

Submission to: [secretariat@unfccc.int](mailto:secretariat@unfccc.int)

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**Re: Views Regarding the purpose, content and structure of the indigenous peoples platform under [1/CP.21 paragraph 135](#).**

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This submission is provided to convey views relating to the indigenous peoples' platform referenced in decision 1/CP.21 paragraph 135 with the endorsement of the following constitutional and customary indigenous governments and organizations:

1. Affiliated Tribes of Northwest Indians, Oregon
2. Chickaloon Village, Alaska
3. Coeur d'Alene Tribe, Idaho
4. Hoh Tribe, Washington
5. Institute for Tribal Government, Oregon
6. Jamestown S'Klallam Tribe, Washington
7. National Congress of American Indians, Washington D.C.
8. Native American Rights Fund, Colorado
9. Port Gamble S'Klallam Tribe, Washington
10. Siletz Tribe, Oregon
11. Squaxin Island Tribe, Washington
12. Suquamish Tribe, Washington
13. Tulalip Tribe, Washington
14. Quinault Indian Nation, Washington

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## I. EXECUTIVE STATEMENT

Decision V para 135 of the Paris Agreement (1/CP.21) reads:

"135. *Recognizes* the need to strengthen knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change, and *establishes* a platform for the exchange of experiences and sharing of best practices on mitigation and adaptation in a holistic and integrated manner; "

Both the Preamble to the Paris Agreement and the Paris Decision provide that "Parties should, when taking action to address climate change, respect, promote, and consider their respective obligations on human rights,...the rights of indigenous peoples...."

- The Platform should explicitly state and conform to its purpose: ***to "strengthen knowledge, technologies, practices and efforts of indigenous peoples" to address and respond to climate change.*** This foundation is vitally important to avoid potential misunderstanding of the types of information to be collected and potential misuse of shared information.

- The Platform must acknowledge that “*knowledge, technologies, practices and efforts*” are integral parts of indigenous peoples’ cultural heritage and intellectual property, which for convenient reference has been termed “*traditional knowledges (TKs)*.” TKs include various types of technologies, practices and cultural ceremonies relating to ecological relationships, fishing, hunting, gathering, agriculture, ethnobotany, and medicines which are based on intergenerational accumulation of knowledge of communities gained through interaction with place-based environments. TKs holders also hold beliefs about the spiritual origins and characteristics of the TKs. TKs can be expressed in many different forms, such as language, stories, dances, songs, rituals, traditions, and practices. Holders do not generally view their TKs as information, but as an integral part of a way of life in relationship with lands, waters and all living beings. Because different types of TK have different cultural sensitivities, access, transfer, and use are determined by the customary and traditional laws of indigenous peoples and their collective systems of governance.
- Indigenous peoples are a specific subject of the international human rights system, such as in the United Nations Declaration on the Rights Indigenous Peoples (UN Declaration) and International Labor Indigenous and Tribal Peoples Convention Organisation No. 169 (ILO 169), as well as the American Declaration on the Rights of Indigenous Peoples (American Declaration). These rights are associated with their status as Peoples with the right to self-determination.
- The leading document on the human right to traditional knowledges is the UN Declaration, particularly in, but not limited to Articles 11 and 31. Article 11(2) address rights to redress “with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs,” while Article 31(1) affirms that “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions . . .” The international minimum standard for access to indigenous property, tangible or intangible, is free, prior and informed consent (FPIC).
- The American Declaration in Article 28(1) affirms that 1. Indigenous peoples have the right to the full recognition and respect for their property, ownership, possession, control, development, and protection of their tangible and intangible cultural heritage and intellectual property, including its collective nature, transmitted through millennia, from generation to generation,” and 28(2) includes types of collective intellectual property that applies to climate-related traditional knowledges.
- The treatment of TKs varies in international legal instruments, including the UNESCO Convention on Intangible Cultural Heritage, Convention on Biological Diversity (CBD), the Nagoya Protocol on Access and Benefit Sharing (Nagoya Protocol), the UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) and is included in the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES)(Chiarolla and Savaresi, 2016)<sup>1</sup>. There are on-going discussions at the World Intellectual Property Organization (WIPO) Intergovernmental Commission on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) on the protection of traditional knowledge. The most advanced international instruments on TK include the Convention on Biological Diversity (CBD) and the Nagoya Protocol on Access and Benefit Sharing (NP), which includes provisions on access to, and the sharing of, benefits arising from the use of TK. The CBD and the Nagoya Protocols use the

<sup>1</sup> Chiarolla, Claudio and Annalisa Savaresi (2016). Indigenous challenges under IPBES - embracing indigenous knowledge and beyond. In: Hrabanski, Marie; Pesche, Denis (eds). The Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES): Meeting the Challenge of Biodiversity Conservation and Governance. Routledge.

standard of fair and equitable benefit sharing based on prior informed consent or approval and involvement for biodiversity-related TK of indigenous peoples and local communities. The CBD has recently adopted Decision XIII/18 on the Mo'otz Kuxtal Voluntary Guidelines which contains useful guidance for the operations of the Platform, and adds the option for the recognition of free, prior and informed consent (FPIC).

