



**CONVENTION ON  
BIOLOGICAL  
DIVERSITY**

Distr.  
GENERAL

UNEP/CBD/WG8J/5/INF/9  
31 July 2007

ORIGINAL: ENGLISH

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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

Fifth meeting

Montreal, 15-19 October 2007

**REPORT ON RESEARCH ON AND IMPLEMENTATION OF MECHANISMS AND  
MEASURES TO ADDRESS THE UNDERLYING CAUSES OF THE DECLINE OF  
TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES**

*Note by the Executive Secretary*

1. The Executive Secretary is circulating herewith, for the consideration of participants in the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions, the above-mentioned report, which was prepared by a consultant in response to decision VIII/5 B, II, paragraph 12.
2. The report is being circulated in the form and language in which it was received by the Secretariat.

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Consultant's Report

Prepared for the Secretariat of the Convention on Biological Diversity

by

Ms. Neva Collings

Masters of Laws, Sydney University, 2005

Diploma of Legal Professional Training, 1996

Bachelor of Laws - University of Sydney, 1995

Bachelor of Economics (Government) - University of Sydney, 1993.

Research on and implementation of mechanisms and measures to address the underlying causes of the decline of traditional knowledge, innovations and practices

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## CONTEXT

At its eighth meeting, in decision VIII/5 B, the Conference of the Parties expressed appreciation for the completion of phase one of the composite report on the status and trends regarding the knowledge, innovations and practices of indigenous and local communities relevant to the conservation and sustainable use of biodiversity. The report, which had been prepared pursuant to decision VI/10, focussed on the state of retention of traditional biodiversity-related knowledge. The Conference of the Parties also expressed its appreciation for the progress made in the work on the second phase of the composite report, which focuses on sections 4 and 5, the identification of national processes that may threaten the maintenance, preservation and application of traditional knowledge and the identification of processes at the local level that may threaten the maintenance, preservation and application of traditional knowledge<sup>1</sup> and requested the Executive Secretary to further develop phase two of the composite report taking into account comments made during the fourth meeting of the Working Group on Article 8(j).

The present report was commissioned by the Executive Secretary in response to the Conference of Parties' request for the further development of section D of the plan of action (decision VIII/5, B, section I). Section D of the plan of action, given in the annex to decision VII/16, calls for "research on and implementation of mechanisms and measures to address the underlying causes of the decline of traditional knowledge, innovations and practices". In decision VIII/5, B, section I, the Conference of the Parties renewed the mandate of the advisory group (established by decisions VI/10, annex I, paragraph 28(b), and VII/16 E, paragraph 4(d)) to continue to provide advice "on the further development of phase two of the composite report and, in particular, element D".

In light of the above, the main task of the consultant is to draft a report examining: "Research on mechanisms and measures (including the implementation of measures and mechanisms) to address the underlying causes of the decline of traditional knowledge, innovations and practices".

## INTRODUCTION

Article 8(j) requires that each contracting Party, shall, as far as possible, and where appropriate: 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;

Article 8 is also of particular relevance to Article 10 (c) as customary use of biological resources in accordance with traditional cultural practices can only exist within the context of in-situ conservation. Hence Article 10C, should more accurately be interpreted as a related provision and for full clarity be interpreted together.

Article 10 (c) provides for the sustainable use of components of biological diversity. In accordance with paragraph (c) of Article 10, Contracting Parties shall, as far as possible and as appropriate, protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

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<sup>1</sup> The obstacles identified in the second phase of the composite report are attached at a list in annex I of this report and also assist in providing a structure for this report.

Indigenous and local communities' knowledge directly derives from customary use of biological resources.

Many initiatives are directed towards the conservation and sustainable use of biodiversity, or the protection and promotion of traditional knowledge, but there are few examples which address both.

Most projects that do prioritize biodiversity do not prioritize traditional knowledge.<sup>2</sup> On the other hand, of the many projects to restore and preserve traditional knowledge, conservation or sustainable use of biodiversity is rarely a priority in the planning of such activities. This is a common flaw in policy, programme and project development and implementation throughout the various world regions.

Furthermore, as the causes of decline of traditional knowledge are diverse, as identified in the second phase of the Composite Report, and traverse local, national and international levels, measures and mechanisms to retain traditional knowledge relevant to the conservation and use of biodiversity are correspondingly diverse and often traverse local, national and international levels.

Also given that Article 8(j) and traditional knowledge are cross-cutting issues, measures and mechanisms to retain traditional knowledge will intersect with many sectors of society including but not limited to politics, research, administrative measures, economy, legislation, education, and information.<sup>3</sup>

It is thus considered that the programme of work for Article 8(j) in considering measures and mechanisms to address the underlying causes for the decline of traditional knowledge, can at best deliver a tool kit of options for the consideration of Parties, governments and indigenous and local communities and other partners, that can be cobbled together according to unique local and national circumstances.

The concern of Indigenous people and local communities to preserve and maintain their knowledge systems is not only motivated by the desire to conserve 'biodiversity' as an end in itself, but also by the desire to live on their ancestral lands, to preserve their traditional livelihoods, to safeguard local food security and, to the extent possible, exercise local economic, cultural and political autonomy.<sup>4</sup>

The *Declaration on the Rights of Indigenous Peoples*<sup>5</sup> states that:

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 flora and fauna, 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.<sup>6</sup>

It has been suggested that preservation of traditional knowledge has to be addressed through two complementary approaches:

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<sup>2</sup> <http://www.biodiv.org/doc/meetings/tk/wg8j-03/official/wg8j-03-04-en.pdf>

<sup>3</sup> UNEP/CBD/WG8J/4/4

<sup>4</sup> Langton and Zea "Traditional Indigenous Biodiversity Related Knowledge" in *Australian Indigenous Knowledge Libraries* (2005) at p. 42

<sup>5</sup> *Human Rights Council Resolution 2006/2, entitled "Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994"*

<sup>6</sup> Article 31(1)

- the management of cultural processes, primarily inter-generational transmission; and,
- the management of the major drivers of cultural change which address the underlying causes of knowledge loss and cultural erosion.<sup>7</sup>

In general, existing reports emphasize the relative scarcity of examples of measures and initiatives specifically designed to protect, promote and facilitate the use of traditional knowledge.

Measures and initiatives that are most effective appear to be those that are local in focus and involve the active participation of traditional knowledge holders in planning, execution and management.

Many initiatives are directed towards the conservation and sustainable use of biodiversity, or the protection and promotion of traditional knowledge, but there are few examples which address both.

As noted in the Latin American Regional Report:

from the perspective of traditional knowledge maintenance in the long term, the essential challenge is to ensure inter-generational transmission within indigenous and local communities; the second major challenge is to encourage and support the adaptation of traditional knowledge to socio-economic and cultural change, particularly in terms of maintaining its functionality and its dynamic connections with the practices of individuals and groups in their daily interactions with their surroundings.<sup>8</sup>

This necessitates targeting funding and resources and local levels and empowering indigenous and local communities to strengthen links between traditional knowledge and biodiversity at the local level. Furthermore, as indigenous and local communities' knowledge is locally based, access to their traditional territories (lands and waters) is a pre-requisite and basis for the preservation of their knowledge systems and for the exercise of their environmental knowledge and the sustainable management of their local environment.

Given this, access to territories and empowerment of indigenous and local communities at the local level are key elements to preserving traditional knowledge and related biological diversity.

Hence there is a clear delineation of duties between what Governments can do at the national level in terms of respecting traditional knowledge and what indigenous and local communities can do at the local level to preserve and promote their knowledge systems.

On a national level, respect may take the form of recognition of indigenous and local communities, facilitation of their access to their territories, equal partnerships in managing the environment and the provision of resources to empower indigenous and local communities to develop their own local solutions to preserving, promoting their knowledge. This is the likely recipe for success.

How this is done is best determined by national government and indigenous and local communities in equal partnership. It is hoped that the measures and mechanisms considered in this report provide a menu of options for the consideration of both national governments and indigenous and local communities in constructing a suite of actions that best suite unique national and local circumstances.

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<sup>7</sup> UNEP/CBD/WG8J/4/INF/5 at Page 19

<sup>8</sup> UNEP/CBD/WG8J/AG/2/2/Add.4 at p. 6.

MEASURES AND MECHANISMS TO ADDRESS TERRITORIAL FACTORS THAT RESULT IN  
DECLINE OF TRADITIONAL KNOWLEDGE

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1. Guaranteeing access to lands and natural resources
    - i. international standards & guidelines
    - ii. tenure systems & equitable resolution of land claims
    - iii. natural resources within territories
  2. Protected areas
  3. Restricting access to significant and sacred sites
  4. Environmental management
- 

1. GUARANTEEING RIGHTS TO LANDS AND NATURAL RESOURCES

Land issues need to be addressed at the national level, taking into consideration its relationships with culture and knowledge.<sup>9</sup>

Continued connection to the land and maintenance of decision-making authority with respect to the land is the greatest determinant of wealth and fundamental to the survival of Indigenous peoples, and to the maintenance, preservation and application of their knowledge systems.<sup>10</sup> Guaranteeing access to traditional territories is regarded as:

one of the best examples of incentive measures and capacity building, as it acts as an incentive for involvement (providing what people want most) and builds the capacity of participants (by providing land upon which to subsist and thrive).<sup>11</sup>

Yet most of the world's indigenous people live on land to which they have no legal title, or the title they have is restricted.

Maintaining connection to land and waters can be achieved through a variety of means: recognising and securing Indigenous land and marine tenure, facilitating access to protected areas and other lands, restricting access to sacred and significant sites, and active participation in environmental management.

Severing or restricting the relationship of Indigenous peoples and local communities with traditional lands and waters, removes their economic base and strikes at the heart of their emotional, social, cultural and spiritual support. Hence loss of ancestral lands, waters and marine areas is regarded as “the single most

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<sup>9</sup> UNEP/CBD/WG8J/AG/2/2/Add.4 at p. 7

<sup>10</sup> UNEP/CBD/WG8J/4/INF/7 Page 16

<sup>11</sup> UNEP/CBD/WG8J/3/4 at p. 7

significant cause of decline in traditional knowledge”<sup>12</sup> including knowledge of land practices which translates to a loss of knowledge of land practices and a loss of biodiversity knowledge overall.<sup>13</sup>

Recent decades have seen some progress in the area of legal recognition of indigenous peoples' rights to the protection and control of their lands, territories and natural resources, but in practical terms, this has not always translated into action.<sup>14</sup>

States are obliged to identify lands traditionally used by indigenous peoples, and provide legal protection according to traditional customs and laws. Indigenous groups have the right to be effectively consulted and to share in profits derived from their lands.<sup>15</sup>

There is thus a need for countries where relevant at the national level, to initiate the process of clearly defining ownership of resources (domesticated and wild) as well as land ownership on communal land, commercial land, and state land including protected areas. Governments hold sovereignty of the countries' resources on behalf of their peoples; it is important however to recognize that it is people who have rights over natural resources not governments.

***By guaranteeing access to lands Indigenous peoples and local communities can maintain, cultivate and continually renew their traditional knowledge.<sup>16</sup> However access to the ownership and development of resources within territories remain contentious.***

For example, in Australia, Indigenous customary forms of property rights in land are now incorporated into Australian law through the Mabo [No 2] decision and the Native Title Act 1993 (Cth)(the NTA) yet there is no clarity regarding indigenous rights in natural resources, or in the intangible heritage that may attach to, flow from, or form elements of native title rights in land.<sup>17</sup>

### **International Standards and Guidelines**

Within the context of the Convention on Biological Diversity, the adopted Akwe: Kon Guidelines<sup>18</sup> and the proposed draft elements of an Ethical Code of Conduct both recognize:

Parties should be encouraged, in accordance with national domestic law and international obligations, to recognize traditional land tenure of indigenous and local communities, as recognized rights and access to land and water as fundamental to the retention of traditional knowledge and associated biological diversity. Sparsely populated lands and waters should not be

<sup>12</sup> UNEP/CBD/WG8J/AG/2/2/ Add.6

<sup>13</sup> UNEP/CBD/WG8J/4/4 at p. 7

<sup>14</sup> <http://www.un.org/apps/news/story.asp?NewsID=22531&Cr=indigenous&Cr1=>

<sup>15</sup> Representative of Norway's Sami Parliament addressing the Permanent Forum, 2007 at

<http://www.un.org/News/Press/docs//2007/hr4918.doc.htm>

<sup>16</sup> M. Nakata & M. Langton Eds., *Australian Indigenous Knowledge and Libraries*, Australian Academic and Research Libraries Vol. 36, No. 2, June 2005 at p. 54

<sup>17</sup> MICHAEL DAVIS “INDIGENOUS RIGHTS IN TRADITIONAL KNOWLEDGE AND BIOLOGICAL DIVERSITY: APPROACHES TO PROTECTION” AT [HTTP://WWW.AUSTLII.EDU.AU/AU/JOURNALS/AILR/1999/40.HTML](http://www.austlii.edu.au/au/journals/ailr/1999/40.html)

<sup>18</sup> *Akwe: Kon Guidelines & draft Ethical Code Of Conduct To Ensure Respect For The Cultural And Intellectual Heritage Indigenous And Local Communities Relevant To The Conservation And Sustainable Use Of Biological Diversity*



presumed to be empty but may in fact be lands and waters traditionally occupied or used by indigenous and/or local communities.<sup>19</sup>

That territories are essential to the transmission of traditional knowledge is emphasized in the Statement of Principles and Guidelines for the Protection of Heritage of Indigenous Peoples of the Working Group on Indigenous Populations, UN Commission on Human Rights:

the discovery, use and teaching of indigenous peoples' knowledge, arts and culture is inextricably connected with the traditional lands and territories of each people.....; and that control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and its full protection.<sup>20</sup>

Indigenous peoples have collective interests in lands and territories which is highlighted in the Final Report of the Special Rapporteur, Madame Erica Irene A. Daes on Permanent Sovereignty of Indigenous Peoples over their Natural Resources which states:

*developments during the past decades, international law and human rights norms in particular, demonstrate that there now exists a developed legal principle that indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories.*<sup>21</sup>

#### *Recognising Indigenous Land and Marine Tenure Systems*

Although the traditional model of land and marine tenure is often conceptually very different from the legal land and marine tenure systems adhered to by many modern States, there is a need for recognition of Indigenous land and marine tenure within the dominant framework<sup>22</sup>.

