

## Submission by NATURAL JUSTICE

### Information and views in preparation for the meeting of the Expert Group on traditional knowledge associated with genetic resources

To be held in Hyderabad, India, from 16 to 19 June 2009

### Answers to the questions posed to the Expert Group on TK associated with GR as specified in COP decision IX/12

#### (a) What is the relationship between access and use of genetic resources and associated traditional knowledge?

To restate the question for the sake of clarity: What is the relationship between the use of 'associated traditional knowledge' and access to and use of genetic resources?

Article 8(j) reads "*Each Contracting Party shall, as far as possible and appropriate (chapeau) subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities (ILCs) embodying traditional lifestyles relevant to 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;*"

The use of the term 'traditional knowledge' (TK) has developed in the Working Group (WG) on Access and Benefit sharing (ABS) as shorthand for 'knowledge, innovations and practices of ILCs' and the term 'associated TK' has been developed as shorthand for 'knowledge, innovations and practices of ILCs embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity'. The use of 'associated TK' in CBD terms then implies not merely the use of TK associated with genetic resources (GR) but the use of all 'knowledge, innovations and practices of ILCs embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity'.

In order to understand what 'the use of associated TK' under Article 8(j) means, we must ask the question: what does 'the use of knowledge, innovations and practices of ILCs embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity' mean? To read the above statement as referring only to the knowledge, innovations and practices of ILCs embodying traditional lifestyles leads to absurdity since it raises the definitional problem of what exactly does a 'traditional lifestyle' mean and would necessarily exclude all knowledge, innovations and practices of ILCs living in a manner that does not qualify under the strict definition of 'traditional lifestyle'.

A more reasonable reading of Article 8(j) that captures the spirit of the CBD is one where we understand 'the use of knowledge, innovations and practices of ILCs embodying traditional

lifestyles' as meaning that 'traditional lifestyles' are embodied in 'the knowledge, innovations and practices of ILCs' rather than the other way round. This implies that ILCs do not necessarily have to be living a 'traditional lifestyle' today for Article 8(j) to apply to them, but that as long as the ILC has 'knowledge, innovations and practices' that historically embodied the traditional lifestyle, it is sufficient for Article 8(j) to apply.

The essence of this interpretation of Article 8(j) lies in understanding traditional lifestyles of ILCs as being embodied in their knowledge, innovations and practices and not merely the other way round - it is not just that a lifestyle embodies knowledge, innovations and practices but equally that knowledge, innovations and practices embody lifestyles. The truth of the matter is that there is a virtuous cycle between 'knowledge, innovations and practices' on the one hand and 'traditional lifestyles' on the other, each embodying and being embodied by the other.

Such a reading of Article 8(j) manifests the spirit of the CBD which seeks to promote conservation and sustainable use of biological diversity through the sharing of benefits that arise from the use of biological diversity. Thus while a provider country may not have conservation best practices, it can put in place best practices through incentives of benefit sharing. Similarly, while some ILCs may not be living the traditional lifestyle relevant to conservation and sustainable use of biological diversity, those ILCs can be supported to value and sustain aspects of their traditional lifestyle by affirming their rights over their knowledge, innovations and practices.

'Associated TK' then in the context of Article 8(j) can simply be understood as 'all knowledge, innovations and practices of ILCs relevant to the conservation and sustainable use of biological diversity'. Such an interpretation goes well beyond just use of 'TK associated with GR' as conventionally understood to include the use of any TK of ILCs that has links to conservation and sustainable use. Coming back to the question at hand of 'what is the relationship between access and use of GR, and associated TK'? The short answer is that the use of associated TK goes beyond merely access to and use of GR.

To provide a scenario to elucidate the above assertion: The San of Southern Africa had originally entered into a benefit sharing agreement with the Council for Scientific and Industrial Research (CSIR) for the use of the San's TK that is linked to the appetite suppressant qualities of the Hoodia. The CSIR based on this TK extracted a bioactive compound (P57) from the Hoodia that has the appetite suppressant qualities. CSIR has now licensed its P57 patent to Phytopharm which is in the process of identifying companies (initially Pfizer and later Unilever) that would want to develop the P57 patent into a product for the diet industry. The P57 patent led to an unprecedented interest in the Hoodia and created huge manufacturing interest and consumer demand for raw Hoodia, Hoodia pills, powders etc. This demand for dry Hoodia was the impetus behind the development of a farmer's organization called the Southern African Hoodia Growers Association (SAHGA). SAHGA grew, processed and exported dry Hoodia to a range of Hoodia importers who sought to cash in on the consumer demand for Hoodia.

