environmental defender's office new south wales

Submission to Department of Foreign Affairs and Trade (DFAT) on the international regime for Access and Benefit Sharing under the Convention on Biological Diversity

25 June 2010

The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- *the importance of public participation in environmental decision making in achieving environmental protection*
- *the importance of fostering close links with the community*
- *the fundamental role of early engagement in achieving good environmental outcomes*
- *the importance of indigenous involvement in protection of the environment*
- *the importance of providing equitable access to EDO services around NSW*

Contact Us

Environmental Defender's Office Ltd
Level 1, 89 York Street
Sydney NSW 2000

Freecall 1800 626 239

tel (02) 9262 6989
fax (02) 9262 6998
email: edonsw@edo.org.au
website: www.edo.org.au

For further inquiries on this matter contact neva.collings@edo.org.au

Submitted to: **genetic.resources@dfat.gov.au**

Executive Summary

The Environmental Defender's Office NSW ('EDO') is a community legal centre specializing in public interest environmental law. We have over 20 years experience in public interest environmental law matters.

The EDO's primary concern in relation to indigenous peoples is to ensure that indigenous people in NSW, and more broadly across Australia, are actively engaged and involved in issues that are of concern to them, ensuring that laws and regulations are adequate for this purpose, and to ensure that indigenous people have access to justice to protect and promote their environmental rights. The strategies employed by the EDO include, relevantly:

- *Promoting the value of public participation in environmental decision making and empowering the community to achieve better environmental outcomes through the informed use of the law;*
- *Increasing access to justice by working with diverse groups within the community, and providing equitable access to services throughout New South Wales; and*
- *Recognising the importance of indigenous involvement in the protection of the environment.*

We advise and act on behalf of indigenous clients, and engage in indigenous law and policy reform issues, particularly in relation to indigenous cultural heritage protection and land management issues, both in NSW and at the Commonwealth level through our collaboration with the Australian Network of Environmental Defender's Offices ('ANEDO').

Moreover, the EDO's Aboriginal lawyer, Neva Collings, has been involved with the access and benefit sharing negotiations under the Convention on Biological Diversity ('CBD') since 2007 in the International Indigenous Forum on Biodiversity (IIFB) where she collaborates with other IIFB representatives to develop positions concerning the rights of Indigenous peoples pursuant to the objectives of the CBD.

We are therefore pleased to provide this submission to the Department of Foreign Affairs and Trade ('DFAT') in preparation for the meeting of the ABS Working Group in Montreal in July 2010 (ABS-WG9, Part 2) on the ongoing negotiations for an international protocol on access to and benefit sharing from genetic resources and associated traditional knowledge ('ABS Regime'). The EDO has an ongoing interest in the ABS negotiations under the CBD to promote the adequate recognition of the rights of indigenous peoples in the ABS Regime. In particular, we will continue monitoring and engaging in the current negotiations domestically and internationally with a view to ensuring that the final ABS Regime is implemented via appropriate legislation throughout the States and Territories in Australia.

In this submission, we limit our comments to focus on issues relevant to our expertise, including providing specific comments on articles in the current draft negotiating text ('Cali Annex') relating to traditional knowledge and compliance. These matters are amongst those that are most pressing to ensure that the rights of indigenous peoples are adequately represented and protected by the ABS Regime.

Our comments relate to:

Part 1. General Comments

1.1 *United Nations Declaration on the Rights of Indigenous Peoples*
1.2 Need for widespread consultation around Australia
1.3 Need for review of current operation of ABS in Australia

Part 2. Text of Cali Annex

2.1 General comments on the Cali Annex
2.2 Traditional knowledge
2.3 Compliance

Key Issues and Recommendations

General Comments

- The Australian Government must frame its position regarding the negotiations on the ABS Regime in the context of indigenous rights articulated by the *United Nations Declaration on the Rights of Indigenous Peoples*;
- The Australian Government must undertake widespread and culturally appropriate community consultation, in combination with awareness-raising activities, with indigenous people across Australia, in respect of the proposed ABS Regime as well as future domestic ABS legislation;
- The Australian Government should conduct a review of the existing operation of access and benefit sharing schemes in Australia with a focus on their accessibility and impact on indigenous people;

Traditional Knowledge in the Cali Annex

- The references to 'indigenous and local communities' in the Cali Annex text should be replaced with the phrase 'indigenous peoples and local communities' to better reflect the right to self-determination of indigenous peoples in line with the *United Nations Declaration on the Rights of Indigenous Peoples*, and ensure that their interests are adequately protected by the ABS Regime;
- The indivisibility of genetic resources and traditional knowledge for indigenous people must be acknowledge in the text of the Protocol, and ensure that both are given equal recognition and protection to reflect that indigenous peoples also assert their rights to genetic resources even in the absence of traditional knowledge;
- Prior informed consent and mutually agreed terms are necessary preconditions for access to traditional knowledge, and prior informed consent is also necessary prior to implementing legislation measures to implement such arrangements;
- State oversight of access to traditional knowledge is critical, in addition to oversight by an indigenous representative body as determined by Indigenous peoples themselves (for example to confirm prior informed consent was obtained in accordance with customary laws and protocols). This could be a two tiered process;