Titling alone does not guarantee land security, as is demonstrated by the frequent granting of private rights over these traditional territories. Collective tenure is fundamental to most Indigenous communities. One of the major requests of indigenous communities is the recognition and protection of collective forms of land tenure.<sup>23</sup>

As long as the issue of land ownership or land tenure is not adequately addressed, benefit sharing, access and sustainable use of the components of biodiversity will be problematic. This will have a significant impact on the maintenance of the related traditional knowledge, innovations and practices of Indigenous peoples.<sup>24</sup>

***Legal recognition and guarantees of access to lands and upon which traditional knowledge is based and practiced is essential to the implementation of Article 8(j).***<sup>25</sup> ***For Indigenous Peoples the legal recognition of rights to their land and waters, especially land and territorial security,***

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<sup>19</sup> UNEP/CBD/WG8J/4/8 14 November 2005 at para 19

<sup>20</sup> E/CN.4/sub.2/1995/26, annex.

<sup>21</sup> E/C.4/Sub.2/2004/30 para 39

<sup>22</sup> *Ibid* at para 40

<sup>23</sup> UNEP/CBD/WG8J/AG/2/2/Add.1 at p. 9

<sup>24</sup> UNEP/CBD/WG8J/4/INF/2 PAGE 49

<sup>25</sup> UNEP/CBD/8J/3/4 at p. 13

*is paramount over monetary and non-monetary benefits. Only from this position of security can flow equitable sharing of benefits.*<sup>26</sup>

Whilst a minority of states have developed land rights legislation or other arrangements, it is often applicable only to the remnants of the traditional territories of indigenous and local communities that have not been claimed by other elements of society. Moreover the title granted is often conditional in terms of access to resources, control over decision-making, and developmental aspects.

Some countries have introduced measures and mechanisms to recognize traditional territorial rights, through constitutional reform, land rights legislation and statutory claims process.

In Bolivia there is constitutional recognition of traditional territorial rights although several traditional lands are still illegally occupied.<sup>27</sup>

In Australia the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (ALRA) provides for statutory titles granted on the basis of Aboriginal customary land tenure systems and procedures relating to use and access of Aboriginal land. The Act sets out the processes for negotiation of exploration and mining agreements, and other activities such as bio-prospecting that might occur on Aboriginal land, in practice individual communities have limited control compared with other forms of title such as freehold.

#### *Fair and Equitable Resolution of Land Claims*

Governments must speed up and finalize land claim negotiations and ensure negotiations are respecting principles of fairness and good faith and are in line with international standards and human rights obligations.<sup>28</sup>

*In most countries, national institutions have very little capacity to deal with and solve conflicts over land.*<sup>29</sup>

In 1973, the Canadian federal government established a federal policy for the negotiation and settlement of Aboriginal land claims.<sup>30</sup> A number of land claims and self-government agreements that have been negotiated, notably in the north, but these remain the exception and not the rule.

Also in Australia the Native Title Act 1993 was enacted to give effect to the principles of the Mabo decision. The act provides a regime for determining whether native title exists over particular areas of land or waters, for validating certain past acts of government and for regulating future acts which may affect Aboriginal rights in land. Claims for compensation are also provided for. The difficulty with the Native Title Act is the protracted claims process through the Native Title Tribunal and Federal Court, the high evidentiary thresholds, administrative delays that have involved reregistering native title representative bodies, and the limited funding available for representative bodies to pursue claims.

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<sup>26</sup> *Statement of International Indigenous Forum on Biodiversity at the Ad Hoc Open-Ended Working Group on Access and Benefit Sharing Convention on Biological Diversity, 22-26 October 2001 - Bonn, Germany*

[http://www.treatycouncil.org/new\\_page\\_523211.htm](http://www.treatycouncil.org/new_page_523211.htm)

<sup>27</sup> UNEP/CBD/WG8J/4/4 at para 53

<sup>28</sup> UNEP/CBD/WG8J/AG/2/2/ Add.6 at para 34

<sup>29</sup> UNEP/CBD/WG8J/4/4 at para 36

<sup>30</sup> <http://www.atns.net.au/background.php>

In Sabah in Malaysia there is a level of recognition for customary titles given through the Sabah Land Ordinance (1930). However there remains a significant number of qualifications for the establishment and continued enjoyment of this customary title such as a 15 acre limit, the legislative enforcement of non-traditional fallow periods and the non-consideration of native title if land is to be taken for a public purpose.<sup>31</sup>

In New Zealand the focus is on remedies for wrongful dispossession. New Zealand settlements usually take the form of an agreement on a financial amount (the biggest are the \$170 million packages agreed to in the Ngai Tahu and Waikato/Tainui settlements). Once the amount is agreed, a package is developed which might include cash, land, forests and other assets to the value of the agreed amount. The package might also include return of specific sites of spiritual significance.<sup>32</sup>

In Latin America land security for indigenous peoples and rural communities in the region has increased since the start of agrarian reforms several decades ago, but has not been fully achieved. In the last decade most of the countries have started a process for the recognition of indigenous peoples' lands in rainforests.

Only Peru had already recognized collective property rights of indigenous communities from the Amazon in 1974. A different approach has been taken by Brazil, which, since 1910, has established a legal regime to protect indigenous lands in the form of reserves.

During the 1990s several Latin American countries implemented land market-oriented measures (Colombia, Ecuador, Peru, Mexico) with the aim to foster and modernize the agricultural sector. Indigenous lands from the rainforest were kept out of the land market, with the exception of Peru (1995) and Mexico (1992).

Argentina, Bolivia, Paraguay, Guatemala, Brazil, Colombia, and Ecuador have undertaken constitutional and legal reforms in order to recognize or strengthen land rights of indigenous peoples.<sup>33</sup>

The Peruvian Land Law of 1995 has been criticised by several experts and largely contested by indigenous peoples on the grounds that it threatens the integrity of their traditional lands and put pending land claims at risk. In Mexico, the 1992 Amendment to its Constitution permitted ejidos to decide if they want to remain under communal property or divide the land in individual plots.

Several Latin American constitutions have “started to recognize not only land rights, but also the cultural dimension of such rights. In order to adapt land rights to the special needs and characteristics of indigenous peoples' relation with lands and natural resources, several countries incorporated special guarantees for indigenous lands (inalienable, imprescriptibly and non-mortgageable), with the exception of Peru and Mexico.

In Canada, even though many Indigenous peoples have treaties that guarantee a continued right to hunt and gather in their traditional territories these rights have been constrained through the years.<sup>34</sup>

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<sup>31</sup> UNEP/CBD/WG8J/4/INF/4 Page 32

<sup>32</sup> Australian National Native Tribunal website at  
<http://www.nntt.gov.au/publications/talkingvic1.html>

<sup>33</sup> UNEP/CBD/WG8J/AG/2/2/Add.4 at p. 11

<sup>34</sup> *UNEP/CBD/WG8J/4/INF/7 at p. 16*

The Regional Report focusing on the Arctic region recommends that Parties restructure their land rights policies because one of the main problems with land tenure claimed, retained or granted to Indigenous peoples is that the power to make decisions concerning land is restricted under the empowering legislation. In many cases, indigenous societies and groups do not have sufficient national legislative support and or any degree of self-governance that is needed for maintenance of their biodiversity-related practices and knowledge for successful implementation of Article 8(j).<sup>35</sup>

## 2. PROTECTED AREAS

Many protected areas have been established on lands held in common property by communities during the nineteenth and twentieth centuries on the premise of terra nullius. Considering that there are now over 100 000 protected areas worldwide, covering over 12% of the Earth's land surface, it represents one of the most significant human resource use allocations on the planet.<sup>36</sup> This has had a significant and detrimental impact on indigenous and local communities who were occupying the lands deemed 'protected' and subsequently expelled and/or restricted from accessing their lands.

When Indigenous peoples lose their traditional territories or no longer have access necessary to maintain their living cultural traditions, the processes which sustain and create traditional knowledge and beliefs are likely to be severely weakened or lost, thus putting traditional knowledge at serious risk.<sup>37</sup>

The 5<sup>th</sup> World Parks Congress in 2005 called upon the CBD Conference of Parties to implement the following by 2010:

- ensure that indigenous and local communities fully participate in the establishment and management of protected areas and that mechanisms are put in place to guarantee that they share in the benefits arising from these areas;
- foster and implement effective communication programmes to ensure that indigenous and local communities effectively participate in the establishment and management of protected areas; and,
- reform protected area policies, systems and funding arrangements to effectively support Community Conserved Areas and co-managed protected areas.

### **Planning, Establishing and Managing Protected Areas**

Legislation and policy at the national level is required to recognize the rights of Indigenous peoples to land and resource rights within protected areas, as well as the role of indigenous and local communities in the conservation of biodiversity and protected areas management.<sup>38</sup>

The commitment to promote the rights and interests of indigenous and communities under the CBD also applies to communities within protected areas, and assumes recognition of rights and interests in the development of protected area policies and management strategies.<sup>39</sup>

The CBD Programme of Work on Protected Areas includes a specific goal (Goal 2.1) on Equity and Benefit Sharing that suggests a number of activities CBD parties could take:

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<sup>35</sup> UNEP/CBD/WG8J/4/4 at p. 7

<sup>36</sup> S. Chape, J. Harrison, M. Spalding and I. Lysenko, *Measuring the Extent and Effectiveness of Protected Areas as an Indicator for Meeting Global Biodiversity Targets*, UNEP World Conservation Monitoring Centre, Cambridge, UK, 2005 at p. 1.

<sup>37</sup> UNEP/CBD/WG8J/4/INF/18 p. 3

<sup>38</sup> UNEP/CBD/WG8J/4/4 at para 33

<sup>39</sup> [http://www.ias.unu.edu/binaries/UNUIAS\\_ProtectedAreasReport.pdf](http://www.ias.unu.edu/binaries/UNUIAS_ProtectedAreasReport.pdf)

- Adjust policies to avoid and mitigate negative impacts, and where appropriate compensate costs & equitably share benefits in accordance with the national legislation;
- Recognize and promote a broad set of protected area governance types ..... which may include areas conserved by indigenous and local communities.
- Use social and economic benefits generated by protected areas for poverty reduction, consistent with protected-area management objectives.

Some States have implemented constitutional recognition of the rights of Indigenous peoples to protected areas. Under article 105 of the Samoa Constitution, the use of areas in marine protected areas up to high tide mark current, rests with the communities. However there is a push from external interests for more government control in marine protected areas, and communities may no longer be allowed access to these demarcated areas. The Argentinean Constitution recognizes indigenous peoples rights to land and Forest law allows co-management and access to resources within protected areas.

\* see also Mobilisation of Resources below.

### **Benefits, Equity and Participation of Indigenous and Local Communities**

Successful implementation of conservation programmes can only be guaranteed on long term basis when there is consent for and approval by indigenous peoples and local communities because their cultures, knowledge and territories contribute to the building of comprehensive protected areas.<sup>40</sup> There is often commonality of objectives between protected areas and the need of indigenous peoples to protect their lands, territories and resources from external threats.

The active participation of Indigenous peoples and local communities in the management of protected areas is way of protecting biodiversity related knowledge by facilitating access to lands that had previously been appropriated. Furthermore the involvement of indigenous and local communities in the early stages of planning for a protected area may assist with identifying biodiversity hotspots and other significant areas that should be included in such areas.

For example, in Australia Kakadu National Park is managed through a joint management arrangement between the Aboriginal traditional owners and the government. Participation of Aboriginal people in the management Kakadu is enabled through the Environmental Protection and Biodiversity Conservation Act which provides for boards of management to be established for parks on Aboriginal land which has an Aboriginal majority that represent the Aboriginal traditional owners of land in the park. The Kakadu Board determines policy for managing the park and is responsible for preparing plans of management for the park. The ensuing Kakadu Plan of Management ensures the rights of the Aboriginal traditional owners are recognised, that traditional owners contribute to managing the park, and that they are able to benefit from the park economically and through the promotion of Aboriginal values.

### **Access and Benefit Sharing of Resources**

In many countries there are limitations imposed on access to and use of resources in protected areas. 'No take' protected areas have serious implications for indigenous peoples environmentally, socially,

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<sup>40</sup> Recommendation 24 of World Parks Congress 2003 at <http://www.iucn.org/themes/wcpa/wpc2003/pdfs/outputs/recommendations/approved/english/html/r24.htm>

culturally and economically. It is argued that the issue of sustainable use is central to, not only biodiversity protection, but also the survival of cultures.

It is essential that Plans of Management for protected areas be negotiated to ensure Indigenous peoples can maintain access and use of resources on Indigenous Protected Areas they manage and occupy.

Use of biotic resources in protected areas for cultural purposes should be permissible, including in and around sacred natural sites, if the overall quality of the environment is not jeopardised. It has been noted above that respect for sacred natural sites tends to be beneficial for environmental conservation, and are often biodiversity hotspots, yet traditional belief systems not only require the conservation of the area but may also require offerings and sacrifices of plant/animal species that live within a sacred natural site.

This is a source of conflict between protected area managers and Indigenous and local communities. There is a need for mechanisms by which selective usage of such plant/animals species may be permissible for cultural purposes. For example, selective usage of biotic resources could be spelled out in a 'social contract' between parties concerned.<sup>41</sup>

In Australia under the joint management of some Australian Government National Parks, title to Indigenous land is granted to its traditional owners who in turn lease it back to the Australian Government for management as a national park. The traditional owners are paid rent and other fees in recognition of the land's use for conservation purposes and public benefit.

The Kakadu Plan of Management<sup>42</sup> provides that:

Aboriginal people are able to continue to exercise their traditional rights to gather plants and plant material for food and making artefacts. The impacts of Aboriginal use of resources will be monitored and regulated while consulting with Aboriginal people.

Traditional owners will be involved in management programs for native plants, and Aboriginal people will be encouraged and supported to use traditional knowledge and skills in managing plants and habitats.

Traditional owners will be involved in management programs for native animals. Aboriginal people will be encouraged and supported to use traditional knowledge and skills relating to managing animals and their habitats.

In the Northern Territory of Australia capture, possession, killing and trading in wildlife and their parts is controlled by permits issued under Section 43 of the Territory Parks and Wildlife Conservation Act (TPWCA). Section 122 of the Act provides for Aboriginal traditional harvest of wildlife for hunting, food gathering (other than for purposes of sale) and for ceremonial and religious purposes.