While SAHGA may not have been 'utilizing Hoodia as a GR' but rather exporting Hoodia as a biological resource (BR), their entire market was based on the San TK relating to the appetite suppressant qualities of the Hoodia. This resulted in an ABS agreement between the San and the SAHGA where a certain percentage of profits would be paid to the San for every kilogram of dry Hoodia exported. The San-SAHGA ABS agreement is an interesting example of the relationship between access to and use of GR and the use of associated TK extending beyond the mere use of TK associated with GR.

The San- SAHGA agreement raises 2 important questions that are of relevance to the Expert Group in understanding the relationship between access and use of GR and associated TK:

- 1. Would any use of GR/BR that is related to the use of TK of an ILC require an ABS agreement with the ILC in question?*

In the San-SAHGA case, it was arguable that the SAHGA was not directly using the TK of the San but were merely supplying Hoodia as a biological resource (BR) to a market that emerged as a result of the San TK about the appetite suppressant qualities of the Hoodia. The argument from the San was that even though the SAHGA was exporting Hoodia as a BR, there was a strong link between the SAHGA's market base and the San TK. The San therefore asserted that all exporters of Hoodia to any market that was created as a result of the San's TK must also enter into ABS agreements with the San.

What is pertinent for the Expert Group on TK to note is that where a clear link can be established between the use of GR/BR and the use of the TK of an ILC, then there is a strong argument, subject to national ABS frameworks, that the users of such GR/BR should enter into an ABS agreement with the holders of the TK as if they (the users) had been directly using the TK itself.

- 2. Whether any use of 'GR/BR that has resulted from the TK' of an ILC should necessarily require an ABS agreement with the ILC in question?*

Article 8(j) requires the sharing of all benefits arising from the use of the 'knowledge, innovations and practices of ILCs relevant to the conservation and sustainable use of biological diversity'. This raises the question of whether the use of any GR/BR that has developed or been conserved as a result of the TK of ILCs would necessarily require an ABS agreement with the ILCs whose TK was responsible for the development or conservation of the resource. A question such as this leads us to a more important point of the difficulty of neatly separating GR/BR in ecosystems where ILCs live from their knowledge, innovations and practices. Many ILCs do not see themselves as distinct from their ecosystems but rather as an integral part of the ecosystem web. The ILCs have conserved and sustained the ecosystem and the ecosystem in turn has conserved and sustained the ILCs.

Such a paradigm shift in our understanding of the complex interplay between communities and their ecosystem leads us to far reaching conclusions about the scope of Article 8(j). Could

Article 8(j), in protecting the rights of ILCs over their TK, actually be affirming their rights over the GR/BR within the ecosystems where they live? Such an argument is plausible if we understand that ecosystems where ILCs live as having been significantly informed by the conservation and sustainable use practices of the communities living therein. The conclusion then would be that any use of GR/BR from within these ecosystems must necessarily be interpreted as using the 'associated TK' of the ILCs living therein and would require an ABS agreement to that effect.

Reflecting on the above points, we reach a fundamental conclusion about the nature of 8(j) within the CBD as a whole. Article 8(j) establishes a countervailing right to the principle of state sovereignty over natural resources (CBD Article 3). For whilst the CBD reaffirms state sovereignty over natural resources, it also calls requires states to protect the traditional lifestyles of ILCs. Where communities are living in their endemic landscapes, any state action that degrades either the natural resource base that sustains their lifestyles, or that denies them rights (such as to land, community based natural resource management, culture, for example) is a clear infringement of their obligations under 8(j). Thus whilst the principle of state sovereignty over natural resources remains a cornerstone of international law, we are witnessing under the international regime on ABS the emergence of a new customary rule, constituting a limitation of absolute state sovereignty over natural resources, namely: the self-determination of ILCs over natural resources relevant to their traditional lifestyles.