- Defining 'associated traditional knowledge' is complex, and must be developed through engagement with indigenous people in Australia according to mutually agreed terms and must accommodate the dynamic nature of knowledge;
- It is unacceptable for a regime to permit both access and use of traditional knowledge to be negotiated at the time of access, given that not all potential uses may be foreseen at the time access is granted;
- Provisions that acknowledge the assertion of indigenous rights to genetic resources are supported, although the need to obtain consent prior to establishing criteria to govern access to these rights should be included in the text;
- The EDO generally supports the existing provisions in the Cali Annex relating to traditional knowledge, although they could be strengthened, particularly in respect of publicly available traditional knowledge;

Compliance in the Cali Annex

- The compliance measures of the text should apply to traditional knowledge to ensure that the rights of indigenous peoples are adequately protected, as currently they apply solely to 'genetic resources';
- The proposed compliance measures (checkpoints, disclosure and certificates) are supported, although the information to be contained in the certificates should better address indigenous rights;
- There should be greater acknowledgement in the text of the role of indigenous customary laws and protocols, including dispute resolution;
- The ABS Regime should contain more robust enforcement mechanisms, including the introduction of an 'international ombudsman' or 'international authority' to hear complaints and resolve disputes, as well as adjudicate on an offence of 'misappropriation,' which must be included in the regime.

Part 1 - General Comments

As a starting point, we are pleased to acknowledge that the Australian Government recognises the need for a binding international ABS Regime and is prepared to constructively work towards, and accept, this outcome at Nagoya in December 2010. This submission is intended to provide direction to DFAT so that it adequately represents the interests of indigenous peoples throughout the final stages of the negotiations.

However, prior to providing comments on specific articles of the Cali Annex, we make some general comments about the ABS Regime and how the EDO perceives DFAT's role in the ongoing negotiations, and at the domestic level.

1.1 *United Nations Declaration on the Rights of Indigenous Peoples*

As a preliminary matter, the EDO submits that DFAT must be guided in its approach to the ABS Regime (and more broadly, the CBD), in respect of its impact on and relationship to indigenous peoples in Australia, by the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'). This is particularly relevant now that the Australian Government formally acknowledged its support of UNDRIP in April 2009.

It is essential to consider how the CBD recognizes and protects the rights and interests of indigenous peoples. The CBD contains provisions that protect indigenous peoples' rights to customary use of biological resources (Article 10(c)) and the right to recognition of knowledge (Articles 18.4 and 8(j)) in accessing and utilizing biological resources. The preamble to the CBD also recognizes:

> *'the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components'.*

Clearly, these provisions have implications for an ABS Regime established under the CBD. Article 8(j) of the CBD acknowledges that Parties must (subject to national legislation) respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity…and encourage the equitable sharing of the benefits.' However, it is generally accepted that this provision has not led to the adoption of sufficient access and benefit sharing protections on a global scale through domestic implementation by Parties of ABS domestic regulatory measures, particularly in relation to protecting the rights of indigenous peoples.

Therefore, in the absence of explicit guidance within the CBD on the implementation of access and benefit sharing of genetic resources, it is appropriate that UNDRIP should be used to inform these provisions, and to provide the substantive content of, and context for, the application of these rights within the framework of the CBD.

UNDRIP has a number of articles that are acutely relevant in the interpretation of the third objective of the CBD, that being the fair and equitable sharing of benefits arising out of the utilization of genetic resources, which the ABS Regime is directly intended to fulfill.

In particular we draw DFAT's attention to the following relevant articles of UNDRIP (with emphasis added):

> *Article 11*
>
> 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes **the right to maintain, protect and develop the past, present and future manifestations of their cultures**, such as archaeological and historical sites, artefacts, designs, ceremonies, **technologies** and visual and performing arts and literature.
> ……
>
> *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 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.

Article 31

1. 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.

2. In conjunction with indigenous peoples, States **shall take effective measures** to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have **the right to determine and develop priorities and strategies for the development or use** of their lands or territories and other **resources**.

2. States **shall consult and cooperate in good faith** with the indigenous peoples concerned through their own representative institutions in order to **obtain their free and informed consent prior** to the approval of any project affecting their lands or territories and other resources, **particularly in connection with the development, utilization or exploitation of mineral, water or other resources.**

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Collectively, these articles confirm that indigenous peoples have the right to control, protect and develop their traditional knowledge and genetic resources (amongst other things) and in particular emphasise the centrality of consultation on the basis of free, prior and informed consent in relation to any measure that affects indigenous peoples.