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<sup>41</sup> UNESCO/IUCN Working Guidelines for the Conservation and Management of Sacred Natural Sites at [http://www.unesco.org/mab/biodiv/Cdiversity/symposium/UNESCO\\_IUCN\\_guidelines.pdf](http://www.unesco.org/mab/biodiv/Cdiversity/symposium/UNESCO_IUCN_guidelines.pdf)

<sup>42</sup> Kakadu Plan of Management *Environment Australia*, 1998 ISBN 0642214012 at <http://www.environment.gov.au/parks/publications/kakadu-pom.html>

In Malaysia where the current Park laws and policy do not provide for the sharing of benefits from protected areas, efforts are now being made to establish a framework for equitable sharing of management costs and also to recognize Community Use Zones through the Southeast Asia Collaborative Management Learning Network (CMLN) on Indigenous Peoples and Protected Areas initiated at the regional level involving 7 PA sites. It is hoped that amendments to Park laws and policies would be finalized in 2007.

*Examples:*

#### Indigenous Protected Areas, Australia

In Australia the National Reserve System aims to establish and effectively manage a comprehensive, adequate and representative system of terrestrial protected areas, and specifically by:

Providing incentives for indigenous people to participate in the NRS through voluntary declaration of protected areas on their lands and support for greater involvement of Indigenous people in the management of existing statutory protected areas.<sup>43</sup>

Through the Indigenous Protected Areas (IPA) programme under the National Reserve System Indigenous land owners manage 13.9 million hectares of land as protected areas. cover 13 million hectares as part of the National Reserve System. The IPA programme is a suitable vehicle that can facilitate the passing on this knowledge to new generations.<sup>44</sup>

The success of the Indigenous Protected Areas (IPA) Programme in Australia hinges on capacity building support and links to initiatives to address Indigenous disadvantage if biodiversity outcomes are to be achieved.<sup>45</sup>

The IPA Programme is regarded as a vehicle for facilitating the transfer of traditional knowledge and engaging young people in positive educational experiences centred on the equitable exchange of western science and traditional knowledge.<sup>46</sup>

Beyond the direct economic or financial benefits that might follow on from declaration of lands as Indigenous Protected Areas there are considerable social and cultural outcomes from promoting conservation activities for Indigenous communities. Indigenous people have a deep cultural relationship to the land. The opportunity to be active in conservation of their lands, or in some cases of rehabilitation, provides mechanisms whereby this relationship is strengthened.

### **Marine Protected Areas in Western Melanesia**

Collaboration between Torres Strait Islanders and Australian conservation authorities has resulted in the establishment of a number of indigenous marine protected areas. These areas have integrated sacred, totemic sites and distinctive coral reef habitats. The experience suggests that “cultural and ceremonial

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<sup>43</sup> B. Gilligan *Indigenous Protected Areas Programme 2006 Evaluation*, Department of Environment and Heritage, Australian Government, at p. 2

<sup>44</sup> *Ibid* at p. 38

<sup>45</sup> *Ibid* at p. 6.

<sup>46</sup> *Ibid*

sites in the seas can work to enhance marine conservation, and reciprocally, how marine protected area approaches can protect sacred sites and traditional environmental knowledge.<sup>47</sup>

In the Pacific Islands protected areas for nature conservation have been an integral part of Pacific island communities for thousands of years. Pacific island reserves were established by taboos to prevent anyone from entering the area, with the express purpose of allowing the wildlife to recover. Taboos were placed on garden areas as well as on coral reefs and lagoons. In some instances, particular species were protected. Papua New Guinea, Vanuatu, Fiji and Samoa acknowledge the value of community law in their national legislation and have recently made progress in forming partnerships between communities and national agencies for conservation.

### 3. RESTRICTING ACCESS TO SACRED & SIGNIFICANT SITES

#### **International Standards and Guidelines**

The *Tokyo Declaration on the Role of Sacred Natural Sites and Cultural Landscapes in the Conservation of Biological and Cultural Diversity* ('the Tokyo Declaration') acknowledges the "important role of indigenous peoples and local communities as custodians of sacred natural sites and as holders of traditional knowledge, which is fundamental for the preservation of biological and cultural diversity."<sup>48</sup>

The Tokyo Declaration was the outcome of the International Symposium Conserving Cultural and Biological Diversity: The Role of Sacred Natural Sites and Cultural Landscapes in Tokyo, Japan 2005 ('the Tokyo Symposium'), where participants called upon national authorities, protected area and site managers, indigenous peoples and local communities, the international systems, governments and non-governmental organisations, to consider and implement:

- the UNESCO/IUCN Guidelines for the Conservation and Management of Sacred Natural Sites;
- the CBD Akwe: 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
- The Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage.

The Declaration also calls upon governments, non-governmental organizations, religious institutions, indigenous and local communities to work together to ensure respect for religious and spiritual traditions and practices linked to sacred natural sites, and to protect such sites against desecration and destruction.<sup>49</sup>

*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*

<sup>47</sup> G. Oviedo, S. Jeanrenaud, & M. Otegui *Protecting Sacred Natural Sites of Indigenous and Traditional Peoples: an IUCN Perspective*, Gland, Switzerland, June 2005 at p. 12 -

<http://www.iucn.org/themes/spg/Files/sacred%20sites/protecting-sacred-natural-sites-indigenous.pdf>

<sup>48</sup> <http://www.unesco.org/mab/biodiv/Cdiversity/symposium/FinalDeclaration.pdf>

<sup>49</sup> UNEP/CBD/WG8J/4/INF/14



The 7<sup>th</sup> COP to the CBD adopted the Akwe:Kon Guidelines in February 2004. These guidelines were developed, in cooperation with indigenous peoples, to implement Article 8(j)'s provisions and to ensure that indigenous peoples would be able to participate in impact assessments on any projects that may affect them and may affect sacred sites.

***The guidelines are voluntary and subject to national legislation in developments that impact sacred sites, lands and waters traditionally occupied by Indigenous and local peoples. They promote the full and effective participation of indigenous and local communities in screening, scoping and development planning exercises, and require that the cultural, environmental and social concerns and interests of indigenous and local communities are taken into account.***

***Specifically the Guidelines recommend that impact assessment:***

- take into account the traditional knowledge of indigenous and local communities, with due regard to the ownership of the need for its protection; promoting the use of technologies associated with TK;
- identify and implement appropriate measures to prevent or mitigate any negative impacts of proposed developments; and,
- take into consideration of the interrelationships among cultural, environmental and social elements.

The “voluntary” nature of the guidelines and the phrase “subject to national legislation”, may provide governments with strategies to avoid their responsibilities regarding their CBD obligations. The effectiveness of the Akwe:Kon Guidelines remains in the domestic implementation of these guidelines which has so far been limited. Indigenous peoples argue that there is a need for a binding treaty regarding impact assessment, which incorporates processes of free, prior and informed consent and mutually agreed terms.

In the progress report on the implementation of article 8(j)<sup>50</sup>, no country reported on the actual implementation of the Akwé:Kon Guidelines. However, Estonia and Thailand reported on review processes that are considering the protection of sacred sites and the improvement of environmental impact assessment mechanisms. Norway indicated that they already have sufficient legislation and mechanisms to protect Sami cultural heritage. Sweden has provided funding for indigenous communities in the developing world to hold workshops and build capacity regarding the implementation of the Akwe:Kon Guidelines. Zimbabwe reported that there is no review being undertaken, but present EIA legislation addresses some of the Guidelines. It is been recommended that a set of legal and operational instruments for the implementation of the Akwe:Kon Guidelines be developed.<sup>51</sup>

Indigenous and local communities should be more involved in the elaboration of protection strategies for sacred and significant sites.<sup>52</sup>

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<sup>50</sup> UNEP/CBD/WG8J/4/2

<sup>51</sup> Parshuram Tamang “The Permanent Forum on Indigenous Issues and Its Mandate on Education and the Environment” at *International Symposium on Conserving Cultural and Biological Diversity: The Role of Sacred and Natural Sites and Cultural Landscapes*, 1 June 2005.

<sup>52</sup> UNEP/CBD/WG8J/AG/2/2/ Add.2 at p. 17

Given that sacred and significant sites can lie within protected areas or outside such areas, integration of the principles embodied in the Akwe: Kon Guidelines in national environmental impact assessment processes will better ensure that decisions to approve developments on private and public tenures will take into consideration cultural impacts, including impacts upon sacred and significant sites.

Where sacred sites lie outside protected areas they are vulnerable to desecration, as a result of trespassers, but also vulnerable to inadequate environmental impact assessment that fail to adequately protect sacred sites.

Native American concerns about development activities adversely affecting “sacred sites” have emerged in recent years in relation to mineral and energy development projects. In 2000, the United States Department of the Interior withdrew over 9,000 acres of federal land to protect an alleged Native American sacred site in the vicinity of the proposed Glamis Imperial gold mining project in the California desert.<sup>53</sup> The decision to withdraw the lands was to protect Quechan resources claimed as traditional cultural property and, protect cultural transmission of traditional knowledge and practices. It was argued that:

If implemented, the [Imperial] Project would be so damaging to historic resources that the Quechan Tribe’s ability to practice their sacred traditions as a living part of their community life and development would be lost. Overall, the Council is convinced that the cumulative impacts of the proposed mine . . . even with the mitigation measures proposed by the company, would result in a serious and irreparable degradation of the sacred and historic values of the [land] that sustain the tribe. Therefore the Council concludes that the Glamis Imperial Project would effectively destroy the historic resources in the project area, and recommends that Interior take whatever legal means available to deny approval for the project.<sup>54</sup>

In Australia the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 provides for the Commonwealth Minister to make declarations for protection over significant areas, sites or objects that are under threat of desecration. However the Act does not include provisions for protection of non-material aspects of heritage.

The 1996 Evatt report, which provided an independent review of the Act recommended the need to include consideration of intangible components of heritage (including intellectual property) in protection measures, and matters concerning the need to respect confidentiality, and customary restrictions on information in dealing with heritage protection.<sup>55</sup>

The Evatt report also recommended that, if State and Territory governments do not establish appropriate bodies, the Commonwealth Government should establish an Indigenous cultural heritage committee to ensure that Indigenous peoples have primary responsibility in deciding the significance of sites. This may

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<sup>53</sup> Kochan, Donald J., "An Examination of Increasing Protection for Sacred Sites and the Trust Responsibilities of the Federal Government". Rocky Mountain Mineral Law Foundation, Chapter 12, 2003 Available at SSRN: <http://ssrn.com/abstract=907694>

<sup>54</sup> *Ibid*

<sup>55</sup> *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report by Hon Elizabeth Evatt AC 1996 (ATSIC)

allow the potential for the inclusion of intangible aspects of cultural heritage, including knowledge in frameworks for protection.<sup>56</sup>

### *Case Studies*

## **Alaska Highway Pipeline project**

The Alaska Highway Pipeline Project is a development that involved three first Nations in Canada as well as four different jurisdictions: federal, provincial, territorial and Aboriginal jurisdictions.

It became apparent in the course of the project that in the implementation of agreements, such as the Akwe:Kon Guidelines, there is need for a gap analysis to ensure the principles stipulated in the guidelines are fulfilled at the community level which included notification and public consultation, mechanisms (and resources) for indigenous participation, impact and benefit agreements, review and appeal processes and the importance of cultural impact assessments.

Identified cultural concerns included cultural heritage, traditional knowledge agreements, customary practices forms of social organization, systems of natural resource use, places of cultural significance, economic valuation of cultural resources, languages and customary law systems, which should be taken into account in an effective assessment.

In the course of the project it was apparent that it may remain the responsibility of informed Aboriginal groups to take proactive measures to ensure compliance. Information and capacity building strategies are therefore necessary to support such community action and translate to more meaningful implementation of the guidelines on the ground.

### The Conservation Value of Sacred Sites of Indigenous Peoples of the Arctic: A Case Study in Northern Russia—Report on the State of Sacred Sites and Sanctuaries

In 2000, a coalition of organizations led by the Russian Association of Indigenous Peoples of the North (RAIPON) initiated a program to document sacred sites in two regions of the Russian Arctic and explore protection measures in partnership with Conservation of Arctic Flora and Fauna (CAFF) and the Danish Environmental Protection Agency, which funded the project. The project was designed to support integrated conservation of Arctic biodiversity and the cultural heritage of northern indigenous peoples, through documenting the biological and cultural significance and status of indigenous peoples' sacred sites and sanctuaries.<sup>57</sup>

The project resulted in the release of a report entitled “The Conservation Value of Sacred Sites of Indigenous Peoples of the Arctic: A Case Study in Northern Russia—Report on the State of Sacred Sites and Sanctuaries.” (2004) It details both the environmental impact of threats, such as destruction of wildlife, vegetation and water supplies, and the impact on sacred sites.

Increased development has brought increased access to sites by people unfamiliar with local culture and belief. Some sites have been burned or dug up, for example, by mining operations, while at other sites newcomers have looted sacred objects.

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<sup>56</sup> Michael Davis “Indigenous Peoples and Intellectual Property Rights” **Research Paper 20 1996-97** at <http://www.aph.gov.au/library/pubs/rp/1996-97/97rp20.htm>

<sup>57</sup> [http://www.sacredland.org/world\\_sites\\_pages/Arctic\\_Russia.html](http://www.sacredland.org/world_sites_pages/Arctic_Russia.html)

The Russian Federation lacks a specific policy approach to the sacred sites of indigenous peoples and legislation to secure sacred sites, but existing laws related to environmental protection, cultural heritage and indigenous peoples' rights could potentially be a means for sacred site protection. The report advocates a "bottom-up" approach to sacred site protection, allowing indigenous communities themselves to designate sites and determine the most effective protection strategies.

Along with empowering indigenous communities and enabling them to sustain their traditional livelihoods, local control and management of sacred places also protects biodiversity. According to the report, "Sacred sites provide a 'win-win' opportunity for strengthening biodiversity conservation and protect area networks through integrating various models of ancestral territorial management based on indigenous land use."<sup>58</sup>

#### IUCN - Conservation of Biodiversity Rich Sacred Natural Sites of Indigenous and Traditional Peoples

The project has been developed by the IUCN in partnership with the Rigoberta Menchu Tum Foundation (FRMT) and in collaboration with UNEP, UNESCO, and the Global Environment Facility.