**(b) What practical impacts should the negotiations of the international regime take into account based on the range of community level procedures and customary systems of indigenous and local communities for regulating access to traditional knowledge associated with genetic resources at the community level?**

Only ILCs who are empowered and knowledgeable about ABS can make truly informed decisions about whether to engage with ABS in the first place, and if so, how to negotiate benefit sharing agreements that are calibrated to meet their specific needs. Despite the generic reference, ILCs are, by their very nature, highly diverse, representing the most heterogeneous aspects of human populations. Thus the international regime must provide flexibility to ILCs to engage with ABS on their own terms, according to their specific purposes, to generate local benefits. The emergence of (biocultural) community protocols in the draft international regime at the 7<sup>th</sup> meeting of the WG on ABS (Paris, April, 2009) under compliance, and their inclusion in the African operational text under TK has the potential to both empower ILCs vis-à-vis the regime, and to provide them with the ability to engage with ABS on their own terms.

The 7<sup>th</sup> meeting of the CBD COP on the basis of recommendations by the WG on Article 8(j) adopted the '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' (the Guidelines).

The Guidelines do not just refer to developments that directly impact community sacred sites, lands and waters but also developments that are likely to impact or indirectly impact on the sacred sites, lands and waters of ILCs. The significance of the Akwe:Kon guidelines to ABS is the clear possibility that ABS agreements with ILCs regarding their 'associated TK' can have an impact on their biological and cultural resources thereby highlighting the mutually reinforcing relationship between the ecosystem and culture. This interconnection between the ecosystem and culture is affirmed by the title of the guidelines: 'Akwe:Kon', which comes from a Mohawk term 'everything in creation'.

Community sacred sites, lands and waters are not merely physical entities but infused with cultural and spiritual significance. Relationships communities have with these entities are biocultural relationships and any impact on a community's culture (for e.g. associated TK) will necessarily impact the community's biocultural relationships with ecosystems and therefore their sacred sites, lands and waters.

Coming back to the question at hand, the International Regime in accordance with the Akwe:Kon guidelines must consider the social, cultural and environmental impact of any regulatory framework it puts in place to govern access to "associated TK" of ILCs. The Akwe:Kon guidelines lists out procedural considerations such as - identification of ILC stakeholders, mechanisms for meaningful participation, process for recording views, and sufficient assistance for full participation of ILCs at various stages of the ABS process, among others. Regarding the biocultural impacts of any regulatory framework the International Regime puts in place, the Akwe:Kon guidelines point out that the ramifications on customary use and exchange of 'associated TK' within and between ILCs should be considered.

The Akwe:Kon guidelines, bearing in mind the practical impacts of any ABS activity vis-à-vis associated TK, suggest in paragraph 60 that *'In all circumstances related to the proposed development, the customary laws and IPRs of ILCs with respect to their TK, innovations and practices, should be respected. Such knowledge should only be used with the PIC of the owners of that TK. In order to safeguard their rights, ILCs should establish or be assisted to establish, protocols consistent with relevant national legislation for access to and use of TK, innovations and practices in the cultural, environmental and social impact assessment processes'*.

The Akwe:Kon guidelines indicate that any regulatory framework set up by the International Regime to address access to associated TK of ILCs will have social, cultural and environmental impacts by virtue of this regulatory framework affecting community level procedures and customary systems of regulating access to TK. It is therefore important for ILCs themselves to develop (biocultural) community protocols that affirm these community level procedures and customary systems of access within communities and between communities that share 'associated TK'. The regulatory framework of the International Regime must then recognise and facilitate the enforcement of these community protocols. Such a way forward is based on the clear understanding that the owners of TK are in the best position to determine the impact of any access to it and therefore should be supported to determine the conditions for such access.

**(c) Identify the range of community level procedures and determine to what extent customary laws of indigenous and local communities regulate access to genetic resources and associated traditional knowledge at the community level and its relevance to the international regime;**

Regulating access to GR and associated TK at a community level in the context of their use for commercial and research purposes is relatively recent. While ILCs always had customary laws that regulated gifts, exchanges and sharing of TK and biological resources within communities, the idea of regulating its use by research and business interests emerged after the growing acknowledgement of the rights of communities as owners/custodians of their GR and associated TK. Community level procedures and customary laws regulating access to GR and associated TK are therefore dynamic and are currently being developed.