- Indigenous peoples and TKs are also subjects of national laws and other constructive arrangements with states, that situate at various levels of law, such as constitutional orders and statutory provisions. In terms of their status, some countries have affirmed their sovereignty or self-determination. Tribes in the United States possess sovereign rights which are not granted by the United States but are recognized as inherent and pre-existing the US<sup>2</sup>. The tribes of the United States hold a government-to-government relationship to the Federal government. In terms of rights Indigenous peoples over their TKs, these are collective and imprescriptible, and are recognized, not granted by governments. The UN Declaration, in Article 31, frames these as collective rights, and an increasing number of States are codifying this into international law.
- Methods of transfer of TK differ markedly from the peer review - publication process relied upon by western science. Within the written and unwritten laws that govern sharing of TK within indigenous communities, TK may be considered a form of intellectual property in the care of knowledge keepers and is generally shared orally and by showing at the discretion of their keepers who determine if individuals can be trusted to protect and use the wisdom entrusted to their care. Many types of TK are not amenable to or appropriate for ways of information sharing such as publication or storage in an electronic database.
- In conclusion:
  - Indigenous peoples have rights to self-determination as peoples, and collective rights to determine the conditions of access to their TKs through free, prior and informed consent.
  - Traditional knowledges are the subject matter of an increasing number of minimum standards for protection under international law, and are also treated under national laws. These must be respected in the operation of the Platform.
  - Components of TK cannot be isolated, extracted, or used indiscriminately. The concept of “best practices” contained in paragraph 135 must be viewed within the context of place, time, and culture from the perspectives of both the entities applying those practices and the entities impacted by them. Climate preparation, adaptation, and mitigation measures have cross-boundary impacts which, due to close ties to place and dependence on resource use, will be of special concern to indigenous peoples. There is a high potential for cross-cultural miscommunication with TKs.
  - The platform should not be used to mine traditional knowledges, compile databases, or engage in other activities that would violate the collective intellectual property, human or other rights of Indigenous Peoples. Indigenous Peoples have significant differences in their belief systems, types of knowledges, and aspirations related to access to and the

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<sup>2</sup> Office of the Solicitor of the United States Department of the Interior (2017). Reaffirmation of the United States' Unique Trust Relationship with Indian Tribes and Related Indian Law Principles. M-37045. January 18, 2017. Washington.

125 use of their TKs. There cannot be a “one size fits all” model for dealing with access to  
126 and use of TKs in the platform, and no assumptions should be made without FPIC<sup>3</sup>.

- 127 ○ Even though the most developed obligations related to TK have been developed in  
128 relationship to biodiversity, the UN Declaration affirms that the right to free, prior and  
129 informed consent applies to all TKs of indigenous peoples (Article 31), as does the  
130 American Declaration in (Article 28(3)). The CBD and NP are important reference points  
131 for legal issues related to the use of biodiversity-related TK. These should be viewed as  
132 the current best international practices for the UNFCCC in dealing with TK, in the absence  
133 of specific climate-related guidelines. The Platform should not collect and make  
134 available primary TK without the explicit free, prior and informed consent (FPIC) of  
135 indigenous peoples. By focusing on the mandate of the Platform, and linking to local  
136 initiatives under the control of indigenous peoples, the Platform will reduce the need  
137 to work with primary TK. In the absence of clear FPIC procedures, benefit sharing  
138 mechanisms or protections from the potential misuse of TK, failure to respect the rights  
139 and sensitivities of indigenous peoples in the Platform will likely lead to lack of trust in  
140 its integrity as a support tool.
- 141 ○ Indigenous peoples must have a central role in the governance and operations of the  
142 platform, and protocols must be developed to ensure their FPIC and protect them from  
143 unintended harms.

## 145 II. VIEWS AND RECOMMENDATIONS

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147 Paragraph 135 sets forth the goal of providing a Platform for “*the exchange of experiences and sharing*  
148 *of best practices on mitigation and adaptation in a holistic and integrated manner.*” The Platform should  
149 consist of several foundational “planks” that collectively establish a foundation for the development,  
150 creation, use, and administration for the following:

- 151 1. Enforceable guidelines for the exchange of TKs, delineating boundaries and sharing benefits for  
152 its use, based on the principle of free, prior and informed consent (FPIC).
- 153 2. Adequate technical and financial support for substantive participation in the development and  
154 use of any guidelines for the sharing of TKs by indigenous peoples within the Platform.
- 155 3. Transparent processes for submission, access, storage, and dissemination of TK.

### 156 Planks

#### 157 A. Overarching Principles.

158 The foundation of the Platform should explicitly state its purpose: ***to support the ability of indigenous***  
159 ***peoples to address and respond to climate change.*** Development and operationalization of the  
160 Platform must be centrally directed at this purpose. Other potential uses of the information must be  
161 ancillary, supportive, and secondary to avoid potential misunderstanding and misuse of shared  
162 information.

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<sup>3</sup> CBD/COP/DEC/XIII/18, Mo’otz Kuxtal Voluntary Guidelines, II(A) para 9.