The goal of the project is to "achieve a strengthened enabling environment to support conservation and sustainable use of biodiversity of sacred sites of indigenous and traditional peoples." It will focus on Meso-America, South America, South Asia, East Africa, and West Africa.

The specific objectives are:

- (i) increase awareness globally and nationally, through improved information, knowledge sharing and communications;
- (ii) Strengthen legal and policy frameworks, globally and nationally;
- (iii) Improve the institutional capacity of relevant actors to work at the national and local levels; and,
- (iv) Make available lessons and field-tested tools.

#### 4. ENVIRONMENTAL MANAGEMENT

Many of the regional reports on threats to traditional knowledge raised the issue of degradation of lands and waters traditionally occupied or used by indigenous and local communities as a national issue along with lack of secure land tenure.<sup>59</sup>

Influence over decisions concerning natural resource management and the quality of the environment in which Indigenous and local communities live is directly tied to the social, cultural and economic future of those communities. Indigenous peoples should be actively involved in natural resource management projects from design to implementation, management and evaluation.

Article 14.1 of the Convention on Biodiversity stipulates that:

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<sup>58</sup> Ibid

<sup>59</sup> UNEP/CBD/WG8J/4/4 p. 16

Indigenous and local community knowledge is relevant to the conduct of environmental impact assessments and its beneficial role in the conservation and sustainable use of biodiversity should also be the subject of public education and awareness program within [Article 13](#).

The Programme of Action for the 2<sup>nd</sup> Decade recommended that:

programmes to strengthen synergies between indigenous knowledge and science should be developed to empower indigenous peoples in processes of biodiversity governance and assessment of impacts on territories, as part of the intersectoral project of UNESCO on Local and Indigenous Knowledge Systems.

### **Participation in Land Use Planning**

A third of reporting countries have established national, sub-regional and/or regional indigenous and local community biodiversity advisory committees, however there is limited support to assist indigenous and local communities in drafting their own development and biodiversity conservation plans.<sup>60</sup>

In Australia the development of Guidelines For Indigenous Participation In Natural Resource Management (NRM) recommends that regional natural resource management, regional planning, and implementation plans incorporate the interests of Indigenous peoples. Specifically, the objectives of the guidelines are to:

- Support activities that improve indigenous NRM activities and planning
- Build the capacity of Indigenous communities to understand, identify and apply improved NRM practices, and/or to articulate, and communicate their knowledge of NRM issues
- assist Indigenous community development of discussion, decision and participation options
- Encourage and directly/cooperatively support the development of Indigenous participatory structures, organisations and governance arrangements
- Incorporate Indigenous NRM aspirational and resource condition targets, and actions into Regional Plans;
- Build partnerships with Indigenous communities supporting complementary NRM outcomes
- Identify and document current community engagement arrangements. Articulate specific actions and plans supporting improved Indigenous participation.
- Adopt participatory strategies and membership rules (at board and/or advisory group level) appropriate to address Indigenous community issues, taking into account community size, ownership, and development/support potential.
- Put in place processes relevant to continuing or improving cross cultural understanding, cooperation and relationship development.

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<sup>60</sup> UNEP/CBD/WG8J/4/2 at para 11-12

- Identify economic and social returns relevant to Indigenous engagement in NRM processes;

In Australia environmental management objectives that specifically focus on intergenerational transfer of traditional knowledge and protecting traditional knowledge is achieved to some extent through the Indigenous Protected Areas programme funded through the National Reserve System. This is outlined above under “protected areas”.

In the absence of resourcing, the Sami in Sweden have ‘volunteered’ environmental plans for each local Sami Community which constitute part of the work to implement the national environmental quality objectives.<sup>61</sup> One of the criticisms of the Indigenous Protected Areas Programme in Australia is that while funding is provided to Indigenous communities to manage protected areas, there appears to be less resources available than for other protected areas.

## ADDRESSING CULTURAL FACTORS

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1. Mitigating loss of languages
2. Education systems
3. Promoting traditional healthcare
4. Implementing cultural impact assessment
5. Community-controlled databases/registers

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### Introduction

Addressing the decline of traditional knowledge due to cultural factors can be approached through two complementary approaches:

- the management of cultural processes, primarily inter-generational transmission; and,
- the management of the major drivers of cultural change which address the underlying causes of knowledge loss and cultural erosion.<sup>62</sup>

As noted in the Latin American Regional Report:

from the perspective of traditional knowledge maintenance in the long term, the essential challenge is to ensure inter-generational transmission within indigenous and local communities; the second major challenge is to encourage and support the adaptation of traditional knowledge to socio-economic and cultural change, particularly in terms of maintaining its functionality and its

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<sup>61</sup> UNEP/CBD/WG8J/4/2 at para 20

<sup>62</sup> UNEP/CBD/WG8J/4/INF/5 at Page 19

dynamic connections with the practices of individuals and groups in their daily interactions with their surroundings.<sup>63</sup>

## 1. MITIGATING LOSS OF LANGUAGES

Over generations indigenous peoples have “accumulated a wealth of wisdom about their environments and its functions, management, and sustainable use. Local, minority, and indigenous languages are repositories and means of transmission of this knowledge and the related social behaviours, practices, and innovations.”<sup>64</sup>

Indigenous and local communities have expressed the need to preserve, use and revitalize Indigenous languages as a chief vehicle for cultural and knowledge transmission.<sup>65</sup> The survival and vitality of indigenous and local languages are pivotal to maintaining entire bodies of cultural and biological knowledge.<sup>66</sup>

As noted in the Composite Report “although loss of indigenous languages occurs at the local level it is often the result of national policies of assimilation or integration, which do not adequately value diverse indigenous languages or as a direct result of government service delivery in the dominant language only.”<sup>67</sup>

### **The Canadian Taskforce on Aboriginal Languages and Cultures**

The Canadian Task Force on Aboriginal Languages and Cultures undertook lengthy consultations, field research and analysis of legislative and policy trends surrounding language and culture revitalization in Canada. The final report “A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures” (2005)<sup>68</sup> (‘the Taskforce Report’) documented the “fundamental connectedness between language retention, traditional knowledge preservation and the overall well-being of Indigenous nations – socially, economically, psychologically and spiritually”.<sup>69</sup>

The Taskforce Report emphasized interconnected nature of language retention and the maintenance of traditional knowledge. As explained in the Taskforce Report, “Our [indigenous] languages are more than just tools of communication. They also describe who we are as peoples and tell us of our relationship to each other and to the land”.<sup>70</sup> The recommendations in the Taskforce Report aimed to address language loss in a variety of ways, and at the personal, local and national levels.

To combat against language and culture loss on this front, it recommended that governments engage in nation-to-nation negotiations with Indigenous peoples on resource-sharing, environmental sustainability and the protection of traditional knowledge. If links to the land are to continue or be revitalized, communities need significant rights over their traditional lands and need to meaningfully participate in policies and activities that affect their knowledge of the land or the wellbeing of the land.

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<sup>63</sup> UNEP/CBD/WG8J/AG/2/2/Add.4 at p. 23

<sup>64</sup> <http://www.terralingua.org/>

<sup>65</sup> <http://www.biodiv.org/doc/meetings/tk/wg8j-04/official/wg8j-04-04-en.pdf>

<sup>66</sup> G. Borrini-Feyerabend, A. Kothari & G. Oveido, *Indigenous and Local Communities and Protected Areas*, Best practice Protected Area Guidelines Series No. 11, IUCN, 2004 at p.114.

<sup>67</sup> UNEP/CBD/WG8J/4/4 at p. 16

<sup>68</sup> *Task Force on Aboriginal Languages and Cultures, 2005, Towards a New Beginning, A Foundational Report for a Strategy to Revitalize First Nations, Inuit, and Métis Languages and Cultures*, (Minister of Canadian Heritage, Ottawa)[*Taskforce Report*].

<sup>69</sup> UNEP/CBD/WG8J/4/INF/7, at p. 11

<sup>70</sup> *Taskforce Report*, *supra* note 70 at p.21.

Specifically the Taskforce Report recommended:<sup>71</sup>

- Indigenous peoples must also be part of government planning for implementation of the Convention on Biological Diversity;
- language revitalization initiatives should be promoted with full participation of Indigenous peoples;
- There must be a strong concerted effort to translate traditional value systems and concepts into a new language. This point is important in communities where the language is already lost, or perhaps beyond the point of repair;
- At the local level, resources are needed to help in the creation of immersion programs (for both youth, adults and perhaps young children in the form of Maori style language nests);
- At a national level, there is a recognized need for a National Language Organisation that can help coordinate, support and fund language-retention initiatives;
- Governments [s]upport resource development, including lifestyles that foster language retention, by financially supporting:...First Nation, Inuit and Métis people who choose to live a traditional lifestyle, as well as supporting initiatives to teach youth the skills to live traditionally or on the land.

In Africa in Southern Algeria Tuareg language classes that use Tifinagh characters are fast disappearing. A positive development in the region has been the launch of a Tuareg section within the national Amazigh radio channel broadcasting from Algiers.<sup>72</sup> In North Africa Tamazight (the amazigh language) is used in primary schools.

In Morocco, the ban on the Amazigh language has been lifted after 40 years enabling the language to be introduced into schools. Also the prohibition on giving children Amazigh names which threatened the very identity of Amazigh people has also been lifted and a registry system has been changed to allow for the registration of Amazigh names.<sup>73</sup>

## 2. EDUCATION SYSTEMS

The Millennium Development Goals commit to achieve universal primary school education for all people but they need to include indigenous education and traditional knowledge with full participation of indigenous peoples.<sup>74</sup>

Indigenous and local communities need to be involved in education programme design and implementation with a view to respectfully incorporating traditional knowledge and knowledge holders. This will improve education systems as potential mechanisms and measures to assist in the retention and use of traditional knowledge<sup>75</sup>

Where required, education systems should be reformed to allow Indigenous knowledge and values to be promoted and encourage inter-generational transfer of traditional knowledge as well as traditional forms of education.<sup>76</sup>

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<sup>71</sup> *Ibid.*, at pp. 74-5

<sup>72</sup> UNEP/CBD/WG8J/AG/2/2/Add.1 at p. 24

<sup>73</sup> UNEP/CBD/WG8J/AG/2/2/Add.1 at p. 35

<sup>74</sup> UNEP/CBD/WG8J/AG/2/2/Add.5 at p. 24

<sup>75</sup> UNEP/CBD/WG8J/4/4 at p. 15

<sup>76</sup> UNEP/CBD/WG8J/AG/2/2/ Add.6 at para 30.



The Australia/Asia Regional Report on Threats to Traditional Knowledge recommends full acknowledgement of this issue across all regions, and responses that enable traditional knowledge to be taught within or alongside education systems and reduce the pressure for children to move away from their people or community for extended periods of time.<sup>77</sup>

The Phase I and Phase II Composite Report recommended that:

- Where appropriate, indigenous knowledge should be integrated into formal, local or national systems of education, which are directed towards local or indigenous communities; and,
- Incorporation of indigenous and traditional knowledge into mainstream formal education can both ensure that indigenous people educated within such systems do not lose touch of their traditional knowledge and practices, and can increase familiarity with, and respect for, such knowledge among non-Indigenous public.
- Parties offer appropriate education and training to indigenous and local communities that can enable sustainable development while being compatible with their traditions
- Parties to the Convention ensure education and training programmes should be established, by or with close involvement of local and Indigenous communities, with the purpose of passing on traditional knowledge and appropriate education to members of the community.
- educational institutions be established in areas populated by indigenous peoples that are accessible to their children, and reduce the migration of people out of communities to access infrastructure such as education facilities.<sup>78</sup>

In recent times, greater efforts are being made to develop curriculum more in tune with indigenous peoples, but without the Indigenous peoples in full control of indigenous education, training and decision-making processes these efforts are not as effective as they could be.<sup>79</sup>

Strategies, policies, and programmes have been designed to implement a more culturally sensitive education for indigenous peoples. Some countries also approved general provisions in laws and constitutions to support this new approach. Although there is no specific legislation regarding the inclusion of traditional knowledge in the curricula, the inclusive approaches to the design and development have led to significant consideration of traditional knowledge as part of the curricula.

A joint UNESCO and the UNHCHR expert seminar on Education in Paris in October 2004, attended by indigenous educators, educational experts, UN staff and the UN Special Rapporteur on Education and Indigenous Peoples, recommended States take corrective measures that include:<sup>80</sup>

1. Institute special measures to address racism and bias in the educational system;
2. Involve Indigenous Peoples in educational design and development;
3. Include indigenous culture, history, values and traditions in educational programs;
4. Research and address special needs of Indigenous women and children,

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<sup>77</sup> UNEP/CBD/WG8J/4/INF/4 Page 41

<sup>78</sup> <http://www.biodiv.org/doc/meetings/tk/wg8j-03/official/wg8j-03-04-en.pdf>

<sup>79</sup> UNEP/CBD/WG8J/4/INF/7 Page 25

<sup>80</sup> See E/CN.4/2005/88/Add.4 15 December 2004 for conclusions and findings.

5. Involve Indigenous educators in design and teaching; and
6. Evaluate bilingual and multicultural approaches to education.

In New Zealand pre-school language nests (Te Kohanga Reo) have been developed as an urgent and strategic intervention to halt the demise of Maori language. There are now over 578 Kohanga Reo in NZ responsible for producing over 25 000 native language speakers and students well versed in matauranga Maori. There are opportunities for Maori education as alternative learning institutions and to enhance Maori throughout mainstream education. The ability to learn about matauranga Maori throughout all levels of the education system has significantly strengthened over the past five years and “the significant shift in empowering Maori with their own cultural knowledge is largely happening through Maori initiated, owned and managed tertiary providers”.<sup>81</sup>

In Canada the Canadian Taskforce Report recommended:

- the development of educational resources in Indigenous languages, and the creation of language teacher training.
- Indigenous control over education curriculum. Indigenous control over education is still weak in North America. For example, the Newfoundland and Labrador government has repeatedly refused Innu requests to change their school year to allow their youth to go inland during the winter to help with hunting and trapping.

In Vanuatu the current Education Master Plan (2000-2010) there are now opportunities to incorporate traditional knowledge into national education. As noted in the Master Plan the new curriculum is to teach in the vernacular language which was realized after World Bank funding for the initiative.<sup>82</sup>

In Bolivia, Guatemala, and Ecuador Multicultural Bilingual Education is regarded as a “most dynamic area of the educational system”.<sup>83</sup> In Brazil multicultural education is a constitutional right (e.g., Constitution of Brazil in 1988).