A Peruvian indigenous organization Asociacion Andes for example has been authorized by local indigenous communities to facilitate the return of their potato germplasm from the International Potato Centre (CIP) so as to ensure the continued access of the community to their historical variety of potato in order to sustain its cultural, spiritual and practical uses by the community. The community also had anxieties about their potato varieties being privatized to the extent that they would violate its customary uses. Potato varieties were returned by the CIP to the communities to for insitu conservation in a Potato Park. The communities view the Park as a step towards developing a 'community protocol' for the management of their knowledge systems, in accordance with the customary rights and responsibilities of the communities and have entered into an Agreement with the CIP so as to reflect the principles of open sharing for mutual benefit and for the benefit of humanity and any benefits generated from the use of the genetic resources are to be used for the maintenance of the Potato Park. The model is an open access and a "commons" model where the communities do not object to access for breeding research and sharing of their historical potato varieties with other communities as long as they are not privatized and they are used in accordance with customary laws.

Other examples of community procedures in the form of community protocols include: the Central Land Council which is the Native Title Representative Body for central Australia which has four protocols specifically targeted at research; photography, film, recording and media; environment and conservation activities; and anthropological work. The CLC protocols have jurisdiction over native title lands in central Australia. They include provisions for PIC, participation of Aboriginal people, benefit sharing, recognition of 'Aboriginal cultural and intellectual property rights', ethics approval, and publication and dissemination of research outcomes. All of the protocols also have a section for an application for a permit to enter Aboriginal lands.

The Desert Knowledge-Cooperative Research Centre ('DK-CRC') is a virtual network of researchers with a management team located in Alice Springs. The DK-CRC's Indigenous Intellectual Property Protocol ('IIPP') is a policy document broken down into three sections: purpose, philosophy and practices. With a recognition that determining the extent of

Indigenous knowledge in research and development is a difficult task, the IIPP seeks to share the benefits through allowing 'an amount from the total commercialisation revenue of the Centre, equal to the Company's Participating Share' allocated into a separate account to be administered by the Indigenous Trustees.

The Songman Circle of Wisdom Protocol ('Songman Protocol') which derives from the Songman Circle of Wisdom – a Western Australian Aboriginal corporation operated, managed and controlled by Aboriginal people. The Protocol includes recognition of parallel legal systems, consent, confidentiality, planning, operational implementation and certification.

The CLC protocols and the DK-CRC's IIPP make reference to formal ethical approval and clearance. While the Songman Protocol is silent on this issue, it places the negotiation of cultural impacts with the community, thus effectively moving control over ethical matters from an external governing body to a community-driven process.

The role of customary law in governing the use, sharing and storing of Indigenous knowledge is recognized in the CLC's protocols and the Songman Protocol. The DK-CRC's IIPP does not explicitly recognize customary law, but rather appears to place emphasis on the dominant legal system. However, while the IIPP was established at the inception of the DK-CRC, it also included an inbuilt mechanism for review. Such a mechanism not only allows for the subsequent addition of customary law into the protocol, but also allows for DK-CRC to be reflexive with regard to its own research and commercialization practices.

Perhaps the most significant difference between the CLC, DK-CRC and Songman Protocols is the process of certification. The Songman Protocol establishes a process of certification for quasi-trademarks or geographical indicators. Rather than waiting for other organizations to create the boundaries for the relationship based on using, commercializing or sharing Indigenous knowledge, the Songman Protocol creates the parameters through which other organizations and corporations can access the knowledge and product.<sup>1</sup>

The relevance of these community protocols to the international regime will be explored in the answer to question (d).

**(d) To what extent measures to ensure compliance with prior informed consent (PIC) and mutually agreed terms (MAT) under Article 15 also support the prior informed consent of indigenous and local communities for the use of their associated traditional knowledge?**

At the face of it CBD Article 15 does not make any mention of 'associated TK' or the PIC of ILCs in accessing such 'associated TK'. However Parties to the CBD at the ABSWG have not disputed the rights of ILCs to provide their free PIC for any access to their associated TK. While Article 8(j) of the CBD requires the fair and equitable sharing of benefits arising from the utilization of TK

