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## Latest developments related to benefit-sharing under the Convention on Biological Diversity

Posted on [December 17, 2014](#) by [Elisa Morgera](#)

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December 2014: Representatives of the 194 Parties to the Convention on Biological Diversity (CBD) have recently adopted consensus decisions on benefit-sharing related to indigenous peoples and local communities.

The [twelfth meeting of the Conference of the Parties](#) (COP 12) to the CBD was held from 6-17 October 2014, in Pyeongchang, South Korea. It adopted three decisions of particular interest from a benefit-sharing perspective: an action plan on customary sustainable use, a decision on the development of international guidelines on benefit-sharing from the use of traditional knowledge, and a decision on priority actions for coral reefs and closely associated ecosystems. This blogpost will review each of these developments in turn and conclude by pointing at outstanding questions regarding beneficiaries and possible further developments related to benefit-sharing under the Convention.

### Customary sustainable use

The most tangible outcome of COP 12 with regard to *indigenous and local communities* is a [plan of action on customary sustainable use](#) of biological resources, the implementation of which should be undertaken with the full and effective participation of these communities and take into consideration the UN Declaration on the Rights of Indigenous Peoples.

Continued customary use of biological resources is essential for the preservation and further development of traditional knowledge. For that reason, it has been linked to [CBD Article 8\(j\)](#), which provides for the sharing of the benefits arising from traditional knowledge use, and to the [ecosystem approach](#), which also foresees benefit-sharing as a reward for ecosystem stewards.

While not referring to benefit-sharing explicitly, the action plan does point to possible opportunities arising from customary sustainable use which can be interpreted as benefit-sharing in a broad sense. These include the support of community-based initiatives and collaboration through joint initiatives between governments and communities. In addition, the action plan underscores the need for protected areas to be established with the prior informed consent or approval and involvement of 'indigenous and local communities' to avoid restricting access to and use of traditional areas and thereby undermining customary practices and knowledge associated with certain areas or biological resources. Against this background, the action plan notes that customary sustainable use contributes to the resilience of social and ecological systems and to human well-being at large. It underscores that shared governance or joint management of protected areas, preference for indigenous and community conserved areas, or at least the active involvement and effective participation of communities in the planning, establishment and management of protected areas are preconditions for ensuring that customary sustainable use and traditional knowledge contribute to conservation. These options for devolved or shared natural resource management embody a possible form of sharing the benefits that arise from the reliance on traditional knowledge and customary use by *indigenous and local communities*.

### International guidelines on benefit-sharing from traditional knowledge use

As previously discussed in [one of our blogposts](#), CBD Parties had already acknowledged the need for more detailed international guidelines on sharing benefits arising from the use of traditional knowledge with *indigenous and local communities*. Accordingly, COP 12 [officially launched work](#), with the participation of *indigenous and local communities*, on the development of new international guidelines to support Parties in the development of legislation or other mechanisms to:

- ensure that private and public institutions interested in using traditional knowledge obtain communities' prior informed consent or approval and involvement;
- ensure that indigenous and local communities obtain a fair and equitable share of benefits arising from this use and application of their knowledge; and
- report and prevent unlawful appropriation of traditional knowledge.

This development is particularly interesting when compared with the [outcome document of the 2014 World Conference on Indigenous Peoples](#), which while recognizing the important contribution of traditional knowledge to the conservation and sustainable use of biodiversity, used qualified language in relation to benefit-sharing ('We *acknowledge the importance* of the participation of indigenous peoples, *wherever possible*, in the benefits of their knowledge, innovations and practices.')