A set of eight tribal climate change principles has been broadly endorsed by tribal governments in the United States. While these principles were developed to provide guidance for responding to U.S. federal policies and actions, the over-arching principles are relevant to the development of the Platform:

*“To respond to the impacts of climate change, Indigenous Peoples must have access to the financial and technical resources that are required to assess the impacts of climate change on their cultures, air, land and water, economies, community health, and ways of life, and address those impacts through adaptation and mitigation. In turn, federal action must be taken to support the efforts of Indigenous Peoples to adapt to climate change impacts and to reduce their carbon footprints through a range of mitigation approaches, including renewable energy development and energy efficiency.”<sup>4</sup>*

The eight principles address four topical areas: (1) Strengthen Tribal Sovereignty; (2) Support Tribes Facing Immediate Threats from Climate Change; (3) Ensure Tribal Access to Climate Change Resources; and (4) Traditional Knowledges and Climate Change. Gruenig et.al. 2015 discuss the background, challenges and solutions for each of the climate change principles and provide an extensive set of literature references

## **B. Free, Prior, and Informed Consent.**

Traditional Knowledges are central to the ability of indigenous peoples to sustain their cultural identities and economies. Article 31 of the UN Declaration recognizes the need for protecting the cultural property of indigenous peoples while Article 19 emphasizes the need for securing “free, prior, and informed consent” (FPIC) before adopting and implementing administrative measures such as the Platform. As part of FPIC, the implications of the multiple cultural, legal, risk-benefit and governance contexts of knowledge exchange must be considered.<sup>5</sup> The UN Declaration affirms that indigenous peoples possess a collective right of self-determination. The right to FPIC for access to TKs is affirmed in the American Declaration in Article 28(3), and the UN Declaration affirms the right of indigenous peoples to “maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions” (Article 31).

Participants in the Convention on Biological Diversity processes have spent considerable time in drafting principles, guidelines and legal commitments related to TKs. The Mo’otz Kuxtal Voluntary Guidelines<sup>6</sup> deal most directly with issues relating to obtaining informed consent and benefit sharing, and were adopted by the 196 parties in December, 2016. Though voluntary, these are the first global guidelines

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<sup>4</sup> Gruenig, R., K. Lynn, G. Voggesser, and K. Whyte. 2015. Tribal Climate Change Principles: Responding to Federal Policies and Actions To Address Climate change. [https://tribalclimate.uoregon.edu/files/2010/11/Tribal-Climate-Change-Principles\\_2015-148jghk.pdf](https://tribalclimate.uoregon.edu/files/2010/11/Tribal-Climate-Change-Principles_2015-148jghk.pdf). Last Accessed 1/31/17.

<sup>5</sup> Williams, T. & P. Hardison. 2013. Culture, Law, Risk and Governance: Contexts of Traditional Knowledge in Climate Change Adaptation. *Climate Change* 120: 531-544.

<sup>6</sup> Mo’otz Kuxtal Voluntary Guidelines: Voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of indigenous peoples for accessing their knowledge, innovations and practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge. <https://www.cbd.int/doc/decisions/cop-13/cop-13-dec-18-en.doc>.

194 adopted by the parties to a United Nations' convention. They are designed to provide guidance for the  
195 drafting of national legislation, but contain useful guidance for the operations of the Platform.

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197 These Guidelines define FPIC as<sup>7</sup>:

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199 (a) Free implies that indigenous peoples ...are not pressured, intimidated, manipulated or unduly  
200 influenced and that their consent is given, without coercion;

201 (b) Prior implies seeking consent or approval sufficiently in advance of any authorization to access  
202 traditional knowledge respecting the customary decision-making processes in accordance with national  
203 legislation and time requirements of indigenous peoples...

204 (c) Informed implies that information is provided that covers relevant aspects, such as: the  
205 intended purpose of the access; its duration and scope; a preliminary assessment of the likely economic,  
206 social, cultural and environmental impacts, including potential risks; personnel likely to be involved in  
207 the execution of the access; procedures the access may entail and benefit-sharing arrangements;

208 (d) Consent . . . is the agreement of the indigenous peoples ... who are holders of traditional  
209 knowledge or the competent authorities of those indigenous peoples ... as appropriate, to grant access  
210 to their traditional knowledge to a potential user and includes the right not to grant consent or  
211 approval;

212 (e) . . . Consultation and full and effective participation of indigenous peoples and local  
213 communities are crucial components of a consent . . . process;"

214 In additions, the Guidelines provide principles for the fair and equitable sharing of benefits, reporting  
215 and preventing unlawful appropriation, the identification of relevant authorities, and respect for  
216 community protocols and customary law. These Guidelines should be referenced and relevant principles  
217 incorporated into the operations of the Platform, consistent with the UN Declaration and other  
218 international standards .

219 The Platform must also recognize that climate-related TKs may overlap with specific international and  
220 national obligations by member countries. Where, for example, traditional knowledges are associated  
221 with genetic resources, there are specific obligations for those 89 countries that are parties to the  
222 Nagoya Protocol<sup>8</sup>. This includes the obligation to obtain prior and informed consent for access to  
223 traditional knowledge associated with genetic resources (Article 7) and the need to take into account  
224 Indigenous "customary laws, community protocols and procedures, as applicable, with respect to  
225 traditional knowledge associated with genetic resources (Article 12). Potential users of TKs are to be  
226 made aware of obligations for PIC, access and benefit sharing (Articles 7 and 12(2)), including through  
227 the use of the Access and Benefit Sharing Clearinghouse.