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<sup>1</sup> Raven, Margaret, Protocols and ABS: Recognizing Indigenous Rights to Knowledge in Australian Bureaucratic Organizations, <http://www.austlii.edu.au/au/journals/ILB/2006/39.html>

with ILCs providing such TK, the obtaining of PIC and negotiating MAT prior to accessing such TK has been read into the interpretation of Article 8(j). PIC of ILCs for the use of their 'associated TK' has also been recognized in para 26 (d) of the Bonn Guidelines which were adopted unanimously by 180 Parties to the CBD at COP 6 in 2000. Other regional and national efforts have also interpreted Article 8(j) as requiring the PIC of ILCs for the use of their 'associated TK'. Examples include the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources which was adopted by the 53 African country members of the OAU in 2000. The 4th session of the UNPFII in their recommendations for FPIC also concluded that PIC and MAT of ILCs are prerequisites for any access to their TK and rights of ILCs over their TK has also been affirmed by the Declaration of the Rights of Indigenous Peoples.

At the 9th Conference of Parties (COP 9), held in May 2008, Parties to the CBD resolved in Decision IX/12 that Annex 1 to the Decision will be the basis for further negotiations towards the International Regime on ABS (IRABS). Decision IX/12 required Parties to submit operational text and explanations that they would like to see in the IRABS under each of the main components of Annex 1. Further negotiations towards the IRABS beginning with WG ABS 7 would then be based on the operational text submitted by Parties. Measures to ensure compliance with PIC and MAT of ILCs for the use of their TK was discussed at ABSWG 7 under the head of the 'Compliance' component specifically under the heading 'Measures to Ensure Compliance with Customary Laws and Local Systems of Protection'.

The African Group of countries introduced operational text under this subheading in an attempt to operationalize the spirit of Article 8(j) and stay true to the lineage of the African Model Law and the aspirations of the Akwe: Kon Guidelines. Despite the bracketing of the text by Parties during the negotiations at ABSWG7 due to concerns about its form, its substance was widely supported by Parties and has been included as negotiating text for the IRABS under the head of Compliance provisions. The International Indigenous Forum on Biodiversity, which is the official representative of ILCs in the ABSWG negotiations, supported the African text (with a few changes) as it resonated with their expectations from the IRABS.

The African Group proposed the development of 'community protocols' in their operational text as a tool to ensure rights of ILCs over their TK and as the basis for acquiring PIC and MAT. Community protocols are essentially protocols that affirm the rights, customary laws and 'ecological values' of ILCs related to their TK and any access to 'associated TK' and subsequent ABS agreements related to it would have to be based on such protocols. Community protocols would be agreements developed within communities that would foreground their customary laws and values and would be backed by the IRABS and consequently national laws. All ABS agreements regarding TK would then have to be governed by these community protocols. The African Group elaborated on the idea by stating that:

*"This implies ensuring that the ecological values of the ILCs in question are central to all stages of the ABS negotiation i.e. at the stage of 'PIC', 'MAT' and 'benefit sharing'. While the overarching framework of ecological values within which ABS agreements must be negotiated does not preclude monetary and non-monetary benefits to ILCs in exchange for the use of their*

*TK, these benefits should not be the sole aim of ABS agreements. The process and the outcome of an ABS agreement between ILCs and the relevant stakeholders must affirm aspects of their traditional lifestyles that conserve and sustainably use biological diversity."*

The African Group explained community protocols as going beyond merely highlighting best practice standards for obtaining prior informed consent or negotiating mutually agreed terms with communities that own the TK. On the contrary:

*"a community protocol is an outlining of ecological values on which PIC, MAT and benefit sharing would be based. A useful analogy for a community protocol would be the 'bill of rights' in the Constitution of a country that lists the core values of a people. It enunciates a community's core values and while it remains a flexible instrument, it provides community members and outside interests a level of certainty about the principles upon which any ABS agreement will be negotiated. Community protocols are perhaps the best chance for ILCs to ensure that their ways of life and values are respected and promoted. Merely relying on the benefits of ABS agreements without affirming their 'ecological values' would reduce ILCs to sellers of TK who warm themselves on the embers of a lifestyle that is fast dying out."*

Namibia on behalf of the African Group submitted operational text to this effect which is currently the negotiating text of the IRABS under 'Measures to Ensure Compliance with Customary Laws and Local Systems of Protection'

#### Operative text

Contracting Parties shall:

With the full and effective participation of the ILCs concerned support and facilitate local, national and/or regional community protocols regulating access to TK taking into consideration the relevant customary laws and ecological values of ILCs in order to prevent the misappropriation of their associated TK and to ensure the fair and equitable sharing of benefits arising from the utilization of such associated TK.