Some Latin American countries have implemented Multicultural Bilingual Education programmes in various ways and with different levels of success. Some have become official programmes, while others are privately funded, with the strong support of indigenous organizations. For example, Ecuador, Peru, Bolivia, Mexico, and Guatemala have Multicultural Bilingual Education as part of their national educational systems. In Brazil, Colombia, and Chile, legislation recognizes the rights of indigenous peoples to set their autonomous programmes, which are recognized as official programmes.

In Paraguay, the state supports the teaching of Guarani language among the native and mestizo populations. Honduras, Panama, El Salvador, and Argentina are about to approve intercultural bilingual education. Ecuador, Guatemala, Costa Rica, and Colombia have also private indigenous educational projects, but without official recognition by the State.<sup>84</sup>

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<sup>81</sup> Aroha Te Pareake Mead “Emerging Issues in Maori Traditional Knowledge: Can These Be Addressed by United Nations Agencies?” Workshop on Indigenous Traditional Knowledge, 21-23 September 2005, Panama City, Panama.

<sup>82</sup> UNEP/CBD/WG8J/AG/2/2/Add.5 at p. 31

<sup>83</sup> UNEP/CBD/WG8J/AG/2/2/Add.4 at p. 26

<sup>84</sup> UNEP/CBD/WG8J/AG/2/2/Add.4 at. 26

Mexico started to implement a Multicultural Education Programme in 1997 and passed a law of linguistic rights in 2003. However, this programme is quite recent and the government is working on the inclusion of ethnic contents into the national curriculum, in consultation with indigenous peoples.<sup>85</sup>

In Bolivia, where the majority of the population is indigenous, educational reforms started only in 1993, after the Indigenous March of 1990. The set of reforms included a new Education Law, establishing Intercultural Bilingual Education and promoting indigenous participation in the implementation of the Education Reform (Law 1565).<sup>86</sup>

In Mexico the Inter-cultural University of Mexico was created with the aim of promoting a process of revaluation and revitalization of indigenous cultures and language, with a holistic approach to education, where traditional knowledge is integrated with other types of knowledge. The programmes are oriented towards both indigenous and non-indigenous students, with the aim of building bridges and providing alternatives to indigenous youth to return to their villages and apply their knowledge.<sup>87</sup>

The African Regional Report on Threats to Traditional Knowledge recommends that the challenge is not to preserve traditional knowledge, because it has a dynamic nature, but rather to identify those elements in traditional knowledge (and traditional lifestyles) that are worth keeping and to look for ways to integrate these elements with new knowledge, insights and ways of living based on modern scientific methods.<sup>88</sup> According to the report most Namibians are of the view that it is desirable for the Ovahimba to send their children to modern schools and by children are then able to “defend their rights better using their knowledge of the mainstream development agendas to defend their case and using the national language to argue their case both at national levels and at international levels.” There is, according to this approach, a place for the traditional Ovahimba way to co-exist with the new ways.<sup>89</sup>

UNESCO has developed a Local and Indigenous Knowledge Systems (LINKS) programme that seeks to maintain the vitality of local knowledge within communities by strengthening ties between elders and youth in order to reinforce the transmission of indigenous knowledge and know-how. UNESCO is also piloting activities aimed at maintaining the dynamism of local knowledge within local communities in such areas as the Solomon Islands.<sup>90</sup>

### 3. PROMOTING & SUPPORTING TRADITIONAL HEALTHCARE

The use of traditional medicine facilitates intergenerational transfer of knowledge, experiences and observations, and results in a health system that is tribally and culturally specific, but also continuously changing and strongly influenced by social, economic and political factors.

As noted in the Phase I and Phase II Composite Report efforts to develop health programmes specifically for Indigenous peoples that take into consideration their cultural characteristics are inadequate. Failure to develop such programmes results in under-nourishment as a consequence of indigenous and local communities having modified their natural environments and lost their traditional source of feeding, while communities that are relatively isolated have better levels of nutrition.

The Draft Declaration on the Rights of Indigenous Peoples developed by the working group includes important provisions concerning intellectual property rights. Article 24 states that:

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<sup>85</sup> *Ibid*

<sup>86</sup> UNEP/CBD/WG8J/4/INF/5 Page 34

<sup>87</sup> UNEP/CBD/WG8J/4/INF/5 Page 34

<sup>88</sup> UNEP/CBD/WG8J/4/INF/2 Page 64

<sup>89</sup> UNEP/CBD/WG8J/4/INF/2 Page 64

<sup>90</sup> UNEP/CBD/COP/8/7

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

Conservation efforts are necessary to protect biodiversity, but also to meet the health needs of local and Indigenous communities. The use and harvesting of traditional medicinal plants and herbs can result in a decline in the availability of the plant or herb population, particularly when local use is combined with large scale export for trade. For this reason a number of medicinal plants have become rare and it has become necessary and imperative to put them under protection.

Health indicators are needed to measure and monitor the state of retention of traditional biodiversity-related knowledge without which it cannot be adequately assessed.<sup>91</sup>

In the Philippines the Traditional and Alternative Medicine Act 1997 defines traditional medicine as “the sum total of knowledge, skills and practice on health care, not necessarily explicable in the context of modern, scientific philosophical framework, but recognised by the people to help maintain and improve their health towards the wholeness of their being, the community and society, and their interrelations based on culture, history, heritage, and consciousness”. The Republic Act 8423 (1997) established the Institute of Traditional and Alternative Health Care (PITAHC) to enhance traditional healthcare throughout the country by promoting and validating the use of traditional medicine and practices. A development fund has also been created to support the overall activities of the Institute.

In Africa there are two systems of medicine that co-exist: one based on traditional medicine and the use of biodiversity, and the other dominant western approaches to healthcare that utilize pharmaceutical products.<sup>92</sup> Numerous countries are integrating traditional medicine into their official healthcare programmes whereby an estimated 80 % of the African population use traditional medicine for their health needs, including those who also visit modern health facilities.

In Ecuador national protection of traditional medicine is protected in its national constitution.

In Australia in the Northern Territory, traditional medical knowledge is recognized in a limited way through the use of Aboriginal Health Workers under the Health Practitioners and Allied Professionals Registration Act 1985 who “act as a bridge between traditional healers, indigenous communities and conventional medical practitioners.”<sup>93</sup>

#### 4. REGISTERS / DATABASES

In the light of the historical destruction of Indigenous knowledge, its current fragile existence, and its threatened future, the preservation of Indigenous knowledge and protection of Indigenous intellectual property rights to ensure proper attribution and use of it now requires the documentation of such knowledge.

Documentation plays an important role in the retention and protection of Indigenous intellectual property<sup>94</sup> although in isolation it is not enough to maintain the traditional knowledge that benefits biodiversity and sustainability.

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<sup>91</sup> <http://www.biodiv.org/doc/meetings/tk/wg8j-03/official/wg8j-03-04-en.pdf> at para 55

<sup>92</sup> UNEP/CBD/WG8J/4/INF/2 at p. 18

<sup>93</sup> “Report on Traditional Knowledge” Permanent Forum on Indigenous Issues, Sixth Session, New York, 14-25 May 2007 .

<sup>94</sup> <http://epress.lib.uts.edu.au/dspace/bitstream/2100/57/1/Libraries+and+Indigenous+Knowledge.pdf>

The Phase I and Phase II Composite Report recommends to Governments:

that registers developed at local and national levels with the full and effective participation and the prior informed consent of indigenous communities may be useful measures to protect traditional knowledge.<sup>95</sup>

Desire to protect TK from unapproved use has led to the establishment of confidential registers. As a result important sources of prior art including local community registers, indigenous peoples and other confidential registers including the Inuit, BioZulua, and the confidential register under the Peruvian legislation, as well as the oral registers of TK maintained by elders and wise men and women, are effectively excluded from the remit of prior art investigations.

The “Assessment of the Advantages and Limitations of Registers as a Measure to Protect Traditional Knowledge Report on Registers” suggested a “a mix of appropriate initiatives” (“Registers Report”) that can “facilitate the revival and maintenance of traditional knowledge and cultural practices relevant to the conservation and sustainable use of biological diversity” which could include the “establishment of traditional-knowledge registers”.<sup>96</sup>

Registers or databases have been developed by a number of Indigenous communities worldwide. They are generally compiled by communities or community groups for their own benefit and have been found useful for organizing knowledge to enable better protection and improved management of the community resources.

However there is variance in the extent to which existing databases and registries protect traditional knowledge and how they operate. There is also variance as to whether the aim of such registers or databases aim is to conserve and disseminate such material for wider public access, or whether they seek to protect and restrict access to it.

Legal measures for the protection of traditional knowledge should focus on the protection of traditional knowledge rather than the protection of register technologies. Database protection approaches do not necessarily protect the item of knowledge themselves, and rapid advances in digital technology make such protection vulnerable.”<sup>97</sup>

As noted in the Registers Report, some of the purposes of existing databases/registers are:

- (a) Maintenance and preservation of traditional knowledge by virtue of recording and documenting it;
- (b) Protection against the inappropriate granting of intellectual property rights by providing evidence of prior art;
- (c) Raise awareness of communities with respect to the values of traditional knowledge;
- (d) Encourage long-term conservation and promotion of natural resources and their related traditional knowledge;
- (e) Provide information to interested parties who may be interested in obtaining information available in the registry, in exchange for a fee;

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<sup>95</sup> <http://www.biodiv.org/doc/meetings/tk/wg8j-04/official/wg8j-04-04-en.pdf>

<sup>96</sup> UNEP/CBD/WG8J/4/INF/9

<sup>97</sup> UNEP/CBD/WG8J/4/4 at p. 6

- (f) To be used as part of a legislative system for the assertion of intellectual property rights over traditional knowledge (e.g. a national sui generis system to protect indigenous and local knowledge).

Some considerations that may be drawn regarding the use of traditional knowledge databases and registers are:<sup>98</sup>

- (a) Traditional-knowledge databases relevant to the conservation and sustainable use of biological diversity have diverse functions;
- (b) The creation of traditional-knowledge databases present positive and negative incentives to indigenous and local communities that have demonstrated ambivalence to their creation and maintenance;
- (c) The creation of traditional-knowledge registers for the purposes of defensive publication of traditional knowledge as prior art for the pre-emption or invalidation of patents or the positive registration of traditional knowledge rights have provided both some promising and some troubling experiences for indigenous and local communities;
- (d) Traditional-knowledge databases, non-IPR-related traditional-knowledge registers and other traditional-knowledge databases are numerous and also present conflicting incentives to and impacts on indigenous and local communities;
- (e) The design and implementation of traditional-knowledge databases reflect numerous legal and policy issues that should be addressed as part of integrated measures for the development and promotion of traditional knowledge databases relevant to the goals of the Convention on Biological Diversity; and
- (f) The development of policy and law related to traditional-knowledge databases should be flexible, adaptable to the particular circumstances of different indigenous and local communities, based on a fundamental respect for the customary laws and cultural integrity of indigenous and local communities, and be based on the principle of free, prior informed consent (FPIC).
- (g) National governments should repatriate the traditional knowledge of indigenous and local communities stored in national databases, and encourage the repatriation of traditional knowledge stored in private and corporate databases.<sup>99</sup>

## 5. MITIGATING DEVELOPMENTAL IMPACT – CULTURAL IMPACT ASSESSMENT

See above under “Territorial Factors”.

### SOCIO-ECONOMIC FACTORS – ADDRESSING THE DECLINE OF TRADITIONAL KNOWLEDGE

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#### 1. Promoting local capacity

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<sup>98</sup> UNEP/CBD/WG8J/4/4 Page 5

<sup>99</sup> UNEP/CND/WG8J/4/4 at p. 6

2. Participation in decision-making: incentive measures, natural resource & environmental management,
3. Enabling economic development / poverty alleviation

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## 1. PROMOTING & SUPPORTING LOCAL CAPACITY

The capacity and infrastructure of Indigenous communities need to be strengthened so that Indigenous peoples can remain within their communities, self-govern effectively and protect traditional knowledge in a suitable way.<sup>100</sup>

The Phase I and Phase II Composite Report notes that:

in all types of mechanisms and measures used to promote traditional knowledge, as well as cultural, social and economic well-being, it seems that capacity-building is crucial. This involves a significant commitment to building the educational, governance, management and professional capacity of indigenous and local communities. It is also important to building the strength, infrastructure and capacity of indigenous and local institutions, such as governance structures, research bodies, economic structures, health care systems and education systems.<sup>101</sup>

Indigenous institutions, research organizations, political structures, and communities need support to conduct their own activities in relation to Article 8(j). It is important to have an approach that reaffirms and supports local knowledge, strengths, and values, when possible and appropriate, instead of using outside expertise.

Community institutional structures should be developed to make indigenous and local communities equal partners in the design and implementation of incentive measures.<sup>102</sup> This also requires assistance with developing legal and administrative capacity to manage, monitor and enforce incentive measures.<sup>103</sup>

In the strengthening or establishment of institutions, policies should discourage agencies and projects from imposing pre-conceived organisational models on communities, and employ capacities through the preferential use of indigenous and community experts, and supports the application of local knowledge, skills and technologies in natural resource management.<sup>104</sup>

Universities, and other training institutions dedicated to the cause of the further transmission of traditional knowledge should be established with the full and effective involvement of indigenous communities. Elders and traditional healers and other holders of traditional bodies of knowledge could then play a crucial role in such undertakings as teachers, lecturers and even as traditional researchers.<sup>105</sup> Indigenous peoples must be involved in impacts of research, both for their own benefit and for the benefit of the non-indigenous population, given their extensive knowledge of landscapes.<sup>106</sup>

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<sup>100</sup> UNEP/CBD/WG8J/4/INF/2 at p. 44

<sup>101</sup> UNEP/CBD/WG8J/4/4 at para 97.