228 The Nagoya Protocol also has provisions for states to adopt measures to address changes in intent for  
229 the use of exchanged genetic resources and traditional knowledge (Articles 6(3) g 4 and Article 8(A) para  
230 1), where changes in agreed terms of access and use would require a new agreement. This includes  
231 transfer of traditional knowledge to third parties if such consent has not been given. The Mo'otz Kuxtal

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<sup>7</sup> CBD/COP/DEC/XIII/18, II(A) para 7.

<sup>8</sup> <https://www.cbd.int/abs/nagoya-protocol/signatories/>, Accessed February 22, 2017



232 Voluntary Guidelines contain a similar principle in proposing “granting “prior informed consent”, “free,  
233 prior and informed consent” or “approval and involvement”, depending on national circumstances, to  
234 users of traditional knowledge, unless otherwise mutually agreed, merely allows temporary use of such  
235 traditional knowledge for the purpose for which it was granted.”<sup>9</sup> This principle is consistent with Article  
236 31 of the UN Declaration with the right of indigenous peoples to control the use of their traditional  
237 knowledge. The principle is that FPIC should be understood as narrowly given around mutually agreed  
238 terms. Any use that changes those terms requires that a new FPIC be obtained before it can occur.

239 This is related to the issue of the public domain, which is currently under discussion at the WIPO IGC.  
240 Some members believe that traditional knowledge is a special category of knowledge and falls outside of  
241 Western intellectual property concepts, and are seeking *sui generis* protection that is consistent with  
242 Article 31 of the UN Declaration. Other members believe that traditional knowledge is completely within  
243 the Western intellectual system, which has the authority to exhaust indigenous rights to traditional  
244 knowledge and place it in the public domain. Indigenous peoples strongly opposed the idea that their  
245 knowledge is in the public domain, where they have no control over its use. This is not consistent or  
246 respectful of their beliefs, traditions or customary laws. The Nagoya Protocol and Mo’otz Kuxtal  
247 Voluntary Guidelines’ principles support the idea that sharing traditional knowledge should occur under  
248 mutually agreed terms and conditions, and that shared traditional knowledge does not fall into the  
249 public domain<sup>10</sup>.

250 Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples has stated that:

251 *Where indigenous peoples have decided to grant access to and allow the use of their genetic*  
252 *resources and traditional knowledge, it should be pointed out that after the expiration of the*  
253 *agreed term of use, rights to the genetic resources and TK reverts back to the indigenous peoples*  
254 *who own the knowledge and does not pass into the public domain. This is based on the right of*  
255 *indigenous peoples to permanent sovereignty over their natural resources, as well as*  
256 *international human rights instruments and standards*<sup>11</sup>.

257 This concern with the public domain is a large one with many indigenous peoples. Although the UN  
258 Declaration, in Article 31 and other human rights documents recognize the right of control with no time  
259 limit, and this is also implied in the Nagoya Protocol and Mo’otz Kuxtal Voluntary Guidelines, under  
260 current national laws any shared traditional knowledge may be considered to have lost its protection  
261 and be part of the public domain, free for anyone to use. There are many potential problems with this.  
262 Indigenous peoples often emphasize obligations over rights, and there are many obligations that come  
263 with the use of traditional knowledge that never expire. For example, there may be ceremonies that

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<sup>9</sup> Mo’otz Kuxtal Voluntary Guidelines, CBD/COP/DEC/XIII/18, Article 2(A) para 11.

<sup>10</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Fifth Session, Geneva, July 5-17, 2003. Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain. July 09, 2003.  
[www.wipo.int/export/sites/www/tk/en/igc/ngo/tulaliptribes.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/ngo/tulaliptribes.pdf); WIPO/GRTKF/IC/17/INF/8, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Seventeenth Session, Geneva, December 6 to 10, 2010. Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore. Document prepared by the Secretariat.

<sup>11</sup> Tauli-Corpuz, Victoria (2016). Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Indigenous and Local Community Perspectives. Presentation to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Twenty-Ninth Session, Indigenous Panel: Keynote Address, Geneva, February 15 to 19, 2016.

have to be performed, and only certain persons, groups or clans may use the knowledge, or the knowledge can only be used for specific beneficial purposes. Once traditional knowledge is said to have entered the public domain, others are not obligated to share in benefits from its use, or can use it in offensive ways. Another potential harm is that shared knowledge can be turned against indigenous peoples to appropriate their resources or compete for land or water. Although knowledge sharing is often framed in positive terms, risks of knowledge sharing should also be considered. There are a growing number of unintended or maladaptive consequences of adaptation measures in climate change that result in social, environmental, livelihood and cultural harms<sup>12</sup>. Indigenous peoples often live as minorities within their nation states, and may be disproportionately affected from its misuse due to their close dependence on nature. Indigenous peoples, not outsiders, must have the right to evaluate risks and opportunities according to their own values and circumstances.

FPIC is critical and necessary for any use of TKs. The declarations and treaties that lay out international principles and norms for access to and the use of TKs have collectively taken over 30 years to develop and must not be treated lightly. FPIC provides safeguards for access to knowledges that do not fit within the Western mold. It should be borne in mind that TKs may have been developed within indigenous communities for their own use according their own customary laws and protocols for hundreds to thousands of generations, or “time immemorial.” FPIC procedures ensure that before TKs are accessed and used, that TKs holders are fully informed about both the risks and opportunities that are likely to occur if it is shared.