Ensure that any acquisition, appropriation or utilization of TK in contravention of the relevant community protocols constitutes an act of misappropriation.

Ensure that the application, interpretation and enforcement of protection against misappropriation of TK, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the ecological values, customary norms, laws and understandings of the holders of the knowledge.

Encourage and support the development of community protocols that will provide potential users of TK with clear and transparent rules for access to TK where associated TK is shared between: (i) ILCs spread across national boundaries and (ii) between ILCs with different values, customary norms, laws and understandings.

Where such community protocols are developed with the full and effective participation of ILCs, give effect to such community protocols through an appropriate legal framework.

Community protocols in their efforts to prevent misappropriation of associated TK and ensure fair and equitable benefit sharing must also make efforts to respect, preserve and maintain relations within and between ILCs that generate and sustain the TK by ensuring the continued availability of TK for the customary practice, use and transmission.

In conclusion, PIC and MAT of ILCs for the use of their 'associated TK' has been read into Article 15 and Article 8 j at the ABSWG. The question no longer remains whether or not the CBD supports the right of ILCs to give PIC for the use of their associated TK and negotiate MAT but rather how we can best ensure that ABS agreements with ILCs capture the spirit of Article 8(j) and affirm the rights of ILCs therein.

**(e) Identify elements and procedural aspects for the prior informed consent of holders of associated traditional knowledge when traditional knowledge associated with genetic resources is accessed also taking into account potential transboundary contexts of such associated traditional knowledge and identifying best practice examples;**

The African Group saw community protocols as a way of making explicit the customary laws and ecological values of ILCs thereby giving ILCs the option of regulating access to their TK on their own terms and making it clear to potential users what would profane their TK and constitute its misappropriation. Community protocols would also imply a process where the custodians of the shared TK are able to collectively vision the kind of benefits they seek from the use of their TK and prevent the ad-hocism that is likely to creep in where individuals or self-appointed leaders enter into agreements on behalf of the community without a *bona fide* mandate. Ultimately biocultural protocols would sustain relationships between ILCs that share the TK but have different customary laws or are spread across national boundaries. It would prevent a race to the bottom wherein potential commercial users of TK cherry pick the community that can offer them the best deal at the expense of other communities that also share the TK. The African Group envisioned community protocols as backed by state law and the IRABS and therefore enforceable beyond the lands of the communities in the jurisdiction of the users of community TK.

Community protocols at the heart of it create an opportunity for ILCs to identify their cultural and economic objectives within a larger framework of their customary and ecological values prior to entering into any ABS agreement. In doing so, they prepare ILCs to actively seek out potential users of TK that meet the community's ethical requirements by offering them the opportunity to enter into ABS agreements with well organized communities that have clear rules for ABS. This provides potential users of any TK or community resources with clarity and certainty as to how to obtain PIC, negotiate MAT and share benefits. They also provide

government regulators with clear guidelines to assess whether or not an ABS agreement with an ILC is fair and equitable and has the mandate of the entire community. Community protocols are simple multi-dimensional tools similar to those community protocols that have been used beyond ABS as the basis for biotrade, CBNRM and payments for ecosystem services. What all these protocols have in common is the extent that they provide ILCs with an opportunity to leverage the interest in their knowledge and resources to affirm their ecological values, thereby providing alternatives to profit driven business models with value driven business models.

The main environmental impacts of community protocols lie in conservation and sustainable use of biological diversity through:

- ABS agreements that move beyond merely trade in TK and biological resources and ensure that the ecological values of the custodians of biological diversity are at the heart of any good business model
- ABS agreements that understand conservation of biodiversity must go beyond protection of TK to protection of community relationships with their ecosystems that have given rise to such TK

The social impacts of the community protocols may include:

- A community process and an outcome that will facilitate an inclusive reflection within the community about what they want out of ABS agreements and how this will affirm their ecological and customary values that have led to conservation and sustainable use of biodiversity
- A community process that is a result of genuine engagement of the wider community including women that provides a clear mandate to the leadership as to the terms of any ABS agreement and the long term benefits the community needs
- The setting up of adaptive and representative systems of governance and accountability that is able to respond to the new legal concepts such as ABS that would have an impact on intra and inter community relations
- The development of a strong sense of value based identity in hitherto culturally disempowered communities through actively deploying community values in all ABS agreements with potential users

