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DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS
Division for Social Policy and Development
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**INTERNATIONAL EXPERT GROUP MEETING ON THE CONVENTION ON
BIOLOGICAL DIVERSITY'S INTERNATIONAL REGIME ON ACCESS AND
BENEFIT-SHARING AND INDIGENOUS PEOPLES' HUMAN RIGHTS**

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Background Paper

Prepared by the Secretariat of the United Nations Permanent Forum on Indigenous Issues
Division for Social Policy and Development
Department of Economic and Social Affairs
United Nations

A. BACKGROUND

1. Over the last two decades the rights of indigenous peoples worldwide have become key issues in the international arena. This development is reflected in the establishment of the Working Group on Indigenous Populations (WGIP) in 1982, the proclamation of the First International Decade of the World's Indigenous Peoples (1995-2004) as well as the Second Decade of the World's Indigenous Peoples (2005-2015) by United Nations General Assembly, the appointment of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people (2001), the establishment of the Permanent Forum on Indigenous Issues in 2000, and the adoption of UN Draft Declaration of the Rights of Indigenous Peoples by the UN Human Rights Council in June 2006. The increasing activities of the United Nations have provided greater opportunities for indigenous peoples to participate in international and intergovernmental processes. There are also a number of international treaties and other instruments that recognize that all peoples have the right to maintain their unique cultures and traditions, exercise control over their own lives, and to use and benefit from the lands and resources of their territories.

2. Indigenous peoples' special relationship with their lands was outlined in the Rio Declaration of Environment and Development and Agenda 21 (1992) which recognized that indigenous peoples have a vital role in environmental management and development because of their traditional knowledge and practices. (Rio Declaration, Principle 22) It was also recognized that in order to fully make use of that knowledge, some indigenous peoples might need greater control over their land, self-management of their resources and participation in development decisions affecting them. (Agenda 21, Chapter 26.4).

3. The Convention on Biological Diversity (CDB) was adopted at the Earth Summit in Rio de Janeiro, Brazil, in June 1992, and entered into force in December 1993. As the first treaty to provide a legal framework for biodiversity conservation, the Convention established three main goals:

- (a) the conservation of biological diversity;
- (b) the sustainable use of its components and;
- (c) the fair and equitable sharing of the benefits arising from the use of genetic resources.

Contracting Parties (States) are required to create and implement national strategies and action plans to conserve, protect and enhance biological diversity. They are also required to undertake action to implement the thematic work programmes on ecosystems and a range of cross-cutting issues which have been established to take forward the provisions of the Convention. Parties are also obliged to report regularly on their initiatives.

4. The issue of access and benefit-sharing has raised various questions. The Convention recognizes the sovereignty of States over natural resources and this has been extended to include biological and genetic resources. Indigenous peoples argue that only ‘peoples’ have rights under international law to such resources and a State can only hold sovereignty on behalf of the ‘peoples’ they represent. The issue of who owns genetic resources remains a barrier to building a successful international regime (or regimes), which could facilitate both access and benefit sharing. Further confusion over the issue is caused by different perspectives and a lack of agreement regarding the meaning and use of these terms by different actors. Hence, there are major challenges to address a myriad of issues not only to provide access, but also to ensure the evolution of an equitable benefit-sharing framework.

5. Indigenous peoples embodying traditional lifestyles are explicitly mentioned in the CDB and their central contributions to biodiversity conservation are recognized in Article 8 (j) which states that signatories (Parties) to the CBD have pledged, subject to national legislation to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity 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.”

6. Section of 56 (d) and (e) of the 2005 World Summit Outcome, adopted by the General Assembly stated “In pursuance of our commitment to achieve sustainable development, we further resolve:

56(d) To recognize that the sustainable development of indigenous peoples and their communities is crucial in our fight against hunger and poverty;

56(e) To reaffirm our commitment, subject to national legislation, to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity, 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 their utilization”.

7. Indigenous peoples are critically concerned with the conservation and sustainable use of biodiversity within their lands and territories upon which their livelihoods depend, and in which their cultural identities are embedded. In some cases, indigenous peoples may be willing to share and promote their knowledge however; the use of biodiversity for commercial products as well as the issue of economic incentives raises major dilemmas for the knowledge providers. Indigenous peoples are the providers of technical knowledge about the uses of individual species, which may become, or provide the foundation for commercially viable products in the fields of agriculture, medicine, industry, cosmetics and other sectors.