Given that the Australian Government has declared its support for UNDRIP, and the widespread level of support demonstrated by the UN General Assembly, the effect is that UNDRIP now represents the application of international human rights norms contained in relevant international conventions (ICCPR and the ICESCR) specifically to indigenous peoples, and that it therefore represents the applicable human rights norms to be applied to all measures that impact upon indigenous peoples.

Therefore the EDO's position is that UNDRIP, in the context of the broader international human rights framework, should definitively guide DFAT's negotiations on the ABS Regime, in particular because so many of its provisions are directly relevant and speak to the access and benefit sharing provisions of the CBD.

1.2 Need for widespread consultation around Australia

As noted in the introduction to this submission, the EDO is concerned with ensuring that domestic ABS law and policy, and by extension the international ABS Regime, adequately protect the rights of indigenous people in Australia. To ensure that it does so, it is critical that the Australian Government consults widely, and in an appropriate manner, with indigenous people around Australia. This will make certain that the position adopted by Australia at international negotiations, and the manner in which an international ABS Regime is eventually implemented into Australian laws, can be appropriately adaptable to reflect local circumstances and protect the rights of indigenous people.

In this regard, Article 19 of UNDRIP is particularly instructive. It requires the Australian Government to consult and cooperate in good faith with indigenous people, and to obtain their free, prior and informed consent prior to implementing any ABS legislation. This consultation must be conducted throughout all States and Territories, given that local circumstances will differ and the way that ABS legislation will best work will likely differ from jurisdiction to jurisdiction. It will also ensure that important issues that will need to be addressed at a national scale can be comprehensively canvassed, for example suggested approaches to access and benefit sharing arrangements when holders of traditional knowledge associated with genetic resources live in an area that crosses state boundaries, and consideration of what will be appropriate indigenous institutions to monitor compliance with access and benefit sharing in each jurisdiction.

Consultation must also be combined with awareness-raising, including activities to enhance the understanding within indigenous communities about access and benefit sharing in general, and focusing on Australia's current legislative and policy frameworks in this area, and how they operate in practice. This is particularly important, given that in the EDO's experience, it seems that levels of understanding and awareness about access and benefit sharing on the part of indigenous Australians is low. For example, very few ABS agreements based on the DEWHA's *Model Access and Benefit Sharing Agreement* have been entered into.

1.3 Need for review of current operation of ABS in Australia

The EDO submits that the Government must conduct a thorough review of how the existing 'Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources' ('Nationally Consistent Approach') is operating throughout Australia. This is because, to our knowledge, there is limited information available on how benefit-sharing is playing out in practice, and because jurisdictions around the country have been slow to respond to effectively implement the Nationally Consistent Approach (if at all).

Only the Commonwealth, Northern Territory and Queensland have introduced specific legislation, and these have varied markedly in approach. For example, the EDO's review of relevant legislation suggests that while the Northern Territory's *Biological Resources Act*

2006 contains specific provisions for indigenous peoples, requiring ABS agreements to be founded on the principles of prior informed consent and mutual terms, Queensland's *Biodiscovery Act 2004* does not protect indigenous rights and interests to the same extent as the Commonwealth and Northern Territory legislation.

Reviewing the operation of existing legislation, and the effectiveness of the Nationally Consistent Approach, is critical, and must be done prior to the eventual implementation of legislation throughout all the States and Territories to reflect the final ABS Regime. The EDO also submits that this review should to a review of intellectual property legislation to ensure that it is compatible with the protection of indigenous customary use of resources and traditional knowledge in Australia.

Part 2 - Text of the Cali Annex

2.1 General comments on the Cali Annex

In general terms, the EDO supports the overall intent of the Cali Annex to create an ABS Regime, and notes that the Australian Government is committed to the process to achieve a legally binding Protocol in Nagoya, Japan in 2010.

We also acknowledge the difficulties associated with forming consensus on an ABS Regime that is legally binding and provides certainty, and at the same time provides a degree of flexibility so that it can be tailored to the domestic circumstances of each Party. Finding the appropriate balance is critical, and is particularly relevant in relation to procedures governing access and benefit sharing for indigenous peoples and local communities.

It is in this context, and in light of the focus of the EDO's work in this area, we provide comments on the specific aspects of the Cali Annex that address traditional knowledge (in particular those particularly referred to in DFAT's letter to stakeholders dated 11 June 2010), as well as provisions relevant to compliance. The EDO considers these to be critical issues, the outcomes of which will bear most directly upon the rights of indigenous people in Australia.