Community protocols may lead to the following economic impacts:

- An entrepreneurial community that through its protocols will actively seek out potential business and research opportunities that meet its ethical requirements

- The development of the ability of ILCs to facilitate new value based community-business partnership models through basing ABS agreements on community protocols
- The negotiation of ABS agreements based on community protocols that give rise to benefits that move beyond the monetary to non-monetary benefits such as harvesting and processing rights, participation in research and development, co-ownership of IPRs etc.
- The transformation of a community from being merely a recipient of benefits to a collective that seeks to actively participate in value based business ventures that lead to conservation and sustainable use of biological diversity

**(f) Is there a basis for prior informed consent for indigenous and local communities relative to traditional knowledge associated to genetic resources in international law? If so, how can it be reflected in the international regime?**

In a working paper titled Standard Setting: Legal Commentary on the Concept of Free Prior and Informed Consent submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation to the Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations at its 23rd session during 18-22 July 2005, a detailed rationale was provided for the recognition of PIC of ILCs in international law (E/CN.4/Sub.2/AC.4/2005/2) Below is an excerpt from that paper that can be read as a basis for PIC of ILCs relative to TK associated with GR in international law.

The PIC of indigenous communities was observed in 1975 in the advisory opinion of the International Court of Justice in the Western Sahara case where the court stated that entry into the territory of an indigenous community required their freely given PIC. Free PIC is recognized in international instruments such as the ILO Indigenous and Tribal Peoples Convention, 1989 (ILO 169) where the principle of free and informed consent in the context of relocation of indigenous peoples from their land in its Article 16. Article 7 recognizes indigenous peoples' "right to decide their own priorities for the process of development" and "to exercise control, to the extent possible, over their own economic, social and cultural development." In Articles 2, 6 and 15, the Convention requires that States fully consult with indigenous peoples and ensure their informed participation in the context of development, national institutions and programs, and lands and resources. As a general principle, Article 6 requires that consultation must be undertaken in good faith, in a form appropriate to the circumstances and with the objective of achieving consent.

The United Nations declaration on the rights of indigenous peoples explicitly recognizes the principle of free, prior and informed consent in its Articles 10, 12, 20, 27 and 30.

In its general recommendation XXIII on the rights of indigenous peoples, the Committee on the Elimination of Racial Discrimination calls upon States to "ensure that members of indigenous peoples have 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” (para. 4 (d)). The Committee makes repeated reference to the right to consent and general recommendation XXIII in its concluding observations.

On a number of occasions the Committee on Economic, Social and Cultural Rights has highlighted the need to obtain indigenous peoples’ consent in relation to resource exploitation. In 2004, for instance, the Committee stated that it was “deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities” (E/C.12/1/Add.100, para. 12). A few years earlier it observed “with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem” (E/C.12/1/Add.74, para. 12). It subsequently recommended that the State party ensure the participation of indigenous peoples in decisions affecting their lives and particularly urged it “to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No. 169” (ibid., para. 33).

The Inter-American human rights system has also dealt with the issue of consultation and consent in its jurisprudence. “As early as 1984, for instance, the Inter-American Commission on Human Rights stated that the ‘preponderant doctrine’ holds that the principle of consent is of general application to cases involving relocation of indigenous peoples.” In three recent cases, all involving indigenous rights over land and resources, the Inter-American bodies have articulated a requirement for states to obtain the prior consent of indigenous peoples when contemplating actions affecting indigenous property rights, finding that such property rights to arise from and are grounded in indigenous peoples’ customary laws and traditional land tenure systems.

The Inter-American Commission on Human Rights frames inter-American human rights law to include the taking of “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation”. The Commission has also held that inter-American human rights law “specially oblige[s] a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. ... [This is] equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.” Thus the Inter-American Commission has articulated a link between consultation resulting in full and informed consent, and protection of indigenous peoples’ property rights. The Inter-American Court of Human Rights similarly held in the landmark *Mayagna Sumo Awas Tingni Community Case* in 2001.