8. Some of the dilemmas confronting indigenous peoples are:

- The exploitation of traditional knowledge in the pursuit of the development of new products often takes place without the knowledge and consent of indigenous peoples.
- Indigenous peoples rarely receive a share of any benefits, which may derive from the commercial exploitation of their knowledge.
- Western legal systems focus exclusively on the protection of individual rights over knowledge, whereas indigenous peoples repeatedly emphasize their collective rights over traditional knowledge.
- The exploitation of traditional knowledge of biodiversity for commercial purposes represents the commodification of knowledge. That is, it reduces knowledge to a resource that can be bought and sold on the market place like any other commodity. Indigenous peoples have repeatedly emphasized that their knowledge of biodiversity within and beyond their lands and territories is inextricably bound up with their cosmologies, philosophies, institutions, identities and languages and cannot be reduced to a commodity to be traded on the market place. In some instances, indigenous peoples have expressed concerns as to whether their knowledge should be shared at all.
- Indigenous peoples remain deeply concerned about biotechnology, biopiracy and the development and patenting of new life-forms, as well as the commodification of life, in general.

9. Indigenous peoples are caught between a desire to contribute to wider efforts for the conservation of biodiversity and a desire to protect their knowledge from commodification and commercial exploitation without their free, prior and informed consent or in sharing the benefits deriving from the exploitation of their knowledge and resources. This dilemma is not new as indigenous peoples have had to grapple for many years with outside interests over access to natural resources on their lands and territories such as access to minerals, water, tourist sites, fishing and for research purposes among others. Not surprisingly, agreements around access and compensation arrangements on indigenous lands and territories are often negotiated without the participation of indigenous peoples and as a result they are often excluded from any benefit sharing arrangements or even from impact assessments of proposed development.

10. The term “Access and Benefit-sharing” (ABS) is a concept arising out of the CBD. The term “access to genetic resources” refers to the ability of a country or its subjects or representatives to provide permission to others (both nationals and foreign nationals and entities) to obtain the right to sample or study particular indigenous specimens of genetic material. This does not apply to human genetic material which is outside the scope of the Convention. The CBD identifies the “fair and equitable sharing of the benefits arising out of the utilization of genetic resources” as one of its three overarching objectives. The broad concept of benefit-sharing includes numerous other issues relating to genetic resources, such as access to genetic resources (Article 15), transfer of technology (Article 16), ownership/intellectual property issues, and financing issues. At the CDB’s

Conference of Parties meeting in 2000, an interim set of voluntary guidelines on ABS was adopted (the “Bonn Guidelines”), which identify and address elements relevant to creating a working system for ABS, at the national and international levels. Recognizing that a great many other issues remain unresolved, it is therefore, not clear whether benefit-sharing of genetic resources also involves obligations to respect and reward the actual custodians, such as indigenous peoples. It appears likely that indigenous peoples may only benefit if traditional knowledge related to the genetic resource is accessed (with their approval). The discussion and debates around the development of an international regime (or regimes) for access and benefit sharing regime are focused on:

- the effective participation of indigenous and local communities in the national or regional and international processes of drafting and constructing an international regime on ABS, as well as national and regional ABS laws and policies and eventually, in the negotiation of implementation tools such as contractual agreements and other arrangements relative to ABS;
- binding or non-binding regime or regimes, or a combination of both;
- the design of the laws and regulations;
- Contracts, agreements and other arrangements on ABS;
- Aspects relating to the implementation of the legal provisions.

11. According to the Terms of Reference for the Ad hoc Open-ended Working Group on Access and Benefit-sharing, the following elements are to be considered for inclusion in the international regime:

- (i) Measures to promote and encourage collaborative scientific research, as well as research for commercial purposes and commercialization, consistent with Articles 8(j), 10, 15, paragraph 6, paragraph 7 and Articles 16, 18 and 19 of the Convention;
- (ii) Measures to ensure the fair and equitable sharing of benefits from the results of research and development and the benefits arising from the commercial and other utilization of genetic resources in accordance with Articles 15.7, 16, 19.1, 19.2. of the Convention;
- (iii) Measures for benefit-sharing including, *inter alia*, monetary and non-monetary benefits, and effective technology transfer and cooperation so as to support the generation of social, economic and environmental benefits;
- (iv) Measures to promote facilitated access to genetic resources for environmentally sound uses according to Article 15.2 of the Convention on Biological Diversity;
- (v) Measures to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources;