### C. Ethical Guidelines for the Use of TKs

There is increasing interest in incorporating TKs into the body of science knowledge and climate change initiatives. However, western-trained scientists have focused on TKs as sources of information and data without being aware of the ethical challenges relating to access and use of TKs. In a 2015 essay on ethics and TKs, Whyte noted:

*For indigenous peoples, sharing traditional knowledges involve more than providing access to raw data. Traditional knowledges are part of living indigenous governance systems that regulate and protect indigenous ways of life, including cultural practices, subsistence gathering and harvesting and strategic planning. Indigenous governance systems often struggle to fulfill their regulatory and protective functions when certain knowledges are made public or privatized for individual or corporate gain. In this sense, when knowledge is valued as part of a particular governance system instead of only as raw data, the ethics of sharing reflect the traditions and values of the governance system.<sup>13</sup>*

In the United States, a Climate and Traditional Knowledges Workgroup has developed a set of guidelines for considering TKs in initiatives relating to climate change in order to: (1) Increase understanding of the role of and protections for TKs in climate initiatives; (2) Provide provisional guidance to those engaging

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<sup>12</sup> Jones, Lindsey; Carabine, Elizabeth; Schipper, Lisa (2015). (Re)conceptualising maladaptation in policy and practice: towards an evaluative framework. Working and discussion papers. Overseas Development Institute, London. <https://www.odi.org/publications/9237-reconceptualising-conceptualising-maladaptation-policy-practice-towards-evaluative-framework>.

<sup>13</sup> Whyte, K. 2015. The Ethics of Traditional Knowledge Exchange in Climate Change Initiatives. Earthzine <https://earthzine.org/2015/07/31/the-ethics-of-traditional-knowledge-exchange-in-climate-change-initiatives/>. Last accessed 1/31/17.



in efforts that encompass TKs; and (3) Increase mutually beneficial and ethical interactions between tribes and non-tribal partners.<sup>14</sup> These guidelines should be fully considered when developing guidance to develop and operationalize the Platform.

The considerable effort that has already been undertaken by the UN on matters relating to the Convention on Biodiversity should be carefully reviewed to determine how they might usefully be incorporated into the Platform. In particular,

1. Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments 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. <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>
2. The Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity <https://www.cbd.int/traditional/code.shtml>
3. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity appears to be particularly important. <https://www.cbd.int/abs/>. Article 20 on Codes of Conduct, Guidelines and Best Practices and/or Standards encourages parties to engage in “the development, update and use of voluntary codes of conduct, guidelines and best practices and/or standards in relation to access and benefit-sharing,” and further encourages periodic review and updating of these guidelines.
4. Guidelines and rules governing the use and sharing of benefits from TKs that should be incorporated into the Platform. The Guidelines for Considering Traditional Knowledges (TKs) in Climate Change Initiatives contain a lengthy review of existing indigenous peoples and research protocols, and other reviews and list should be compiled for determining the mode of operation of the Platform.

#### **D. Respect for governance of Indigenous Peoples**

The Platform should expressly provide for direct representation by governmental institutions of indigenous peoples and provide financial and staff support to enable substantive participation. Respect for the governance systems that have been developed and employed to establish cultural norms regarding TKs is essential. The right to self-determination of indigenous peoples is expressly affirmed by Articles 3 and 4 of the UN Declaration and supported by other international agreements such as the International Labor Organization (ILO) 169, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Political and Civic Rights (ICCPR), and the Universal Declaration on Human Rights (UDHR). In addition, this right is affirmed in instruments developed by indigenous peoples themselves, such as the International Covenant on the Rights of Indigenous Nations<sup>15</sup>.

The Outcome Document of the World Conference on Indigenous Peoples reported agreement “that

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<sup>14</sup> Climate and Traditional Knowledges Workgroup (CTKW). 2015. Guidelines for Considering Traditional Knowledges (TKs) in Climate Change Initiatives. <https://climatetkw.wordpress.com/>. Last accessed 1/31/17.

<sup>15</sup> International Covenant on the Rights of Indigenous Nations, <http://cwis.org/GML/International/International-Covenant-on-the-Rights-of-Indigenous-Nations-1994.php>

indigenous peoples' knowledge and strategies to sustain their environment should be respected and taken into account when we develop national and international approaches to climate change mitigation and adaptation.”<sup>16</sup>

Articles 3, 4, 5, 18, 19, 24, 25, 29, and 31 of UNDRIP acknowledge the need to recognize and respect self-determination and the institutional governance systems of indigenous peoples. Articles 18 and 31 especially relate to the Platform:

*Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*

*Article 31: Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

Reiterating previous statements, TKs should not come into and be made available on the Platform from just any source. If it comes from indigenous peoples, submissions must come from the FPIC of the collective authorities (including indigenous governments) of those Peoples. Individual TKs holders may possess certain rights, but these will originate in the collective that defines these rights through self-determination. Individuals may be limited in who, when and in which situations they may share TKs, and it is necessary to confirm these rights with collective authorities.

#### **E. Clarification of relationships with Nation States**

The Platform should include principles governing the ability of indigenous peoples to address matters of concern with their respective nation states in a manner that ensures their full consideration as self-determined peoples. Peoples possess rights of autonomous development free from interference by the state that communities do not have.

