish specialized repositories on such subjects as
6 ethnobotany, anthropology and natural sciences in general, to collect traditional
7 knowledge which may have been lost or appropriated from IPLCs. In these instances,
8 these bodies could carry out repatriation to return of information to the relevant
9 communities, so that they continue to be beneficiaries of their own traditional knowledge.

10 18. However, although these actions could address traditional knowledge more generally, and could
11 be considered proactive measures, it is not clear in these submissions how these actions would address
12 publically available traditional knowledge?

13 19. Some submissions received from Parties suggested that there should be special considerations for
14 publically available traditional knowledge and an encouragement for the equitable sharing of benefits
15 arising from ongoing use. IPLCs also argue for the need for special measures to address publically
16 available traditional knowledge. However, other submissions emphasised that, in the context of
17 repatriation of publically available traditional knowledge, repatriation of such knowledge should not
18 impede the ongoing use of such publically available information in the Party, institution or entity that
19 decides to repatriate it.

20 20. Some Parties propose that compensation should be considered for ongoing use, including an
21 encouragement for ongoing commercial users to enter into mutually agreed terms for the equitable
22 sharing on benefits and/or the return of copyright to the original knowledge holders.¹² They also suggest
23 the development of mechanisms for equitable sharing of benefits from traditional knowledge that was
24 collected and used for a specific or ongoing period.¹³

25 21. Those Parties who advocate in their submissions for special measures for publically available
26 traditional knowledge also argue in favor of proactive national measures to protect traditional knowledge
27 (and the knowledge holders), in order to restrict traditional knowledge from entering the public domain in
28 the first place. Other submissions note the difficulty of restricting or regulating traditional knowledge
29 already in the public domain.¹⁴

30 22. While there remains a range of views of this issue, the views are not necessarily incompatible.
31 For instance, some views suggest that Parties and other governments should be proactive in putting
32 measures into place to address the unlawful appropriation of traditional knowledge. Additionally, some
33 Parties have advocated for no impediments for the ongoing use of publically available traditional
34 knowledge, while others consider there should be benefit sharing, with the original knowledge holders
35 where there is ongoing use. Entering into benefit sharing arrangements with the original knowledge
36 holders regarding ongoing use, including of publically available traditional knowledge, need not impede
37 its continued use in the Party, institution or entity that continues to use such knowledge.

38 23. The Conference of the Parties has dealt with these matters in decision XIII/18, which welcomes
39 and adopts the Mo'otz kuxtal voluntary guidelines for traditional knowledge for the development of
40 mechanisms, legislation or other appropriate initiatives to ensure the "prior and informed consent", "free,
41 prior and informed consent" or "approval and involvement", depending on national circumstances, of
42 indigenous peoples and local communities¹ for accessing their knowledge, innovations and practices, for

12 Bolivia, Finland (return of copyright)

13 Peru

14 Mexico

1 fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices
2 relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing
3 unlawful appropriation of traditional knowledge. These guidelines provide advice concerning the
4 development of national measures, which Parties and other Governments may put into place to address
5 the unlawful appropriation of traditional knowledge, and also provide advice on benefit sharing. As these
6 matters may be addressed through the Mo'otz kuxtal voluntary guidelines for traditional knowledge, no
7 further work is recommended on these matters.

8 ***Best Practices to implement “Prior and Informed Consent”, “Free, Prior and Informed Consent” Or***
9 ***“Approval and Involvement”***

10 24. Parties and other contributors provided various contexts to the three terms “Prior and Informed
11 Consent”, “Free, Prior and Informed Consent” Or “Approval and Involvement” and used them
12 interchangeably depending on national circumstances. Some Parties have indicated they are pursuing
13 registers as a mechanism for the protection of traditional knowledge with the proviso that traditional
14 knowledge provided is with the free, prior and informed consent of the original knowledge holders.¹⁵

15 25. Some Parties also welcomed the adoption of the **Mo'otz Kuxtal**¹⁶ **Voluntary Guidelines for**
16 **Traditional Knowledge** in decision XIII/18, as useful guidance for developing mechanisms for prior
17 informed consent.¹⁷ Some Parties also noted that prior informed consent is required under the Nagoya
18 Protocol for access to traditional knowledge associated with genetic resources and in instances where
19 indigenous peoples and local communities have the established right to grant access to genetic
20 resources.¹⁸

