

***OVERVIEW OF RELEVANT WORK IN THE CONTEXT OF THE CONVENTION ON
BIOLOGICAL DIVERSITY AND THE NAGOYA PROTOCOL CONCERNING PRIOR
INFORMED CONSENT OR APPROVAL AND INVOLVEMENT, EQUITABLE SHARING OF
BENEFITS AND UNAUTHORIZED ACCESS***

I. OVERVIEW OF RELEVANT WORK IN RELATED INTERNATIONAL PROCESSES

The concepts of prior informed consent or approval and involvement, and benefit-sharing are not new to the international system. In recent years, many international agencies, programmes and development banks have been working to address these issues. Many United Nations agencies and programmes have adopted internal guidance which they apply in practical ways, including to project work with indigenous peoples and local communities. Relevant work in this area includes the following:

- (a) The United Nations Permanent Forum on Indigenous Issues;
- (b) The International Labour Organization and Convention 169 (Convention concerning Indigenous and Tribal Peoples in Independent Countries);
- (c) Reducing Emissions from Deforestation and Forest Degradation Programme (UN-REDD);
- (d) The European Bank for Reconstruction and Development (EBRD) and its “Indigenous Peoples Guidance Note”;
- (e) The United Nations Human Rights Council;
- (f) The Food and Agriculture Organization of the United Nations and its “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security”;
- (g) The United Nations Development Programme and its guidance on “Social and Environmental Standards”;
- (h) The United Nations Environment Programme and its “Toolkit to Support Conservation by Indigenous Peoples and Local Communities: Building Capacity and Sharing Knowledge for Indigenous Peoples’ and Community Conserved Territories and Areas (ICCAs)”;
- (i) The International Treaty on Plant Genetic Resources for Food and Agriculture;
- (j) The United Nations Declaration on the Rights of Indigenous Peoples;
- (k) The World Intellectual Property Organization’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC).

**II. OVERVIEW OF RELEVANT WORK ON PRIOR INFORMED CONSENT
UNDER THE CONVENTION ON BIOLOGICAL DIVERSITY**

1. This document summarizes a number of different areas of work under the Convention and the Nagoya Protocol related to the issue of prior informed consent and approval and involvement, equitable sharing of benefits, mutually agreed terms and access to and use of traditional knowledge.

2. The programme of work on Article 8(j) and related provisions, which was adopted by the Conference of the Parties in its decision V/16, states under general principle 5, that access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices.

3. In the context of Article 8(j), the Conference of the Parties has adopted various standards, principles and guidelines that address aspects of prior informed consent or approval and involvement,

the equitable sharing of benefits, and unauthorized access and invited Parties, Governments and others to make use of them:

(a) *The Tkarihwaïé:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities*¹ provides that any activities/interactions related to traditional knowledge associated with the conservation and sustainable use of biological diversity, occurring on or likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities and impacting upon specific groups, should be carried out with the prior informed consent and/or approval and involvement of indigenous and local communities. Additionally, the Tkarihwaïé:ri Code of Ethical Conduct provides guidance to Parties, Governments, researchers and others interacting with indigenous and local community on procedures and principles to consider when working with indigenous and local communities. The issue of fair and equitable sharing of benefits is taken up as an ethical principle in section 2 (para. 14): “Indigenous and local communities ought to receive fair and equitable benefits for their contribution to activities/interactions related to biodiversity and associated traditional knowledge proposed to take place on, or which are likely to impact on, sacred sites and lands and waters traditionally occupied or used by indigenous and local communities. Benefit-sharing should be regarded as a way of strengthening indigenous and local communities and promoting the objectives of the Convention on Biological Diversity and ought to be equitable within and among relevant groups, taking into account relevant community level procedures.” The Tkarihwaïé:ri Code of Ethical Conduct also contains several principles that, if applied, can prevent traditional knowledge from being accessed without authorization. This includes the principle that “[t]he right of indigenous and local communities to safeguard, collectively or otherwise, their cultural and intellectual heritage, tangible and intangible, should be respected” (para. 13).

(b) *Akwé:Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*² provide a collaborative framework to support the full involvement of indigenous and local communities in the assessment of cultural, environmental and social impact of proposed developments on sacred sites and on lands and waters they have traditionally occupied. The Guidelines provide for prior informed consent concerning developments proposed on traditional territories. The Akwé:Kon Guidelines, in section C on social impact assessments, provide that “Proposed developments should be evaluated in relation to tangible benefits to such communities, such as non-hazardous job creation, viable revenue from the levying of appropriate fees from beneficiaries of such developments, access to markets and diversification of income opportunities. Evaluation of changes to traditional economies could involve economic valuation of negative social impacts” (para. 40). In addition, the guidelines establish that: “proposed developments on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities should ensure that tangible benefits accrue to such communities, such as payment for environmental services, job creation within safe and hazard-free working environments, viable revenue from the levying of appropriate fees, access to markets and diversification of income-generating (economic) opportunities for small and medium-sized businesses. In accordance with national legislation or relevant national regulations, indigenous and local communities should be involved in the financial auditing processes of the developments in which they participate to ensure that the resources invested are used effectively” (para. 46).

(c) *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization*

In 2004, the Conference of the Parties agreed to launch negotiations on an international regime on access and benefit-sharing.³ As part of these negotiations, a Meeting of the Group of Technical and

¹ See decision X/42.

² See decision VII/16 F.

³ See decision VII/19.

Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing was convened in 2009. The Group considered the issue of prior informed consent for access to traditional knowledge of indigenous and local communities, as well as the equitable sharing of benefits. Relevant elements of their report are considered in section III below.⁴

The negotiations concluded in 2010 with the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.⁵ The Nagoya Protocol entered into force on 12 October 2014. In addition to addressing genetic resources, the Protocol applies to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge (Article 3). It contains a number of provisions that may also be relevant to traditional knowledge not associated with genetic resources.

The Nagoya Protocol, in its preamble, acknowledges the linkages between traditional knowledge and benefit-sharing (recalling the relevance of Article 8(j) of the Convention as it relates to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising from the utilization of such knowledge).

Paragraph 2 of Article 5 on fair and equitable benefit-sharing establishes that “Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.”

Paragraph 5 of the same article establishes that “Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.”

Paragraph 4 of same article establishes that “Benefits may include monetary and non-monetary benefits, including but not limited to those listed in the Annex”.

Article 7 of the Protocol provides that, “[i]n accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.”

Article 12, paragraph 3 on traditional knowledge associated with genetic resources establishes that “Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of:

- (a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge;
- (b) Minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources;
- (c) Model contractual clauses for benefit-sharing arising from the utilization of traditional knowledge associated with genetic resources.”

⁴The report is available as document UNEP/CBD/WG-ABS/8/2 at <https://www.cbd.int/doc/?meeting=ABSWG-08>.

⁵ See decision X/2.

In the Article 13, paragraph 1, on National Focal Points and Competent National Authorities, the Nagoya Protocol requires that “Each Party shall designate a national focal point on access and benefit-sharing. The national focal point shall make information available as follows: ... (b) For applicants seeking access to traditional knowledge associated with genetic resources, where possible, information on procedures for obtaining prior informed consent or approval and involvement, as appropriate, of indigenous and local communities and establishing mutually agreed terms including benefit-sharing; and (c) Information on competent national authorities, relevant indigenous and local communities and relevant stakeholders.”

Article 14, paragraph 3 provides that information on relevant competent authorities of indigenous and local communities may also be included in the Access and Benefit-sharing Clearing-House.

Article 10 of the Nagoya Protocol, on a global multilateral benefit-sharing mechanism, states that “Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally.” Additionally, Article 11 of the Nagoya Protocol, in paragraph 2, provides that, “where the same traditional knowledge associated with genetic resources is shared by one or more indigenous and local communities in several Parties, those Parties shall endeavour to cooperate, as appropriate, with the involvement of the indigenous and local communities concerned...”.

Other relevant provisions include Article 16 on compliance with domestic legislation or regulatory requirements on access and benefit-sharing for traditional knowledge associated with genetic resources and Article 18 on compliance with mutually agreed terms. Furthermore, the procedures and mechanisms on compliance adopted by the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol also contain relevant elements. These will be explored further in section III below.

Additionally, the Nagoya Protocol⁶ is a legally binding protocol that establishes that access to traditional knowledge associated with genetic resources is based on prior informed consent or approval and involvement. Additionally, the Nagoya Protocol in article 6, requires that Parties take measures with the aim of ensuring that prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to do so. Of particular note, the COP/MOP NP (Governing body to the Nagoya Protocol) its first meeting, agreed, amongst other things, to include two indigenous representatives of the compliance committee to the Nagoya Protocol.

(d) *Mo’otz kuxtal*⁷ *Voluntary Guidelines for Traditional Knowledge*

Regarding the traditional knowledge, innovations and practices of indigenous peoples and local communities, the Conference of the Parties at its thirteenth meeting has adopted: the MO’OTZ KUXTAL⁸ VOLUNTARY GUIDELINES.⁹ These guidelines are intended to guide Parties and other governments, in the development of mechanisms, legislation or other appropriate initiatives

⁶ Refer to : <https://www.cbd.int/abs/>

⁷ Which means “roots of life” in the Maya indigenous language

⁸ Which means “roots of life” in the Maya indigenous language

⁹ 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 communities⁹ 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

to ensure **the prior and informed consent**¹⁰ 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.

The guidelines, if effectively implemented at the national level, will assist in achieving Aichi Target 18 of the CBD's Strategic Plan for Biological Diversity (2011-2020), which provides that:

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.

As such the MO'OTZ KUXTAL¹¹ VOLUNTARY GUIDELINES recognise free, prior and informed consent are a substantial contribution to protecting traditional knowledge as envisaged under Article 31 of the UN DRIPs, which is:

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

Conclusion

In the original text of the Convention adopted in 1992, Article 8(j) refers access to traditional knowledge subject to **approval and involvement of the holders of traditional knowledge**. Over the life of the Convention, this requirement has been consistently interpreted in decisions of the Governing Body (the Conference of the Parties) as prior informed consent:

(j) Subject to its national legislation, 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 and promote their wider application with the **approval and involvement** of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

With the adoption of the MO'OTZ KUXTAL¹² VOLUNTARY GUIDELINES, *the requirement embedded in the Convention's in Article 8(j) for approval and involvement has been interpreted as "prior and informed consent", "free, prior and informed consent" or "approval and involvement", depending on national circumstances. The Parties has clarified that these expressions of consent do not imply different standards but a single standard. The use of different terms reflect national legal and policy diversity regarding the use and specific understandings of terms regarding "consent" in the national context.*

¹⁰ This term should be understood as "prior and informed consent", "free, prior and informed consent" or "approval and involvement", depending on national circumstances (Mo'otz Kuxtal Voluntary Guidelines)

¹¹ Which means "roots of life" in the Maya indigenous language

¹² Which means "roots of life" in the Maya indigenous language