Indigenous peoples exercise self-government using systems and forms of their own choosing to maintain social, territorial, and political control over their cultures and economies. Indigenous peoples determine the nature and character of their governing institutions and relations with their nation states to ensure that their voices will be heard. Under the UN Declaration, nation states have the obligation to recognize and work with these systems of governance under Article 19: *“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”*

With climate change initiatives, various measures, laws, rules, and regulations pertaining to preparation, adaptation, and mitigation which are adopted by political jurisdictions will have cross boundary impacts. Due to close ties to place and dependence on resource use, these impacts will be of special concern to

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<sup>16</sup> United Nations, 2014. “Outcome Document of the High-Level Plenary Meeting of the General Assembly Known as the World Conference on Indigenous Peoples.” United Nations, General Assembly, 69th Session, Agenda Item 65.

indigenous peoples. Implementation of the UN Declaration and other UN instruments that involve the rights of indigenous peoples depend upon the development and institutionalization of formalized inter-governmental relationships that are based on respect and recognition of separate political entities with inherent rights of self-government, but obligate the parties to work collaboratively to identify and address differences when they arise.

Ethical principles and international instruments must be capable of advancing the cultural and political rights of indigenous nations *vis a vis* nation states.<sup>17</sup> In May, 2014, a consortium of tribal governments submitted a Joint Statement of Constitutional and Customary Indigenous Governments to the UN Permanent Forum on Indigenous Issues<sup>18</sup> which contained recommendations that are relevant and useful when developing the Platform to respect the governance systems of indigenous peoples and the concerns, values, and traditional/cultural ways appropriate for their communities.

- “• Indigenous constitutional and customary governments and state governments enter into bi-lateral or multi-lateral intergovernmental dialogue to mutually define and agree to an intergovernmental framework (that defines the inherent powers of each government and procedures for engaging) as a foundation for negotiation of mutual concerns providing for a third party guarantor and mediator as a permanent intergovernmental mechanism - wherein each state government and indigenous government can engage in dialogue and negotiate outcomes.
- Pro-actively engage in the prevention and resolution of conflicts involving states and indigenous nations. In doing so the United Nations should respect and promote the implementation of self-determination as the means to self-determination in the broad sense affirmed by the UN Declaration, and as a means to advance peace and mutual benefit.

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<sup>17</sup> See for example, Cowan, Anna. (2013). UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Norther Territory of Australia. *Pacific Rim Law and Policy Journal*, Volume 22, No. 2, pp. 247-310; van Walt, M. & Serroo, O. (1999). The Implementation of the Right to Self Determination as a Contribution to Conflict Prevention. Report of the International Conference of Experts held in Barcelona from 21 to 27, November 1998. UNESCO Division of Human Rights Democracy and Peace & Centre UNESCO de Catalunya.

<sup>18</sup> Center for World Indigenous Studies. 2014. Joint Statement of Constitutional and Customary Indigenous Governments. May 2014. Submission to the UN Permanent Forum on Indigenous Issues, 13<sup>th</sup> Session, New York. AGENDA Item 3: Principles of Good Governance Consistent with the UN Declaration on the Rights of Indigenous Peoples: Articles 3-6 and 46. Submitted by the Qom Nation of Potae Napocna Navogoh (Argentina), Rohingya Nation (Burma [Myanmar]), Nation of Biafra (Nigeria), Lenape Tribe of Delaware, Mohegan Nation, Nanticoke Indian Tribe, Nanticoke Lenni-Lenape Nation, Machantucket Piquot Nation, Quinault Indian Nation, Yamasi (United States of America), Nation of San Francisco Xochicuautla (United States of México) {from the continents of South America, Southeast Asia, Africa and North America}.

## **F. Information sharing among indigenous peoples and with others**

Due to their dependence on place and community, TKs are highly susceptible to cross-cultural miscommunication that can affect information sharing and understanding. In international forums, this potential is further exacerbated by language barriers that can impede the ability to translate or share information or facilitate convenient access. The Platform must include transparent and enforceable processes for submission, access, storage, and dissemination of TKs.

Such processes should include:

- Standardization of terminology and language.
- Clear processes to receive submissions, including evidence of FPIC, disclosure of ability to protect sensitive information, constraints on access and use, and agreements on benefit sharing.
- Portals for information sharing
- Enforceable rules governing third party access and use.

Standardization of terminology and language pertaining to TKs is essential to minimize potential for confusion, miscommunication, misunderstanding and misappropriation.

Processes for receipt of submissions should be clear, easy to follow, and readily accessible to indigenous peoples. Submission requirements should include evidence of FPIC and documentation that the information is being provided with the permission of knowledge keepers in accordance with norms expected by the relevant indigenous peoples. International rules and mechanisms to protect sensitive information would be desirable; however, such mechanisms do not presently exist. The World Intellectual Property Organization (WIPO) established an Intergovernmental Committee in 2000 and agreed to develop international instruments to protect Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore.<sup>19</sup> In the absence of internationally-recognized rules and mechanisms, at a minimum, shared information should be accompanied by statements regarding sensitivity or limitations as to its use.