21 26. One Party¹⁹ also explained in their submission that prior informed consent for access to traditional
22 knowledge (associated with genetic resources) from IPLC knowledge holders in their national context,
23 could be facilitated through such mechanisms as community protocols, a signed prior and informed
24 consent form or an audio-visual record of prior informed consent, as decided by the relevant IPLC
25 knowledge holders. The same Party also noted that technical advice on prior informed consent processes
26 of IPLCs within the national context can be obtained from the competent national authority (for genetic
27 resources and associated traditional knowledge).

28 27. Some submissions reflected on the integrity of the prior informed consent process and one Party
29 in particular, emphasized the need for indigenous peoples and local communities not to be coerced,
30 pressured or intimidated, in the choices they make regarding access to their traditional knowledge. This
31 Party also welcomed the adoption of the Mo'otz Kuxtal Voluntary Guidelines for Traditional Knowledge
32 as useful advice in developing mechanisms, legislation or other appropriate mechanisms to ensure free,
33 prior and informed consent and note legislative arrangements, are in place, that place an obligation on the
34 national government to negotiate with IPLCs on issues related to their rights to traditional knowledge.
35 This Party also emphasises that the adoption of the Nagoya Protocol by the European Union has also
36 placed obligations on Member States to ensure users of genetic resources and associated traditional
37 knowledge conform to standards such as prior informed consent.²⁰

38 28. Related to the requirement for consent for access to traditional knowledge, some Parties indicated
39 they have established proactive legal and policy arrangements for the protection of traditional knowledge,
40 which include such measures as defining specific terms²¹, creating registers, or developing templates to

15 Bolivia

16 Meaning “roots of life” in the Maya language

17 Australia

18 Bolivia, Brazil and Venezuela

19 Bolivia

20 Finland

21 Peru has defined PIC and other terms in the national context.

1 assist communities in developing community protocols, and developing and implementing other forms of
2 public protection for traditional knowledge.²² One Party noted that its policy arrangements (a protocol)
3 for prior and informed consent was based on the country's ratification of the International Labour
4 Organization's Convention 169 on indigenous and tribal peoples.²³

5 29. Submissions from conservation organizations and several NGOs, referred to various guidelines
6 for prior and informed consent processes, which provided detailed advice and are successfully being used
7 in various contexts.²⁴ Some indigenous organizations also provided additional advice on characteristics of
8 prior informed consent processes which could be considered "best practice", including how to approach
9 IPLCs communities and enter into dialogue and the importance of using indigenous languages, as well as
10 ensuring the participation of IPLCs women.²⁵

11 30. Many of the submissions received from Parties indicated that prior informed consent had been
12 incorporated into national laws, relevant to indigenous peoples and local communities, with good affect.²⁶
13 At the same time, IPLCs in their submissions mentioned that unauthorized access continues to occur and
14 that compliance to this principle requires a binding legal framework, especially in instances where the
15 traditional knowledge in question leaves the country of origin.

16 31. In the submissions received under Best Practices to implement "Prior and Informed Consent",
17 "Free, Prior and Informed Consent" Or "Approval and Involvement", many successful examples, as well
18 as guidelines were highlighted however there were no requests for new work regarding this matter, at this
19 time. As the Secretariat has been requested in *Decision XII/12 E*, to produce a technical series publication
20 on possible elements of *sui generis* systems for the protection, preservation and promotion of traditional
21 knowledge, innovations and practices of indigenous and local communities, the Secretariat can complete
22 the publication by including the information and examples received on best practices to implement "prior
23 and informed consent", "free, prior and informed consent" or "approval and involvement" in order that
24 the valuable information received for this document is not lost.