<sup>102</sup> Decision VI/15

<sup>103</sup> Decision VI/15 at Annex I at para 32

<sup>104</sup> UNEP/CBD/WG8J/4/INF/7

<sup>105</sup> UNEP/CBD/WG8J/AG/2/2/Add.1 at p. 31

<sup>106</sup> UNEP/CBD/WG8J/4/INF/7 Page 26

For example the proposed United Nations University International Institute on Traditional Knowledge could make an effective contribution to efforts to addressing the threats to TK and indigenous communities. Pilot activities of the Institute to commence in April 2007 are:

- Exploring the role of TK in local communities adapting to climate change;
- Promoting awareness about traditional knowledge for water management;
- Developing an information service about international policy developments.

## 2. PARTICIPATION IN DECISION MAKING

The Phase I and Phase II Composite Report recommends that Indigenous participation in planning and decision making processes should be become fully participatory.

*Indigenous peoples need to be included in decision-making processes at all levels, especially where Indigenous land or other interests are at stake. This is especially important in environmental management, protected areas and education. As well as being included in decision-making, consultation mechanisms and prior informed consent mechanisms should be strengthened and made mandatory. Traditional knowledge should also be a mandatory consideration in decision-making. Their participation must include the right to say ‘no’ if need be.*

### **Natural Resource Management and Quality of Environment**

Influence over decisions concerning natural resources management and the quality of the environment in which they live is directly tied to the social, cultural and economic future of Indigenous peoples and local communities.<sup>107</sup>

Communities are rarely consulted on what crops to plant, whether waters can be diverted, or where a new settlement or factory will be created. They are also tend to be sidelined from private sector decision-making over the development of natural resources in their territories.

### **Developing Incentive Measures**

Article 11 of the Convention on Biological Diversity prescribes that parties to the convention shall:

as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.

Decision VI/15 calls for the participation of Indigenous Peoples and local communities in the development and implementation of incentive measures, including capacity-building arrangements. In achieving participatory incentive measures incentive measures should be “developed in a manner that is participatory and promotes effective policy integration and stakeholder participation, processes should be established to...facilitate dialogue with relevant stakeholders including indigenous and local communities and representatives of civil society.”<sup>108</sup>

<sup>107</sup> UNEP/CBD/WG8J/AG/2/2/Add.1 at p. 32

<sup>108</sup> Decision VI/15 at Annex I para 9.



However options to participate in the decision-making processes at the national, regional, and local levels are in many cases weak or non-existent. Full participation and responsibility in the decision-making process regarding the management of resources must be promoted.<sup>109</sup>

The Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) in reviewing the work on incentives under the CBD encourages:

the development of mechanisms, including policy, legal and institutional measures in full consultation with representatives of indigenous and local communities that ensure the fair and equitable sharing of benefits arising from positive incentive measures so that indigenous and local communities that maintain customary sustainable use systems are appropriately recognised and rewarded for biodiversity conservation and sustainable use.

Incentive measures include the adoption of economic and social measures that act as incentives for the conservation and sustainable use of biological diversity. Economic incentives are not necessarily the most effective or desired option, as noted in the Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity.<sup>110</sup>

A number of incentive measures are being implemented mostly in the development of sui generis negotiations, as well as poverty reduction strategies, access to benefit sharing strategies, tax exemptions, and collaborative research projects. These measures are providing strong motivation or incentive for “Indigenous peoples, local communities, governments and corporations to investigate collaborative approaches to conservation and economic development on the basis of the use of traditional biodiversity-related knowledge”.<sup>111</sup>

The Convention on the Elimination of All Forms of Racial Discrimination requires States parties to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent”. The Human Rights Commission has found that respect for Article 27 of the International Covenant on Civil and Political Rights includes “measures to ensure effective participation of members of minority communities in decisions which affect them.”

The International Indigenous Forum on Biodiversity has stressed the need for parties to ensure more effective consultation, participation of indigenous peoples and ensure the right of indigenous peoples to free prior informed consent in order to more fully develop useful strategies to protect Indigenous knowledge.<sup>112</sup>

In the recommendations for further cooperation on incentive measures, states are asked to involve Indigenous Peoples and local communities in meaningful policy dialogue for the design and use of incentive measures for conservation and sustainable use of biodiversity.<sup>113</sup>

Specifically the cultural, subsistence and commercial value of biodiversity is recognised in Decision VI/15 and the need for incentive measures to be designed that support the socio-economic development needs of Indigenous peoples and local communities.

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<sup>109</sup> UNEP/CBD/WG8J/4/4 Page 8

<sup>110</sup> UNEP/CBD/WG8J/3/4

<sup>111</sup> M. Nakata & M. Langton Eds., *Australian Indigenous Knowledge and Libraries*, Australian Academic and Research Libraries Vol. 36, No. 2, June 2005 at p. 57.

<sup>112</sup> 4<sup>th</sup> Working Group on Article 8(j) and Related Provisions in Granada the Opening Statement, IIFB, 23 January 2006.

<sup>113</sup> Decision VI/15

Decision VI/15 on incentive measures recommends “community institutional structures should be developed to make indigenous and local communities equal partners in the implementation of incentive measures”.<sup>114</sup> This may involve recognising and/or strengthening existing institutional arrangements or establishing new ones, as necessary, for the conservation and sustainable use of biological diversity, and in the context of article 8(j), the retention and use of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles.

According to Decision VI/15 on ‘incentive measures one of the characteristics of ‘incentive measures’ is the need for clear targets and indicators to measure their success. That is:

to the extent feasible incentive measures should have targets that are specific, measurable, time-driven, and based on an analysis of their effects. The successful monitoring and evaluation of their impacts is an important factor in ensuring the ultimate success of incentive measures.”

Whilst this quantification may be problematic in the context of ‘knowledge’ there is a need for incentive measures that protect and promote traditional knowledge, incentive measures, tailored to secure the survival of traditional knowledge within and beyond this current generation, need to be developed urgently to encourage the use of biodiversity-related traditional knowledge innovations and practices.<sup>115</sup>

Annex I of Decision VI/15 outlines elements that should be taken into consideration in the design and implementation of incentive measures for the conservation and sustainable use of biological diversity. In general terms incentive measures should be designed to address the conservation and sustainable use of biological diversity, while taking into account:

- a. Local and regional knowledge, geography, circumstances and institutions;
- b. The mix of policy measures and structures in place including sectoral considerations;
- c. The need to match the scale of the measure to the scale of the problem;
- d. The measures' relationship to existing international agreements.<sup>116</sup>

### **3. ECONOMIC DEVELOPMENT**

Livelihood diversification is integral in the process of creating economic incentives for the maintenance, preservation and application of traditional knowledge systems.<sup>117</sup> Biodiversity cannot be conserved by keeping people poor even if historically biodiversity survived largely under such conditions.”<sup>118</sup>

National approaches to economic development, including laws, regulations, policies and negotiation strategies should integrate principles of sustainable development and use, and must be reviewed and amended as necessary to correct intentional or inadvertent racist elements that undermine the retention and practice of traditional knowledge.

Decision VI/15 of COP 6 on incentive measures recommended capturing value for Indigenous and local communities. To this end the “value of biological diversity for subsistence, cultural or commercial

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<sup>114</sup> Annex I at para 28

<sup>115</sup> UNEP/CBD/WG8J/4/INF/2 Page 58

<sup>116</sup> UNEP/CBD/WG8J/4/4 para 97

<sup>117</sup> UNEP/CBD/WG8J/4/INF/2 Page 54

<sup>118</sup> UNEP/CBD/WG8J/4/INF/2 Page 53

purposes should be recognized and incentive measures designed so that, to the extent possible, they support the social and economic development needs of indigenous and local communities.”<sup>119</sup>

These economic benefits will serve as an incentive for effective and proper management and use of biodiversity taking into account the traditional knowledge, innovations and practices that relates to the use and management of such resources.<sup>120</sup>

Access to resources need to be increased so that Indigenous communities can build their own resource generating streams.<sup>121</sup> Local subsistence activities need to be supported as well as economic alternatives at local levels. Most biodiversity-related knowledge of indigenous peoples is related to and sustained by everyday practices and these need to be maintained and encouraged.”<sup>122</sup> This will support the long term protection and conservation of biological diversity.<sup>123</sup>

Economic development, particularly that reliant on natural resource extraction must be reconciled with Indigenous peoples’ ability to maintain their languages and culture through the use, retention and practice of traditional knowledge.

The Canadian Royal Commission on Aboriginal Peoples recommended that interim measures be taken to use natural resources for Aboriginal economic and cultural development. The commission also recommends expanding the range of benefits derived from resource development in areas of traditional use and Treaty areas, in order to achieve a more equitable distribution of economic benefits from such activities.

As noted in the Composite Report “Indigenous communities, as distinct peoples, hold their own concepts of development, based on their own values, aspirations, needs and priorities, and that these concepts are often different from other parts of the national population.”<sup>124</sup>

### **Forestry Resources**

It is generally the case that forest policies and legislation are designed without, or with very little, participation of Indigenous and local communities. Very few countries have included considerations regarding forest related traditional knowledge in their forest policies.<sup>125</sup>

Forestry regulations for sustainable management of timberline forests are needed and should include both scientific assessment and traditional knowledge.<sup>126</sup>

Decision VI/22 on forests expresses the need for:

- action to ensure conservation of biological diversity;
- the sustainable use of its components; and,
- the fair and equitable sharing of the benefits arising out of utilization of genetic resources, and arising from the utilization of traditional knowledge, innovations and practices from indigenous

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<sup>119</sup> Decision VI/15 at Annex I at para 21

<sup>120</sup> UNEP/CBD/WG8J/4/INF/2 at p. 53

<sup>121</sup> UNEP/CBD/WG8J/4/INF/7 at p. 7

<sup>122</sup> UNEP/CBD/WG8J/4/4 Arctic Report at p. 9

<sup>123</sup> UNEP/CBD/WG8J/4/INF/7 at p. 23

<sup>124</sup> UNEP/CBD/WG8J/4/4 at para. 15

<sup>125</sup> <http://www.biodiv.org/doc/meetings/tk/wg8j-04/official/wg8j-04-04-en.pdf> at para 38

<sup>126</sup> UNEP/CBD/WG8J/AG/2/2/ Add.2 at p. 35

and local communities, in accordance with Article 8(j) and related provisions, of all types of forests, considering the need for urgent action for forests that are ecologically significant and/or most important for biological diversity on national and regional scales and according to national priorities, where forest biodiversity loss or threats of loss are significant or of great concern, and in areas with greatest potential for conservation, sustainable use and benefit-sharing;

As noted in the African Regional Report, modern forestry practices are acknowledging the invaluable repository of knowledge available from African Indigenous Peoples given that traditional management practices, by definition, have stood the test of time, embodying the knowledge of a particular ecosystem accumulated over several generations. It is noted in the report that cases from different parts of the world suggest that such partnerships with Indigenous and local communities have worked well in conservation and reforestation efforts, wildlife management and timber production.<sup>127</sup>

Successful collaborative forestry management requires the empowerment of local institutions to enable them to negotiate and arrive at agreements as equals.<sup>128</sup> For example the Cameroon government and Ecosystèmes Forestier d’Afrique Centrale (ECOFAC) promise to initiate a new management phase soon with funding from the European Union.<sup>129</sup> The new management plan will consider new information concerning the use by local communities of forest resources, and “community maps will be used to promote meaningful participation by local and indigenous communities in proposed planning discussions through their direct input to park management discussions, and the government-approved management plans.”<sup>130</sup>

In Canada the Canadian National Forest Strategy recognizes the implications of the definition, recognition and exercise of Aboriginal and Treaty rights for forest management.

This awareness has developed at the international level, in the federal government, in provincial governments, within the forest industry and among individual Aboriginal communities although much remains to be done to translate this into forest management regimes and practices.

The implementation of mechanisms for participation, benefit-sharing, and preservation and maintenance of traditional knowledge and practices, is considered fundamental in Canada for improving sustainable forest management. For example, it is argued that the conjunction of modern technology and traditional forest practices could improve the performance in the forest sector and provide the means to local and indigenous communities to participate in the market, while maintaining their own cultural patterns.

However, the value of forest-related traditional knowledge has only recently been recognized in political fora, and remains largely a conceptual and theoretical issue, while mechanisms for their preservation and use in forest management are still under discussion.<sup>131</sup>

## **Fisheries**

There needs to be more rigorous enforcement of offshore commercial fishing interests operating within the Exclusive Economic Zone of States to ensure local and indigenous communities marine resources are not over-exploited.

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<sup>127</sup> UNEP/CBD/WG8J/AG/2/2/Add.1 at p. 36

<sup>128</sup> Ibid

<sup>129</sup> Ibid

<sup>130</sup> Ibid

<sup>131</sup> UNEP/CBD/WG8J/4/INF/5 Page 36

The Saami practice small-scale fishing and require formal recognition and empowerment to manage the resources in the area, and for their knowledge and customary rules to be valued by the Norwegian fisheries administration.<sup>132</sup>

## COOPERATION & COORDINATION: INTERNATIONAL, REGIONAL, NATIONAL, SUB-NATIONAL AND LOCAL

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### INTERNATIONAL COORDINATION AND COOPERATION

Although Indigenous participation at the international level has improved, indigenous communities remain concerned that the level of involvement and their capacity to be involved continues to be extremely limited.<sup>133</sup> The Revised Phase One, and Phase Two of the Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity ('The Phase I and Phase II Composite Report')<sup>134</sup> recommended:

Other international conventions and agreements have to be analyzed and addressed in relation to implementation of Convention on Biological Diversity to see what gaps and overlaps exist to minimize future problems;

- Cooperate internationally to monitor and address climate change, contamination, and pollution, which is an international problem. Appropriate measures have to be taken to prevent damage to indigenous societies;
- International research programs need to communicate and address issues surround traditional knowledge and biodiversity;
- Given the trans-boundary nature of threats to traditional knowledge, such as climate change, it is important to cooperate internationally in devising solutions.<sup>135</sup> Increased communication and collaboration between institutions and organizations that are addressing the issues of indigenous knowledge and biodiversity in the Arctic, and to make efficient use of resources, identify critical issues facing the Arctic, and to examine where there are gaps and overlaps in organizational activities.<sup>136</sup>

United Nations Permanent Forum on Indigenous Issues & the Inter-Agency Support Group on Indigenous Issues

### *The Permanent Forum*

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<sup>132</sup> UNEP/CBD/WG8J/AG/2/2/ Add.2 at p. 37

<sup>133</sup> UNEP/CBD/WG8J/4/4 at para 109

<sup>134</sup> UNEP/CBD/WG8J/4/4 at p. 10

<sup>135</sup> UNEP/CBD/WG8J/4/4 at p. 9

<sup>136</sup> Ibid

Internationally, the mechanism for the coordination of indigenous issues amongst the various agencies is through the Permanent Forum on Indigenous Issues. The work of the Permanent Forum is supported through an interagency mechanism referred to as the Inter-Agency Support Group (IASG). There are other cooperative mechanisms that are mandated to address the decline of traditional knowledge such as the World Intellectual Property Organization Intergovernmental Panel, and partnerships between UNESCO and the CBD.