The Platform could support sharing of several types of information:

- 1) A registry for TKs holders. This would not be a database of primary traditional knowledge, but a register of collective holders that agree to be listed in the register. To minimize potentials for cross-cultural miscommunication or misuse of TKs, we recommend that no attempt be made to provide sensitive information regarding TKs in an electronic database or link to electronic databases that may be established and maintained by indigenous peoples without their free, prior and informed consent. Understanding and use of TKs depends on holistic approaches to problem solving that recognize interactions between environment and human communities. We recommend that the content of databases created to facilitate

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<sup>19</sup> WIPO. Traditional Knowledge and Intellectual Property – Background Brief. Available at: [http://www.wipo.int/pressroom/en/briefs/tk\\_ip.html](http://www.wipo.int/pressroom/en/briefs/tk_ip.html).

information sharing be limited to the types of information available and contact information, and not primary TK. Such a registry would: (a) encourage direct communication between knowledge keepers and those who wish to apply TKs; and (b) provide a means to form networks to share experiences, provide support, and develop best practices, according to their own aspirations.

- 2) A portal to provide ready access to published research regarding climate change, both for general observation about TKs and western science. Indigenous peoples need access to the broad body of science knowledge pertaining to climate. In addition, such a portal would provide a mechanism to share stories regarding the application of TKs with the public. However, the posting of published articles containing TKs should be avoided. This is an area of evolving national and international law. Many articles were written prior to modern legal and ethical standards for TKs. Even if published, compiling them and making them more readily available could contribute to more loss of control over and benefit sharing for access to TKs. The Platform should focus on best practices, only providing metadata and contact information for primary TKs sources to avoid violating FPIC rights. The Platform may also wish to develop rules to prevent linking to external websites and resources that do not follow ethical guidelines and guidelines for FPIC. In other words, links should be vetted for compliance with the operation of the Platform and the rights of indigenous peoples.
- 3) A portal to support the ability of indigenous peoples to secure financial and technical assistance necessary for implementation of climate preparation, adaptation, and mitigation measures. Such information might include pointers to projects embodying best practices, compilations of relevant voluntary guidelines, protocols, and international and national laws and legislation; programs of relevant United Nations instruments and treaties; and guidance on best practices.

The Tribal Climate Change Guide maintained by the University of Oregon could serve as a useful model for structuring information for the Platform: <http://tribalclimateguide.uoregon.edu/>

Enforceable rules should be incorporated into the Platform. Under the 1948 Universal Declaration of Human Rights, intellectual property has been considered a fundamental human right. However, the need to provide protection, the integrity of ownership, and benefit sharing from TKs has become of increasing concern and the subject of considerable scholarship.<sup>20</sup>

The Platform should have a dispute resolution mechanism to allow indigenous peoples' authorities and TKs holders to dispute materials on the Platform and have them removed.

Finally, indigenous peoples should have a direct role in the governance of the Platform to ensure that their rights are respected and that the Platform continues to serve their adaptation needs.

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<sup>20</sup> For example, see: Mugabe, J. 1998. Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse. African Center for Technology Studies, Nairobi, Kenya. Available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_unhchr\\_ip\\_pnl\\_98/wipo\\_unhchr\\_ip\\_pnl\\_98\\_4.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_4.pdf); Anderson, J. 2010. Indigenous/Traditional Knowledge & Intellectual Property. Prepared for the Center for the Study of the Public Domain, Duke University School of Law. Available at: [http://law.duke.edu/cspd/pdf/ip\\_indigenous-traditionalknowledge.pdf](http://law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf).

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### III. CONCLUDING COMMENTS

470 Efforts to develop and operationalize the Platform must be squarely focused on the needs and interests  
471 of indigenous peoples. The information to be shared under the Platform will be largely comprised of  
472 traditional knowledges (TKs) which are integral parts of the heritage of cultural and intellectual  
473 property. TKs encompass beliefs, traditions, practices, stories, songs, dances, languages, and other  
474 forms of cultural and spiritual expression. TKs can involve information about the location, availability,  
475 and uses of traditional foods and medicines and about sacred places within specific ecological, social,  
476 religious and familial contexts. Access and use of TKs within indigenous peoples is governed by norms  
477 and systems of governance which establish societal norms and ethics for information sharing and  
478 transfer.

479 There is increasing recognition of the potential value of TKs in informing and guiding strategies for  
480 climate preparation, adaptation, and mitigation. TKs can provide valuable information about long term  
481 effects of climate change on local environments, ecological processes and local environments. The  
482 observations, interpretations, and strategies employed by indigenous peoples to identify, understand,  
483 adapt and mitigate for environmental changes are being acknowledged as valuable sources of  
484 information. While indigenous peoples may have few qualms for broadly sharing certain types of TKs for  
485 the public good<sup>21</sup>, Whyte (fn 4) provides several examples where sharing can be harmful, such as  
486 locations of water supplies, sacred sites, or places where certain plants and animals are gathered. It will  
487 be important to distinguish between different degrees of cultural sensitivities and provide differential  
488 protections for TKs. The information shared must not be considered or presumed to be freely available  
489 in the public domain; access and use must be consistent with the free, prior, and informed consent of  
490 knowledge keepers provided in accordance with the norms expected under the governance systems of  
491 indigenous peoples. The Platform must proactively address the real potential for abuse, harm or  
492 misappropriation; enforceable rules and guidelines with penalties sufficient to deter violation.