The development of CBD guidelines will also be relevant to the implementation of the recently entered into force [Nagoya Protocol on Access to Genetic Resources and Benefit-sharing](#), where several questions remain with regard to traditional knowledge. Equally, the preparation of CBD guidelines will overlap with ongoing negotiations on the protection of traditional knowledge under the World Intellectual Property Organization (WIPO), given that the [negotiating draft](#) still contains bracketed language on 'promot[ing] the equitable sharing of benefits arising from' traditional knowledge use or 'fair and equitable compensation, as necessary.' Notably, WIPO recently organized a [practical workshop](#) for indigenous peoples and local communities on intellectual property and traditional knowledge which addressed, among other issues, misappropriation of traditional knowledge through the erroneous grant of patents. The CBD guidelines may also be taken into account by the [UN Working Group on the Rights of Peasants](#), whose [draft declaration](#) refers to the traditional knowledge of *peasants* but not to benefit-sharing (see recent [BENELEX blog post](#)).

## Coral reefs

Traditional knowledge through community-based action also figured in the COP 12 [decision on priority actions for coral reefs and closely associated ecosystems](#), as part of the CBD work programme on coastal and marine biodiversity. In the decision, Parties are encouraged to, among other things, promote community-based measures including community rights-based management; manage fisheries sustainably; encourage and support community-based marine managed areas; and identify and apply measures to improve the adaptive capacity of coral reef-based socio-ecological systems in local contexts so as to ensure sustainable livelihoods for *reef-dependent coastal communities, including indigenous and local communities*, and provide for viable alternative livelihoods.

While the decision does not explicitly mention benefit-sharing, it does make reference to developing and implementing socioeconomic incentives to encourage *coastal communities, including indigenous and local communities*, to play a central role in the conservation and sustainable use of coral reefs through the use of tax benefits, conservation agreements that reward users for foregoing unsustainable activities, and community-based conservation trust funds supported by fees from ecotourism and fines for unsustainable use. This language provides interesting insights on the use of incentive measures as specific mechanisms for the operationalization of benefit-sharing at the national and local level. The decision further refers to empowering *coastal communities, including indigenous and local communities* in reef management, particularly in remote regions or where capacity is low, by providing necessary resources and capacity building as well as devolving management responsibilities in line with national/subnational management guidelines.

These developments may be related to the adoption in 2013 of the [Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Eradication](#) under the aegis of the UN Food and Agriculture Organization. These Guidelines recognize that 'customary practices for the allocation and sharing of resource benefits in small-scale fisheries, which may have been in place for generations, have been changed as a result of non-participatory and often centralized fisheries management systems, rapid technology developments and demographic changes.' The Voluntary Guidelines thus call for the equitable sharing of benefits arising from the responsible management of fisheries and related ecosystems to reward *small-scale fishers*. The participatory approach promoted by the Voluntary Guidelines as well as the COP 12 decision on coral reefs is also reflected in the COP 12 [decision on ecologically or biologically significant marine areas](#) (EBSAs). With this decision Parties agreed that the CBD Secretariat should facilitate the full and effective participation of *indigenous and local communities, including fisheries communities*, in the CBD workshops on the description of areas meeting the criteria for EBSAs, and to incorporate the use of traditional knowledge in the EBSA training materials.

## Who are the beneficiaries?

While these developments provide further evidence of mushrooming references to benefit-sharing in different areas of international law-making, they also illustrate the lack of clarity as to beneficiaries. Note the use of italics in the earlier sections of this blog post: in addition to indigenous and local communities, reference has been made to coastal and fisheries communities, small-scale fishers, peasants... This is one of the key legal questions that the BENELEX team wishes to clarify.

In that connection, it is noteworthy that COP 12 finally tackled the long-standing question of the terminology used under the CBD in

relation to traditional knowledge holders ('indigenous and local communities'). The UN Permanent Forum on Indigenous Issues had repeatedly recommended use of the expression 'indigenous peoples and local communities', with a view to more clearly reflecting the status of the former as a particular category under international human rights law. Parties eventually reached consensus, agreeing to [adopt the recommended terminology](#) in future decisions taken under the Convention, but signs that at least some CBD Parties did so unwillingly are evident. First, the decision clarifies that this change 'shall not affect in any way the legal meaning of CBD Article 8(j) and related provisions of the Convention' and 'may not imply for any Party a change in rights or obligations under the Convention.' Furthermore, the decision asserts that the change in terminology 'shall not constitute a context for the purposes of interpreting the Convention or a subsequent agreement or practice among its parties'. The desire of some CBD Parties to prevent the decision from influencing the interpretation of the text of the Convention is thus clear. While it is legally accurate to note that a COP decision could not formally amend the Convention, the other qualifications that aim to limit the evolutive interpretation of the Convention appear of dubious significance, however. What can the possible value of the decision vis-à-vis the Convention be, if not a subsequent agreement among Parties to interpret the Convention in light of intervening developments in international human rights law, or at least the start of a new practice to that end?