There are at least eleven UN agencies currently working on traditional knowledge issues and hence coordination is crucial.

By ECOSOC resolution 2000/22, the Permanent Forum (UNPFII) was created with a broad mandate to deal with six main areas: economic and social development, culture, the environment, education, health and human rights. In carrying out its mandate, the UNPFII is required to provide expert advice and recommendations on indigenous issues to the Economic and Social Council, as well as to programmes, funds and agencies of United Nations, raise awareness and promote integration and coordination of activities related to indigenous issues within the UN system and prepare and disseminate information on indigenous issues.

The Permanent Forum has made a number of recommendations calling for the issue of Indigenous traditional knowledge to be addressed as a matter of urgency.<sup>137</sup>

The Chairperson of the UN Permanent Forum on Indigenous Issues (UNPFII) stressed just before the UN MDG + 5 Summit that “indigenous peoples are invisible in the Millennium Development Goals (MDGs).” On this basis the UNPFII recommended a clearer approach to involving indigenous peoples in implementation of the MDGs, through a rights-based approach<sup>138</sup> and through the development of indicators that capture indigenous realities.

One of the recommendations of the Programme of Action for the 2<sup>nd</sup> Decade for the World’s Indigenous Peoples is that the Permanent Forum should hold regional meetings on indigenous issues with existing regional organizations with a view to strengthening cooperation and coordination as well as supporting regional initiatives of United Nations agencies, funds and programmes.<sup>139</sup>

The Permanent Forum convened an International Technical Workshop on traditional knowledge on 25 September 2005 to address the various TK-related activities being undertaken by some 11 UN agencies with a view to better integrating indigenous peoples' views in these activities. The workshop recommended that the Permanent Forum commission a study on “customary laws pertaining to traditional knowledge in order to investigate to what extent such customary laws should be reflected in international and national standards addressing indigenous traditional knowledge.”<sup>140</sup>

The UNPFII intends to develop a matrix of UN related activities and outcomes regarding TK to ensure a more holistic approach is developed regarding the promotion and protection of TK.<sup>141</sup>

### *Inter-Agency Support Group (IASG)*

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<sup>137</sup> PFII/2005/WS.TK

<sup>138</sup> UNEP/CBD/WG8J/4/INF/5 at p. 32

<sup>139</sup> [http://www.un.org/esa/socdev/unpfii/en/second\\_programme\\_of\\_action.htm#b5](http://www.un.org/esa/socdev/unpfii/en/second_programme_of_action.htm#b5)

<sup>140</sup> E/C.19/2006/2 at para 41.

<sup>141</sup> UNEP/CBD/WG8J/4/INF/14 at p. 7

Coordination of Indigenous issues within the UN system is achieved via through various means including the Inter-Agency Support Group (IASG). The IASG is made up of focal points from all relevant international agencies working on indigenous issues and representation is nominated by the Heads of Agencies.

Initially the IASG was established to support and promote the mandate of the UN Permanent Forum on Indigenous Issues within the United Nations system which has been expanded to include support for indigenous related mandates throughout the inter-governmental system.

The IASG allows the UN system and other intergovernmental organizations to analyze recommendations made by the Forum with a view to facilitating comprehensive and coordinated responses to the UNPFII. The IASG Chairmanship rotates annually. As of 2007, the Chairmanship has been held by the ILO, the World Bank, WIPO, UNDP, UNICEF, IFAD and the CBD.<sup>142</sup>

The IASG membership includes:

- UN Department of Economic and Social Affairs (DESA)
- UN Department of Public Information (DPI)
- Secretariat for the Convention on Biological Diversity (SCBD)
- Food and Agriculture Organisation of the United Nations (FAO)
- International Fund for Agricultural Development (IFAD)
- International Labour Organisation (ILO)
- United Nations Office of the Coordination of Humanitarian Affairs (OCHA)
- Office of the United Nations High Commissioner for Human Rights (OHCHR)
- United Nations Programme on HIV/AIDS (UNAIDS)
- United Nations Conference on Trade and Development (UNCTAD)
- United Nations Development Program (UNDP)
- Regional Initiative on Indigenous Peoples' Rights and Development in the Asia Pacific
- United Nations Environment Programme (UNEP)
- United Nations Educational Scientific and Cultural Organisation (UNESCO)
- United Nations Framework Convention on Climate Change (UNFCCC)
- United Nations Population Fund (UNFPA)
- United Nations Human Settlements Programme (UN-HABITAT)
- Indigenous Peoples' Right to Adequate Housing: A Global Overview

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<sup>142</sup> <http://www.un.org/esa/socdev/unpfii/en/iasg.html>

- United Nations High Commissioner for Refugees (UNHCR)
- United Nations Children's Fund (UNICEF)
- United Nations Development Fund for Women (UNIFEM)
- United Nations Industrial Development Organisation (UNIDO)
- United Nations Institute for Training and Research (UNITAR)
- World Intellectual Property Organization (WIPO)
- World Health Organization WHO
- World Bank
- Inter-American Development Bank (IADB)
- European Union
- Fondo Indígena

### *Collaboration and Coordination between the World Intellectual Property Organisation & UNESCO*

The United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) have collaborated to develop a set of guidelines for national laws relating to legal protection of 'folklore'.

Some national governments have attempted legislation based partially on Model Provisions adopted by UNESCO and WIPO, namely the Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982 ("the Model Provisions").

WIPO has also established an Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in September of 2000. The Committee's work is to facilitate the possibilities of finding common ground for international cooperation with regard to these issues, and if possible, through legally binding international norms.

### *Millennium Development Goals*

Indigenous and tribal peoples are "lagging behind other parts of the population in the achievement of the MDG in most, if not all, the countries in which they live", which tends to be hidden because the situation of indigenous and tribal peoples is often not reflected in statistics or is hidden by national averages. Concern has been expressed that in the process of meeting the targets of the Millennium Goals this may have a harmful effect on Indigenous and local communities through the acceleration of the loss of the



lands and natural resources on which indigenous peoples' livelihoods have traditionally depended or the displacement of indigenous peoples from those lands.<sup>143</sup>

The Interagency Support Group on Indigenous Issues has recommended that if the MDGs are to be achieved special attention must be placed on indigenous peoples. It recommends:<sup>144</sup>

- Partnerships at the international and national level should increase efforts to support and build on indigenous peoples' articulation of their path of development and their full participation in the decision-making processes. They should make every effort to provide adequate funding, technical and institutional support and training to assist those development efforts articulated by indigenous peoples towards achieving the MDGs;
- States, international organizations and non-governmental organizations should promote national dialogues, including through the establishment of institutional frameworks, as appropriate, in order to bring together indigenous peoples' perspectives and priorities for sustainable human development and their expectations regarding the MDGs. Indigenous peoples' institutions and processes, where they exist, should be respected during these dialogues;

Such efforts must take into account the multiple levels and sources of discrimination and exclusion that indigenous peoples face.<sup>145</sup>

It is essential that the linkages between the implementation of the MDGs and the promotion of traditional knowledge be explored and strengthened.<sup>146</sup>

## REGIONAL COOPERATION

There are a number of regional systems and frameworks that aim for greater cooperation around the issues of Indigenous traditional knowledge. They include Model Law and Model Provisions, Declarations such as the Mataatua Declaration, the UNESCO Declaration on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands, the Kari-Oca Declaration, and the Organization of American States Draft Declaration of the Rights of Indigenous Peoples.

The UNESCO Declaration on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands was adopted by the UNESCO Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Culture in the Pacific Islands, Noumea, 15-19 February 1999. The Declaration recommended:

1. Any approach to harmonize the protection of traditional knowledge and expressions of indigenous culture must take into account different needs of Pacific countries and territories;

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<sup>143</sup> Statement of the Inter-Agency Support group on Indigenous Issues regarding Indigenous Peoples and the Millennium Development Goals 30 September and 1 October 2004 at [http://www.un.org/esa/socdev/unpfii/links\\_unsystem/inter\\_agency\\_statement.htm](http://www.un.org/esa/socdev/unpfii/links_unsystem/inter_agency_statement.htm).

<sup>144</sup> *Ibid*

<sup>145</sup> *Ibid*

<sup>146</sup> UNEP/CBD/WG8J/AG/2/2/Add.1 at p. 41.

2. Common goals for the protection, preservation, conservation, promotion and/or enhancement of traditional knowledge and expressions of indigenous cultures through legal and non-legal means can be conceived despite these differences;
3. Regional goals approach should reflect the cases of inappropriateness of conventional intellectual property rights regime for the protection of traditional knowledge and expressions of indigenous cultures;
4. Appropriate model /Sui generis law for the region for intellectual property rights must be developed to ensure protection for heritage and environment while promoting reciprocity amongst Pacific countries and territories;
5. The development of an effective Pacific/regional bloc to negotiate at the international arena must be fostered.

To ensure the viability of regional policy, countries and territories must adopt the following measures:

- Develop, enact and implement appropriate legislation useful for the protection of traditional knowledge and expressions of indigenous cultures that are consistent with the regional goals;
- Develop non-legal mechanisms specific to the needs of individual sustainable Pacific countries and territories;
- Develop sustainable mechanisms in the political, social, scientific, economic, educational and structural areas in line with the legal regimes for the "protection" of traditional knowledge and expressions of indigenous cultures.

## **REGIONAL MODEL LAW**

The purpose of Model Legislation is to provide a starting point for countries wishing to enact legislation for the protection of traditional knowledge and expressions of culture. Countries are free to adopt or adapt the Draft Model Law as they see fit.

The approach taken in Draft Model Law is to protect the rights of traditional owners in their traditional knowledge and expressions of culture and permit tradition-based creativity and innovation, including commercialization thereof, subject to prior informed consent and benefit-sharing.

### **Pacific Model Law**

The Draft Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002), the "Pacific Model Law", establishes procedures whereby consent can be obtained for the non-customary use of traditional knowledge and expressions of culture, including derivative works. It is intended to complement and not undermine intellectual property rights.

The Model Law also recognises rights to traditional knowledge and expressions of culture and allows traditional owners to be compensated for the use of their traditional knowledge. It provides for the establishment of national institutions to create and maintain databases on owners as well as permitting the establishment of a national dispute resolution system.

It recognises that a 'one-size-fits –all' or universal template to protect expressions of culture is unlikely to be a workable approach given the divergence of national and local priorities, and the legal and cultural environment and the needs of traditional communities. What is needed is a 'broad and holistic approach' to issues relating to traditional knowledge to enable the development of policy solutions that work in a complementary manner.<sup>147</sup>

*Some Pacific Island States, such as Fiji, have implemented the Pacific Model Law into national legislation.*

*The Secretariat of the Pacific Community has created a set of Guidelines for Developing National Legislation for the Pacific Model Law. The Guidelines are designed to assist policy makers in Pacific communities in the development of national legislation for the protection of traditional knowledge and expressions of culture. They are based on the Pacific Model Law and a positive development toward implementation of a regional framework for protecting traditional knowledge and expressions of culture. It is envisaged the Guidelines will assist traditional knowledge holders to identify potentially applicable protection mechanisms in the current intellectual property rights regime.*<sup>148</sup>

## OAU African Model Law

The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Genetic Resources (1998) (African Model Law) has been put forward to African countries as the African *sui generis* regime. This model law serves as a framework and guideline for African countries in the process of formulating and developing national access to genetic resources and the associated traditional knowledge and benefit sharing legislation. African countries are encouraged to make use of the OAU model law while finding appropriate means to protect the traditional knowledge, innovations and practices of indigenous and local community embodying traditional lifestyles relevant to the conservation of biological diversity.<sup>149</sup>

### *The Tunis Model Law*

The Tunis Model Law on Copyright for Developing Countries (1976) provides for protection of cultural expressions without the requirement for these to be 'fixed' (as required by copyright laws), and provides protection for an indefinite period of time. It also includes a provision for 'moral rights' to 'prevent the desecration and destruction of folklore works'. A number of African and other countries have adopted the Tunis Model Law.

## NATIONAL and SUB-NATIONAL COOPERATION

National and sub-national committees representing indigenous and local communities at the national level to enhance the exchange of information between the international, national and

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<sup>147</sup> Guidelines for Developing National Legislation for the Protection of Traditional Knowledge and Expressions of Culture Based on the Pacific Model Law, online at

<[www.spc.int/hdp/Documents/culture/TKEC%2520Guidelines\\_final.pdf](http://www.spc.int/hdp/Documents/culture/TKEC%2520Guidelines_final.pdf)>.

<sup>148</sup> Ibid.

<sup>149</sup> UNEP/CBD/WG8J/4/INF/2 at p. 63

local levels are important mechanisms to facilitate effective indigenous and local community involvement and participation in the implementation of the Convention.<sup>150</sup>

## LEGISLATION AND POLICY

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- a. Recognising the rights and interests of indigenous peoples
  - b. Fundamental Principles: mutually agreed terms (MAT) and free prior and informed consent (PIC)
  - c. Decriminalisation of TK related activities
  - d. Recognising Indigenous law and custom
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### 1. RECOGNISING THE RIGHTS AND INTERESTS OF INDIGENOUS PEOPLES

The Phase I and Phase II Composite Report recommended that Parties to the Convention on Biological Diversity revise their policies and legislation that affect indigenous peoples and ensure there is secure funding to implement legislation regarding biodiversity and traditional knowledge.<sup>151</sup> In particular, the Report recommended that Indigenous self-determination should be recognized and legislative support provided.

When recognition of the rights and interests of Indigenous peoples is only legislative it can be easily removed, and tends to be more selective and provide weaker protective measures.<sup>152</sup> Alternatively, Constitutional recognition gives rise to the proper incorporation of Indigenous perspectives, interests and needs into the policies and legislation of a state.<sup>153</sup>

In some countries there are advanced framework legislation and consultation processes for the protection of traditional knowledge.