25 ***Advancement of the identification of the obligations of countries of origin, as well as Parties and***
26 ***Governments where such knowledge, innovations and practices are used***²⁷

27 32. The Conference of the Parties, in decision XII/12 D, paragraph 2 (Phase II), decided that Working
28 Group, having finalised the work of tasks 7, 10 and 12, may consider further work on *advancement of the*
29 *identification of the obligations of countries of origin, as well as Parties and Governments where such*
30 *knowledge, innovations and practices are used*.²⁸ Therefore, in light of progress made on priority sub-
31 tasks (i), (ii), (iii), and (iv), referred to in decision XII/12 D, paragraph 2, which resulted in the adoption
32 of the Mo'otzkuxtal Voluntary Guidelines for Traditional Knowledge, the Executive Secretary in
33 notification SCBD/SPS/DC/VN/JS/DM/86220, seized on the opportunity to invite submissions from
34 Parties, other Governments, relevant organisations, indigenous peoples and local communities and
35 relevant stakeholders on this issue. On this particular matter submissions were received from two Parties
36 and two from indigenous organizations.²⁹

37 33. In a submission received from a Party, it was noted that the historic experience of that country is
38 that their biological resources and traditional knowledge had been collected for centuries without

22 Bolivia

23 Mexico and Norway

24 CI, FPP and IWBN – referred to 9 sets of guidelines for PIC.

25 IWBN LAC region

26 Brazil, Finland, Mexico, Peru, Venezuela.

27 decision XII/12 D, paragraph 2

28 Decision XII/12 D, paragraph 2, Phase II, sub-task (i).

29 Brazil, Peru and COICA and IWBN

1 identifying the origin of the resources or the traditional knowledge. In this context, the Party
2 recommended that Parties and Government where traditional knowledge are used make an effort to
3 recognise the original IPLC owners of the traditional knowledge in question, and that Parties and
4 Government in which traditional knowledge originates, take policy or legal measures to ensure the origin
5 of traditional knowledge is clearly stated and that its access is based on prior informed consent.

6 34. Another Party noted that it has laws that establish mechanisms for access and use of traditional
7 knowledge based on prior informed consent, mutually agreed terms and the equitable sharing of benefits
8 and to punish inappropriate access of traditional knowledge.

9 35. The submissions received from indigenous organizations, emphasised that countries should
10 include measures to ensure that users of traditional knowledge state the origin of any traditional
11 knowledge used, and that it has been accessed according to the national law and with free, prior and
12 informed consent of the IPLC knowledge holders. Another indigenous organization also emphasised that
13 obligations in countries of origin should be to care, respect and protect traditional knowledge. To do this,
14 Governments could take policy or legal measures, drawing on the Mo'otzkuxtal Voluntary Guidelines for
15 Traditional Knowledge, and fund projects that support traditional knowledge retention, transmission and
16 use. Governments could also take such measures as establishing data-bases accessible to indigenous
17 peoples and local communities to track the use of traditional knowledge and to ensure access is based on
18 free, prior and informed consent.

19 36. Overall, regarding the *identification of the obligations of countries of origin, as well as Parties*
20 *and Governments where such knowledge, innovations and practices are used*, in the submissions received
21 emphasis is placed on Parties and Governments attributing the traditional knowledge in question to the
22 original IPLC traditional knowledge holders, and ensuring that it is access with their prior and informed
23 consent, regardless of whether the Party or Government is a country of origin or a Party or Government
24 where the TK in question is used. Therefore the use of the Mo'otzkuxtal Voluntary Guidelines by Parties
25 and other Governments, to develop and implement mechanisms, legislation or other appropriate
26 initiatives,³⁰ for Traditional Knowledge would address matters raised under this section. As the issues at
27 hand can be addressed through the use of the Mo'otzkuxtal Voluntary Guidelines for traditional
28 knowledge and there are no suggestions for further work in the submissions received, the Executive
29 Secretary envisages no further work is needed on these matters at this time.

30 **II. DRAFT RECOMMENDATION FOR THE CONSIDERATION OF THE**
31 **WORKING GROUP**

32 37. In light of the views contained in Section I above, the Working Group may conclude that these
33 issues can be addressed through the effective implementation of the Mo'otzkuxtal Voluntary Guidelines
34 for Traditional Knowledge and propose that no further work is required on these matters at this time.

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30 with the effective participation of IPLCs,