What is clear is that the path towards mutual supportiveness between international biodiversity law and international human rights law remains fraught with political sensitivities. This is yet another key theme currently investigated under the BENELEX project.

## Outlook

As the international community is currently reshaping the international development agenda through the [post-2015 development process](#) and the definition of [global sustainable development goals](#), the contribution of biodiversity to sustainable development was one of the core agenda items at COP 12. In that regard, [CBD Parties highlighted](#) that fair and equitable benefit-sharing arising from the utilization of genetic resources, traditional knowledge, conservation and sustainable use are key to enhancing the contribution of biodiversity to poverty eradication and sustainable development. Benefit-sharing was thus identified as a mechanism for achieving sustainable development, as well as an overarching aim cutting across the CBD objectives in light of considerations of fairness and equity. It remains to be seen whether benefit-sharing will be reflected in the post-2015 development process.

Besides the questions left open by the COP 12 decisions discussed above, there are other areas of future work that have been identified by CBD Parties of interest from a benefit-sharing perspective. One is the role of community-based monitoring and information systems in the development, collection and analysis of environmental data and global efforts to monitor the [Aichi Biodiversity targets](#). On the one hand, the COP encouraged Parties and indigenous and local communities themselves to consider this and to report on it in their annual reports. On the other hand, the [COP invited](#) the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) to consider such a contribution. It remains to be seen (whether and) how the international community expects to reward indigenous peoples and local communities for their contribution through benefit-sharing, both at the national and international level.

Another area for further work concerns traditional knowledge shared by different indigenous peoples and/or local communities. COP 12 decided to devote a future in-depth dialogue to this issue with a view to better understanding the challenges and opportunities for international and regional cooperation across borders in relation to benefit-sharing, together with the other objectives of the CBD. The difficulties of effectively regulating access to and benefit-sharing from shared traditional knowledge had specifically been acknowledged in the Nagoya Protocol on Access and Benefit-sharing and much remains to be understood as to possible options. While an in-depth dialogue may not necessarily result in a COP decision, it may still allow Parties and stakeholders to identify lessons learnt and good practices that can support progress in sharing benefits across communities and borders.

Finally, COP 12 has effectively postponed work on international voluntary guidelines on the repatriation of traditional knowledge related to the conservation and sustainable use of biodiversity. This is due to unresolved concerns that repatriation could affect indigenous peoples' and local communities' rights, including the right to prevent the use of traditional knowledge without prior informed consent. This debate highlights inherent tensions between [CBD Article 17](#), which requires Parties to facilitate the exchange of information from all publicly available sources relevant to conservation and sustainable use, including traditional knowledge and technologies, and 'where feasible, to include repatriation of information,' and [CBD Article 8\(j\)](#), including its provision on sharing the benefits arising from the use of traditional knowledge. For background on repatriation, it may be useful to refer to [UN Doc UNEP/CBD/WG8/J/8/5](#), where repatriation is defined as the return (from universities, museums, botanical and zoological gardens, etc) of traditional knowledge and related information, after a considerable period of time, to where it originated or was obtained for the recovery of knowledge on biodiversity.

Negotiations of interest from a benefit-sharing perspective will therefore continue at the next meeting of the CBD Working Group on Article 8(j), which is expected to be convened in 2015-2016, with a view to a decision at the next meeting of the CBD Conference of the Parties in November 2016.

*Photo courtesy: IISD/RS*

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