493 The Platform should also devote space to frame the benefits from the use of TKs in a way that supports  
494 and enhances the welfare of indigenous peoples, and the maintenance of TKs *in situ*. The main benefits  
495 to the public good often arises from beneficial spillover effects of the utilization of TK by holders  
496 themselves, such as when their maintenance and protection of forests produces co-benefits for carbon  
497 sequestration and biodiversity conservation. There are many unresolved legal and safeguard issues  
498 associated with sharing TKs outside of indigenous communities. Indigenous Peoples have found some  
499 value in forming cooperative relationships with scientists and co-producing knowledge. But divulging  
500 traditional knowledge and co-production must not be made the sole or primary model of relationships  
501 with Indigenous Peoples, and it must occur with FPIC. Using the Platform to collect and compile

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<sup>21</sup> Examples of Awareness and interpretation of observations based on TKs: Rossier, C. and F. Lake. 2014. USDA Agroforestry Center. Indigenous Traditional Ecological Knowledge in Agroforestry. AFNote 44. May 2014. URL: <http://nac.unl.edu/documents/agroforestrynotes/an44g14.pdf>; Folke, C. 2004. Traditional knowledge in social-ecological systems. *Ecology and Society* 9(3): 7. URL: <http://www.ecologyandsociety.org/vol9/iss3/art7/>; The summer 1992 issue of Northern Perspectives produced by the Canadian Arctic Resources Committee (URL: <http://www.carc.org/pubs/v20no1/index.html>) contains reports of collaborative approaches involving TKs and western science, in particular Hobson, G. *Traditional Knowledge Is Science* and Bielawski, E. *Inuit Indigenous Knowledge and Science in the Arctic*; The Arctic Health Portal About Climate Change, Traditional Knowledge, and Local Observations provides a number of articles on knowledge sharing. URL: [https://arctichealth.nlm.nih.gov/climate\\_change/84/witnesses\\_to\\_change/85/traditional\\_knowledge\\_and\\_local\\_observations](https://arctichealth.nlm.nih.gov/climate_change/84/witnesses_to_change/85/traditional_knowledge_and_local_observations); Groc, I. 2013. Being There: Scientists enlist Inuit for long-term observations of Arctic wildlife, *Scientific American*;



502 traditional knowledge into databases would be unethical and unjust, and likely violate obligations under  
503 the CBD and Nagoya Protocol for biodiversity-related TKs.

504 It is likely that much of this discussion is related to the mode of operations of the Platform to be taken  
505 up at a later date, while at this point process issues are more at the forefront. In this it is clear that for  
506 indigenous peoples' trust in the Platform and its success, they must be fully and effectively involved in  
507 its planning, scope, mode and implementation. At all points indigenous peoples' human rights,  
508 sovereign rights, cultural rights, treaty rights and other rights arising out of constructive arrangements  
509 with states must be recognized and respected. TKs are highly spiritual and related to the fundamental  
510 identity and dignity of indigenous peoples, and should receive appropriate treatment.

511 The greatest potential for indigenous peoples to improve the ability to address climate change will likely  
512 stem not in the content of shared TKs per se, but rather from epistemology – differences in ways of  
513 knowing and problem solving. The dominant focus of western science is the quest to find universal  
514 truths, value-free and largely centered on causal relationships. This segmented, reductionist world view  
515 leads to stove-piping along with fragmented thinking isolated from important environmental, economic,  
516 and social contexts. In contrast, the holistic worldview of indigenous peoples is place and community  
517 centered and founded on a covenant with future generations to provide responsible stewardship based  
518 on thoughtful consideration of connections and integration between all things, an essential perspective  
519 when trying to develop policies and strategies that involve complexities such as those encountered with  
520 climate change. Each of these types of scientific knowledge and their governance systems is valid in its  
521 own right and do not require external validation or approval. Western Science and TKs can be blended  
522 to strengthen and expand the body of knowledge available to address climate change not only for  
523 indigenous peoples, but for all of humanity. A 2014 thematic paper prepared for the UN noted:

524 *"In considering issues related to the protection and promotion of indigenous knowledge, it is*  
525 *equally important to consider its inter-linkages with ensuring intergenerational transmission and*  
526 *continued access to and sustainable use of the lands and natural resources on which this*  
527 *knowledge is based. Consideration could also be given on how to provide sustained support for*  
528 *enabling monitoring of traditional knowledge in addition to connecting and communicating*  
529 *across scales between on-the-ground practice, national/sub-national decision-making and*  
530 *international understanding."*<sup>22</sup>

531 We understand that the views presented in this submission are to be reviewed and considered in the  
532 development of the Platform and that there will be further opportunities to contribute to future  
533 deliberations. We request that tribal governments recognized by the United States be formally invited to  
534 participate in the multi-stakeholder dialogue to operationalize the Platform, scheduled for 16-17 May  
535 2017.

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<sup>22</sup> Inter-Agency Support Group on Indigenous Peoples' Issues. 2104. The Knowledge of Indigenous Peoples and Policies for Sustainable Development: Updates and Trends in the Second Decade of the World's Indigenous People. Thematic Paper towards the preparation of the 2014 World Conference on Indigenous Peoples. June 2014. Available at: [http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20Paper\\_%20Traditional%20Knowledge%20-%20rev1.pdf](http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20Paper_%20Traditional%20Knowledge%20-%20rev1.pdf).