- (vi) Measures to ensure the sharing of benefits arising from the commercial and other utilization of genetic resources and their derivatives and products, in the context of mutually agreed terms;
- (vii) Measures to promote access and benefit-sharing arrangements that contribute to the achievement of the Millennium Development Goals, in particular on poverty eradication and environmental sustainability;
- (viii) Measures to facilitate the functioning of the regime at the local, national, subregional, regional and international levels, bearing in mind the transboundary nature of the distribution of some *in situ* genetic resources and associated traditional knowledge;
- (ix) Measures to ensure compliance with national legislations on access and benefit-sharing, prior informed consent and mutually agreed terms, consistent with the Convention on Biological Diversity;
- (x) Measures to ensure compliance with prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources, in accordance with Article 8(j);
- (xi) Measures to ensure compliance with the mutually agreed terms on which genetic resources were granted and to prevent the unauthorized access and use of genetic resources consistent with the Convention on Biological Diversity;
- (xii) Addressing the issue of derivatives;
- (xiii) Internationally recognized certificate of origin/source/legal provenance of genetic resources and associated traditional knowledge;
- (xiv) Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights;
- (xv) Recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated to genetic resources subject to the national legislation of the countries where these communities are located;
- (xvi) Customary law and traditional cultural practices of indigenous and local communities;
- (xvii) Capacity-building measures based on country needs;
- (xviii) Code of ethics/Code of conduct/Models of prior informed consent or other instruments in order to ensure fair and equitable sharing of benefits with indigenous and local communities;

- (xix) Means to support the implementation of the international regime within the framework of the Convention;
- (xx) Monitoring, compliance and enforcement;
- (xxi) Dispute settlement, and/or arbitration, if and when necessary;
- (xxii) Institutional issues to support the implementation of the international regime within the framework of the Convention;
- (xxiii) Relevant elements of existing instruments and processes, including:
- Convention on Biological Diversity;
 - Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization;
 - The International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations;
 - The Commission on Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations;
 - Current national legislative, administrative and policy measures implementing Article 15 of the Convention on Biological Diversity;
 - The United Nations Permanent Forum on Indigenous Issues;
 - Outcomes of Working Group on Article 8(j);
 - The Agreement on Trade-related Aspects of Intellectual Property Rights and other World Trade Organization agreements;
 - World Intellectual Property Organization conventions and treaties;
 - International Convention for the Protection of New Varieties of Plants;
 - Regional agreements;
 - Codes of conduct and other approaches developed by specific user groups or for specific genetic resources, including model contractual agreements;
 - African Model Law on the Rights of Communities, Farmers, Breeders, and on Access to Biological Resources;
 - Decision 391 of the Andean Community;
 - Decision 486 of the Andean Community;
 - United Nations Convention on the Law of the Sea;
 - Agenda 21;

12. Indigenous peoples attending CDB meetings have constantly stressed that any proposed benefit sharing regime must take account their right to self-determination, their right to free and prior informed consent and recognition of the collective custodianship over their lands, territories and resources as well as customary law practices. The critical issues for indigenous peoples is whether the negotiations of an international regime as well as the regime itself, is consistent with the rights of indigenous peoples and whether this regime is able to accommodate the relationship that indigenous peoples may wish to

develop with outside interests seeking access to, and exploitation of genetic resources on their lands and territories.

13. The CDB processes must take into account existing intellectual property rights system which adds another dimension to the debates around the ABS regime. There are many instances where indigenous peoples have sought to prevent the patenting of genetic resources based on their traditional knowledge where they have not given their prior and informed consent and have argued that the reasons and mechanisms for protecting their knowledge does not lie within the intellectual property rights system but within the human rights system. The issue remains as to whether the rights of indigenous peoples can be incorporated into the development of an ABS regime within the CDB. The rights of indigenous peoples are confirmed in a number of international treaties and other emerging instruments including the Draft Declaration on the Rights of Indigenous Peoples (adopted by the Human Rights Council in June 2006), the Universal Declaration of Human Rights, Conventions 107 and 169 of the International Labour Organization, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Declaration on the Right to Development, the Convention on the Elimination of All Forms of Racial Discrimination and others.

B. OBJECTIVES AND OUTCOMES OF THE WORKSHOP

14. This workshop has been organized in accordance with the recommendation of the United Nations Permanent Forum on Indigenous Issues at its Fifth Session and as decided by the Economic and Social Council at its December session (decision 2006/268) It states:

“The UNPFII recommends a three-day international expert group meeting on the Convention on Biological Diversity international regime on access and benefit-sharing and indigenous peoples’ rights with the participation of representatives from the United Nations system, and five members of the Permanent Forum on Indigenous Issues, and invites other interested intergovernmental organizations, experts from indigenous organizations, and interested Member States to participate as well, and requests that the results of the meeting be reported to the Permanent Forum at its sixth session in May 2007”.

15. Negotiation of agreements are often touted as a way forward for indigenous peoples in regards to access to natural resources on indigenous lands and territories. If there is a lack of commitment to recognizing the rights for indigenous peoples in the CDB processes, any negotiation in regards to an ABS regime is likely to take place from positions of unequal power and therefore is unlikely to produce equitable outcomes.