A similar conclusion was reached by the African Commission on Human and Peoples' Rights in the 2002 Ogoni case. The Commission noted that "in all their dealing with the Oil Consortiums, the Government did not involve the Ogoni communities in the decisions that affected the development of Ogoniland" and held that Nigeria had violated the right of the Ogoni people to freely dispose of its natural wealth and resources by issuing oil concessions on Ogoni lands.

The Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights also recognizes the principle of free, prior and informed consent in the context of indigenous peoples by stating: "Transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169). They shall particularly respect the rights of indigenous peoples and similar communities to own, occupy, develop, control, protect and use their lands, other natural resources, and cultural and intellectual property. They shall also respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects" (E/CN.4/Sub.2/2003/38/Rev.2, para. 10 (c)). This is consistent with the views of the former UN Centre for Transnational Corporations expressed in a series of reports that examine the investments and activities of multinational corporations in indigenous territories. The fourth and final report concluded that multinational companies' "performance was chiefly determined by the quantity and quality of indigenous peoples' participation in decision making" and "the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development..." (E/CN.4/Sub.2/1994/40, para. 20).

Similar statements on FPIC have been made by UN Special Rapporteurs on indigenous land rights (E/CN.4/Sub.2/2001/21), treaties concluded between states and indigenous peoples (E/CN.4/Sub.2/AC.4/1998/CRP.1), and indigenous peoples' intellectual and cultural heritage (E/CN.4/Sub.2/1993/28), as well as by the Commission on Human Rights' Special Rapporteur on situation of the human rights and fundamental freedoms of indigenous people (E/CN.4/2002/97).

**(g) Assess options, considering the practical difficulties and distinct implementation challenges, for including traditional knowledge associated with genetic resources in a potential internationally recognized certificate issued by the competent domestic authority also by considering the possibility of a declaration on such certificate as to whether there is any associated traditional knowledge and who the relevant holders of traditional knowledge are;**

ILCs have argued that any system for the protection of their TK should be based upon their customary laws, ecological values and community protocols for it to have legitimacy. The internationally recognized certificate when dealing with 'associated TK' should evidence the PIC of the ILC in accordance with their customary laws and protocols. Establishing a system which requires evidence of PIC of ILCs as a condition for the issuing of a certificate would act as an incentive for users to enter into benefit sharing agreements with them. Furthermore, requiring

disclosure of evidence of PIC (as a condition for processing IPR grants and product approvals) would reduce the commercial value of collections of TK obtained without prior informed consent.<sup>2</sup>

Protection of TK will need to address the status of knowledge which has fallen into the public domain following misappropriation, unfair trading practices, breach of confidence or of a fiduciary position. This would not be the first instance of knowledge in the public domain being provided with protection. One such example is the case of databases under the European Union Database Directive of 1996, which enables compilers of databases in the E.U. to assert ownership and demand payment for licensing the use of content already in the public domain, even where that material could not otherwise be copyright protected. The European database legislation has come under significant criticism for its restriction of the public domain. Similar criticism is likely for proposals to restrict the public domain in order to give retrospective protection to TK. Significant distinctions can, however, be drawn between the information being protected under the European Database Directive and TK - most specifically in relation to the source of the information; its nature; the manner in which it came into the public domain; and, the moral, ethical and legal reasons for the protection of TK.<sup>3</sup>

Indigenous peoples have begun examining the possibilities of developing some form of open access commons license for protection of TK. Such a licensing system could enable TK to circulate in the public domain while restricting unapproved and uncompensated commercial use. It could also restrict other uses which might affect the spiritual or cultural integrity of the knowledge or otherwise degrade that knowledge or the knowledge holders. A commons licensing system for TK may conceivably be developed based upon principles drawn from customary laws and practices of indigenous peoples and local communities. This would in essence extend the remit of customary law as a tool for protection of TK by having users contract into custom.<sup>4</sup>

#### **(h) How to define traditional knowledge associated to genetic resources in the context of access and benefit-sharing?**

Refer to the answer to question (a)

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<sup>2</sup> Tobin, Brendan, et al, Certificates of Clarity or Confusion: The Search for a Practical, Feasible and Cost Effective System for Certifying Compliance with PIC and MAT,(2008)

[http://www.ias.unu.edu/sub\\_page.aspx?catID=7&ddlID=682](http://www.ias.unu.edu/sub_page.aspx?catID=7&ddlID=682)

<sup>3</sup> ibid

<sup>4</sup> ibid