***Bangladesh has passed the Biodiversity and Community Knowledge Protection Act and a number of the specific objectives relate to the protection of traditional knowledge and access and benefit sharing, specifically the need to:***

- a) ensure the conservation and sustainable use of biological and genetic resources and related knowledge, culture and practice in order to maintain and improve their diversity as a means of sustaining the life support and healthcare system of the people of Bangladesh;

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<sup>150</sup> UNEP/CBD/WG8J/3/6 at para 25

<sup>151</sup> UNEP/CBD/WG8J/4/4 at p. 10

<sup>152</sup> M. Nakata & M. Langton Eds., *Australian Indigenous Knowledge and Libraries*, Australian Academic and Research Libraries Vol. 36, No. 2, June 2005 at p. 54.

<sup>153</sup> UNEP/CBD/WG8J/AG/2/2/ Add.3 at p. 44.

- b) protect biological and genetic resources and the related knowledge, culture and practice from pollution, destruction and erosion;
- c) protect and support the rights, knowledge, innovations and practices of local and indigenous communities and national scientific and research institutions with respect to the conservation, use and management of biological and genetic resources;
- d) provide an appropriate system of access to biological and genetic resources and related knowledge based upon the Prior Informed Consent of the concerned local or indigenous communities and the State;
- e) promote appropriate mechanisms for a fair and equitable sharing of benefits arising from the use of biological and genetic resources and related knowledge and technologies;
- f) to ensure participation and agreement of concerned communities in making decisions regarding the distribution of benefits which may derive from the use of biological and genetic resources.

In Australia the Nationally Consistent Approach (NCA) policy framework guides uniform legislation, policy and practice in the Australia's jurisdictions regarding access and benefit sharing within which Indigenous traditional knowledge is recognised. The NCA underpins future action by governments when developing, or reviewing, legislative, administrative or policy measures on access and benefit-sharing.

Based on the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization adopted in 2002 by the 6th Conference of the Parties of the Convention on Biological Diversity, the NCA seeks to “ ensure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and to ensure that the use and collection of that knowledge results in social and economic benefits to the traditional owners.”

In Thailand the constitution provides the foundation for Indigenous and local communities participation in natural resources development and biodiversity management.<sup>154</sup>

#### *Mutually Agreed Upon Terms and Prior Informed Consent*

Development of policy and legislation that does not adequately factor the interests, needs and rights of Indigenous peoples and local communities has the potential to be a direct threat to a people or communities TK, through not adequately factoring in the interests, needs and rights of these groups.<sup>155</sup>

Indigenous and local communities need to participate in the development of policy and law that affect their interests, needs and rights.

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<sup>154</sup> UNEP/CBD/WG8J/3/6 at para 16

<sup>155</sup> UNEP/CBD/WG8J/AG/2/2/ Add.3 at p. 45

Indigenous peoples must fully participate in drafting and implementing law and policy that affects them. As well, in areas where Indigenous peoples are the primary focus of a law or policy, Indigenous people should have full control.<sup>156</sup>

The problem with the current approach to the legal protection and use of traditional knowledge is the focus on commercial application of traditional knowledge, with little attention paid to preservation of such knowledge from a cultural perspective, and for its application to biodiversity conservation outside commercial activities.<sup>157</sup>

### 3. LEGALISATION OF TRADITIONAL KNOWLEDGE RELATED ACTIVITIES

It is common for national policy and legislation to legally prohibit traditional activities upon which the practice and transmission of traditional knowledge is dependent, which in turn prevents Indigenous and local communities from practicing their traditional knowledge due to its criminalisation. For example, through the declaration of protected areas without due regard to Indigenous peoples and local communities, and which prevents a people or community from carrying out customary activities.<sup>158</sup>

The development of legislation and policy should be inclusive of Indigenous and Local community polities, and thereby enable a higher level of consideration of the interests, needs and rights of these peoples and communities.<sup>159</sup> This approach may then enable policy and legislation that is both in the interests of the state and does not directly provide a threat to traditional knowledge.

### 4. RECOGNITION OF INDIGENOUS LAW AND CUSTOM

Parties to the CBD are also obliged and encouraged to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.<sup>160</sup>

*Principles of customary law should be incorporated into intellectual property and other regimes to protect against exploitation of traditional knowledge and to encourage its promotion and use with the free and prior informed consent of the knowledge holders.*<sup>161</sup>

When considering customary procedures governing access to and consent to use biological resources, the Nunavut Wildlife Act provides a useful example for consideration. The Nunavut Wildlife Act lists the most important Inuit customary law principles relating to biodiversity. Many of these principles exist in other bodies of customary law around the world and some may therefore be considered ‘common principles’ or “norms” of customary law.

**MOBILISATION OF FINANCIAL AND TECHNICAL RESOURCES SHOULD BE PROMOTED TO SUPPORT THE DESIGN AND IMPLEMENTATION OF MECHANISMS AND MEASURES TO SUPPORT RETENTION OF KNOWLEDGE, INNOVATIONS AND PRACTICES EMBODYING TRADITIONAL LIFESTYLES RELEVANT FOR THE CONSERVATION AND SUSTAINABLE USE OF BIOLOGICAL DIVERSITY**

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<sup>156</sup> UNEP/CBD/WG8J/AG/2/2/ Add.6 at para 16

<sup>157</sup> UNEP/CBD/WG8J/4/4 at para 40.

<sup>158</sup> UNEP/CBD/WG8J/AG/2/2/ Add.3 at p. 46

<sup>159</sup> UNEP/CBD/WG8J/AG/2/2/ Add.3 at p. 46

<sup>160</sup> Article 10(c)

<sup>161</sup> UNEP/CBD/WG8J/AG/2/2/ Add.6 at p. 46

## LOCAL

- protected areas management
- capacity building

## NATIONAL & SUB-NATIONAL

- mobilising resources for National Biodiversity Strategies

## REGIONAL

## INTERNATIONAL

- Programme of Action of the 2<sup>nd</sup> Decade
  - COP Financial Mechanism
- 

## LOCAL

### **Protected Areas Management**

Funding shortages and limitations in human skills and institutional capacity are some of the most consistently cited obstacles to effective protected area management.

An important aspect of the question of cost effectiveness is how well the IPA Programme makes use of the skills and knowledge of Indigenous people to manage the lands. For example, the WWF submission on page 4 states:

the cost of dedicating long-term funding to an Indigenous people's cultural and natural resource management employment program on country would be substantially cheaper than having to buy in external expertise and fly them in to (often) remote areas to undertake the necessary fire, feral and weed management activities needed to reduce the ongoing threats to biodiversity across the Indigenous estate. (Review at p. 35)

### **Capacity Building**

Decision VI/15 on incentive measures recommends that funding should be ensured for capacity building. It also recommends that adequate funding should be available to ensure the effective management, monitoring and enforcement of incentive measures.<sup>162</sup>

Financial and technical resources should be provided at the local level to facilitate capacity-building initiatives particularly those intended to improve good governance, improve research skills, and increase

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<sup>162</sup> Decision VI/15 at Annex I para 31 & 35.

avenues for accessing human and financial capital. This includes scientific and technical capacity, as well as capacity related to administrative, educational, training and communications issues.<sup>163</sup>

The conference of the Parties in Decision V/26 recognised that key capacity building needs include:

- a) assessment and inventory of biological resources as well as information management;
- b) contract negotiation skills;
- c) legal drafting skills; and,
- d) means for the protection of traditional knowledge associated with genetic resources.

The United Nations University Institute of Advanced Studies (UNU/IAS) has recommended that capacities within local and indigenous communities should be developed to promote their ability to participate in ABS strategies and to develop ABS arrangements.

In Australia, as measure supporting the *Environment Protection and Biodiversity Conservation Act*, traditional owners of land are to be provided with resources to enable them to seek independent legal or other advice in negotiations over possible access and benefit sharing agreements.

It is a recommendation of the Arctic Regional Report that Parties to the Convention need to revise their policies and legislation that affect Indigenous peoples and ensure there is secure funding to implement legislation regarding biodiversity and traditional knowledge.<sup>164</sup>

#### NATIONAL & SUB-NATIONAL

Financial and technical resources are required for the implementation of Article 8(j) to cover the national costs emerging from implementation of Article 8(j)<sup>165</sup> Parties to the convention need to ensure there is secure funding to implement legislation, incentive measures and policies concerned with biodiversity and associated traditional knowledge.

In addition to providing resources to implement article 8(j) is the need to incorporate indicators to measure the success of implementation.

#### *Mobilising Resources for National Biodiversity Strategies*

Adequate funding of TK related objectives of National Biodiversity Strategies is essential, coupled with monitoring and evaluation mechanisms.

In New Zealand the Mataranga Kura Taiao Fund is a contestable fund that supports Maori initiatives to retain and promote traditional Maori knowledge and its use in biodiversity management as part of the New Zealand Biodiversity Strategy.

In Australia the National Strategy for the Conservation of Australia's Biological Diversity (NSCABD), under Objective 1.8, sought to:

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<sup>163</sup> Decision VI/5

<sup>164</sup> UNEP/CBD/WG8J/4/4 at p. 48

<sup>165</sup> UNEP/CBD/WG8J/4/4



Recognise and ensure the continuity of the contribution of the ethnobiological knowledge of Australia's Indigenous peoples to the conservation of Australia's biological diversity

The resourcing of this objective is outlined in Objective 8.1 of the NSCABD which highlights the need to:

Ensure Indigenous communities have access to resources to enable them to preserve their ethnobiological knowledge about biodiversity conservation.

However in a current review of the NSCABD it has been noted that the success in realising the specific TK related targets of the strategy is difficult to measure as there “are no data on trends in efforts to capture and use Indigenous knowledge.”<sup>166</sup>

The review noted “the issue of lack of long-term funding for Indigenous communities to carry out on the ground conservation of biodiversity is a recurring theme and governments need to address the issue if they are genuine about supporting indigenous involvement in the protection of biodiversity.”<sup>167</sup>

Mobilisation of resources must also include sufficient monitoring and evaluating mechanisms in place with regard to strategies addressing the Indigenous peoples-biodiversity matrix.<sup>168</sup>

## REGIONAL MOBILISATION

The Programme of Action for the 2<sup>nd</sup> Decade recommended that “in an effort to systematize and build capacity, regional focal points on indigenous issues should be designated in all agencies, funds and programmes with regional offices that are mandated to follow up on the implementation of recommendations of the Permanent Forum and the objectives of the Second Decade. The Regional Programme on Indigenous Peoples in Asia of the United Nations Development Programme should be further strengthened, and its other Regional Bureaux should also develop such programmes.”

## INTERNATIONAL MOBILISATION

### *Programme of Action of the 2<sup>nd</sup> Decade*

It is recommended that:

there should be increased provision of technical and financial resources to build the capacity of indigenous peoples, government institutions and the United Nations system to address indigenous

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<sup>166</sup> Prof. S. Schnierer “Indigenous Perspective on the Review of the National Biodiversity Strategy” Centre for Traditional Fishing Knowledge, Southern Cross University, May 2007 citing Cork, S. Sattler, P. and Alexandra, J. 2006, *Biodiversity theme Commentary for the 2006 Australia State of the Environment Committee*, Department of the Environment and Heritage, Canberra.

<sup>167</sup> Ibid

<sup>168</sup> Ibid

issues. Such provision should include the establishment of funds for international cooperation and funds for indigenous peoples in United Nations country offices. A process should be developed to facilitate the channelling of funds directly to indigenous peoples' organizations at the community level.

### *COP Financial Mechanism*

The Convention on Biodiversity contains numerous mechanisms and provisions to assist developing country parties to implement the convention. An important aspect of these commitments is the financial resources provided. Article 5 of the Convention provides that Parties shall cooperate either directly or through competent international organizations.

The financial mechanism plays an important role in addressing the capacity building needs of indigenous and local communities. In Decision IV/8, paragraph 4(d), the COP requested the financial mechanism to give special emphasis to the following programme priorities to fund initiatives by eligible Parties within biodiversity projects, other specific benefit-sharing activities such as support for entrepreneurial developments by Indigenous and local communities, facilitation of financial sustainability of projects promoting the sustainable use of genetic resources and appropriate targeted research components.

## Annex I

In accordance with decision VIII/5, B,I, paragraph 5, the Advisory Group continued to provide advice on phase II of the composite report and in doing so agreed that the obstacles identified are accurate and did not identify any further obstacles at this time.

### Obstacles to the retention and use of traditional knowledge

1. Environmental Threats (including environmental damage, Climate Change, Invasive species)
2. Loss of Indigenous languages
3. Coerced imposition of foreign religions and value systems
4. Continuing colonization and coerced assimilation
5. Imposed foreign education systems
6. Objectification through tourism
7. Militarization, conflict, insecurity and war
8. Application of new technologies where there is a lack of opportunity for ILC's to adopt and adapt new technologies within their value systems and to support respect, retention and maintenance of TK
9. Social disintegration, including high rates of suicide, incarceration and violent death
10. Racism and discrimination
11. Degraded health and well being including poverty, HIV, and restrictions on traditional health practices and practitioners
12. Destruction or reduced availability of traditional foods and medicines and food aid.
13. Gender issues<sup>169</sup>
14. Lack of capacity, including infrastructure, training, and financial and social capital.
15. Increasing populations – including young populations and low life expectancy;

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<sup>169</sup> Gender issues need to be carefully presented from an indigenous perspective i.e. men are often deeply and profoundly affected by the loss of traditional economic opportunities, such as the loss of the hunt, as this often goes to the heart of their feelings of self-worth as well as their esteem within the community, also gender is a broad concept for indigenous peoples.

16. Increasing urbanization, forced relocations and coerced migration resulting from, among other things dispossession and environmental damage
17. Restrictions on self-governance and lack of participation in decision making processes
18. Lack of respect for traditional knowledge and customary law, including lack of formal recognition by government and academia, and denigration of traditional knowledge and traditional knowledge holders in the general public
19. Lack of security for ILC's land tenure/usufruct rights and restrictions on access to traditional territories including sacred sites and protected areas
20. Unsustainable economic development and degradation of ILC's traditional economic bases.
21. Unsustainable exploitation of natural resources (with possible subcategories for fish, forests, etc.)
22. Globalization, including concentration of political and economic power and homogenization of cultural influences
23. Misappropriation of TK including through bio-trade, bio-prospecting, and weak/inappropriate intellectual property rights regimes

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