16. The Expert Group Meeting is intended to:

- Promote an opportunity to evaluate current negotiation and agreement-making practices in terms of effective participation of indigenous peoples and their ability

- to produce outcomes which adequately take into account indigenous peoples' concerns and rights;
- Promote an opportunity to exchange information of ABS processes currently operating in various regions that take into account the rights of indigenous peoples;
 - Promote an opportunity to formulate benchmarks for agreement-making and;
 - Highlight good practice models;
 - Identify gaps and challenges and a possible way forward.

17. The overall objectives of the workshop are:

- 1) Exchange information on indigenous agreement-making practices with outside interests over access to natural resources on their lands and territories such as access to minerals, water, tourist sites, fishing and for research purposes among others.
- 2) Highlight the importance of indigenous human rights within ABS regime processes.
- 3) Highlight the importance of indigenous peoples' effective participation in developing an international regime and also within the drafting of ABS laws and policies and eventually, in the negotiation of contractual agreements and other arrangements relative to ABS;
- 4) Propose benchmarks and other strategies to advance indigenous peoples' rights as well as their participation through capacity-building and coalition-building with the CDB process.
- 5) Highlight best practices and partnerships that currently exist between Governments, private sector companies, donor agencies and indigenous peoples in national, regional or local ABS agreements.

C. PROPOSED THEMES FOR DISCUSSION

18. Four major themes of discussion are proposed as follows. Under each of the themes are some preliminary questions that have been identified for consideration and to stimulate discussion.

Theme 1: International Standards and policies on agreement-making with reference to indigenous peoples.

- Analysis of International standards and recommendations concerning the rights of indigenous peoples (Convention on Biological Diversity, Human Rights Committee, Commission on Human Rights, UN Permanent Forum on Indigenous Issues, ILO and others) relevant to the development of an international regime on access and benefit sharing;
- Analysis of private sector companies and donor policies on ABS arrangements with special reference to indigenous peoples;

- Analysis of how the goals and needs of indigenous peoples in ABS arrangements differ from the needs and goals of other interested holders, especially in the CDB processes?

Theme 2: Areas in which indigenous peoples' participation is relevant to any ABS arrangements.

- Analysis of mechanisms for representation and effective participation in regards to gender, youth, elders and other knowledge holders;
- Analysis of indigenous peoples' perspectives in regards to targets and indicators used in ABS processes as well as budgetary concerns that affect indigenous peoples' participation;
- Analysis of effective participation of indigenous peoples in implementing, monitoring and evaluating ABS plans with particular reference to the CDB processes;
- Suggestions on how to bridge the gap between the theories of ABS arrangements and actual tools and practices needed to strengthen or build the effective participation of indigenous peoples in the negotiation processes of the CDB?

Theme 3: Factors that enable or obstruct indigenous peoples' participation in the CDB processes.

- effective participation in decision-making at the national level;
- public access to information on ABS agreement- making;
- accountability and integrity in decision-making and implementation of policies at the international and national levels in regards to the CDB process.
- access to the legal and judicial systems to formulate and negotiate ABS arrangements;
- obstacles, including lack of relevant statistics, lack of information and lack of understanding of technical and legal language of ABS arrangements;
- the role of the private sector in policy, legislation reforms and in defining ABS regimes and how this affects indigenous peoples;
- Focus on the persistent barriers that block indigenous peoples' effective participation in the CDB process.
- What is the role of the donor community and the private sector in enhancing or weakening indigenous peoples' participation in the CDB process?

Theme 4: Good examples of indigenous participation in negotiating ABS processes in other arenas.

- Within the UN system and other intergovernmental organizations;

- Highlight and provide case studies of partnerships that currently exist between Governments, private sector companies, donor agencies and indigenous peoples in national, regional or local ABS agreements;
- Provide examples of the impact of equal participation of indigenous women, men, youth, elders and other knowledge holders in the ABS processes in achieving the goal of sustainable development.

D. PARTICIPANTS (STATES, AGENCIES AND INDIGENOUS EXPERTS)

19. Experts from States, UN system, indigenous experts from the seven indigenous socio-cultural regions¹ are invited to participate in the workshop.

E. WORKING DOCUMENTS

20. Experts invited to participate in the workshop are invited to submit papers on any of the above four themes drawing from the work and experiences at the national and community level as well as within agencies.

¹ Central and South America and the Caribbean, Pacific, Arctic, Africa, Asia, North America, Russian Federation, Central Asia and Transcaucasia.