Application to 'indigenous peoples and local communities'

We note that the text of the Cali Annex continually refers to 'indigenous and local communities' which is of significant concern. We submit that the text use the phrase 'indigenous peoples and local communities', a position Indigenous peoples have maintained. This recognises that indigenous peoples are distinct peoples which carries with it acknowledgement of their collective right to self-determination. This right is asserted in UNDRIP which, as we have noted above, should form the basis for the Australian Government's approach to the rights of indigenous peoples. Amending the text to ensure that it refers to 'indigenous peoples and local communities' is consistent with UNDRIP.

Indivisibility of rights to genetic resources and traditional knowledge

The EDO submits that DFAT must support amendments to the Cali Annex that better reflect the rights of indigenous people to benefit sharing in relation to genetic resources, as well as the traditional knowledge associated with those resources.

Indigenous peoples have, on an ongoing basis, called for the recognition that traditional knowledge and genetic resources are interlinked and cannot be separated. The EDO submits that it will significantly weaken the integrity of the ABS Protocol to have requirements for access to genetic resources, and the utilization of traditional knowledge respect of such access, be given differing protections and subject to different requirements. To do so will fail to adequately meet the needs of, and protect the rights of, indigenous peoples.

While the current text of Article 3 provides that the scope of the ABS Regime shall apply to traditional knowledge associated with genetic resources, and the benefits arising from the utilization of this knowledge, the Cali Annex in other significant aspects (particularly compliance) separates these two elements. The EDO submits that this represents an inconsistency in the draft text that must be addressed.

The same rights, obligations and compliance mechanisms established in the ABS Regime must be applied to access and sharing arrangements for the use of genetic resources and associated traditional knowledge. To this end, the EDO submits that 'associated traditional knowledge' must be integrated with 'genetic resources' throughout the text of the Cali Annex, most critically in the articles addressing compliance, as well as in Articles 17 and 18 addressing awareness raising and capacity building obligations, to ensure that the rights of indigenous peoples are given full and equal respect and protection. The text should also reflect that indigenous peoples assert rights to genetic resources in and of themselves, without necessarily requiring the application of traditional knowledge to enjoy these rights.

We now briefly address the following draft articles of the Cali Annex:

Traditional Knowledge

- Article 5(bis) and Article 5(2)(e): Access to traditional knowledge associated with genetic resources, and access to genetic resources;
- Article 9 and Article 9(5): Traditional knowledge associated with genetic resources.

Compliance

- Articles 12, 13 and 14: Compliance measures

2.2 Traditional Knowledge

Article 5(bis) and Article 5(2)(e)

Article 5(bis) imposes requirements relating to access to traditional knowledge associated with genetic resources. In particular, it specifies that Parties are to take legislative, administrative or policy measures, with the aim of ensuring that prior informed consent and mutually agreed terms are preconditions for access to traditional knowledge associated with genetic resources.

The EDO supports this article, given the critical importance of prior informed consent and mutually agreed terms for the protection of the rights of indigenous peoples. However, we submit that the article should be amended to reflect that the relevant legislation implementing it must be implemented only with the PIC of indigenous peoples, in accordance with Article 19 of UNDRIP.

Further, the EDO submits that the State has an important role to play in ensuring traditional knowledge is accessed with the PIC of the holders of that knowledge. The access to and use of traditional knowledge on the basis of prior informed consent must be subject to State oversight, and should not be simply left to contractual arrangements between the user and providers. This is because unequal levels of bargaining power (as indigenous providers are likely to have varying degrees of awareness and capacity to negotiate) as well as complex cultural matters including potential difficulties with cross-cultural communication in the user-provider relationship, means that holders of traditional knowledge may be liable to exploitation and inequitable benefit sharing arrangements. In this context, State involvement in (and at a minimum, oversight of) awareness raising and capacity building is also critical in terms of ensuring that access and benefit sharing arrangements are fair and equitable, and that indigenous people understand their rights under an ABS Regime, and domestic legislation.

However, while the State should have a regulatory role to play, we also note that indigenous bodies or institutions must have pivotal role to play in confirming that PIC has been obtain in accordance with customary laws and protocols, in appropriate circumstances.

This approach could be explicitly reflected in the text of the Cali Annex. For example, Article 10 should be specifically amended to note that, as appropriate to the local circumstances of Parties, appropriate indigenous institutions are to be designated as 'competent national authorities' to act as a supervisory body, ensuring that PIC and MAT as agreed between indigenous providers and the users of that knowledge, are fair and equitable. This is discussed further below in relation to compliance.

What is 'associated traditional knowledge'?

In relation to the question of what 'associated traditional knowledge' is, we provide the following comments based on the EDO's understanding of the concept of 'traditional knowledge'. However, we emphasise that this is a subject matter that clearly should be subject to proper consultation with indigenous Australians.

Generally speaking, indigenous or traditional knowledge is a difficult concept to define. It is knowledge that stems from the longstanding special relationship that indigenous people have with the lands they have traditionally occupied, in the form of an extensive understanding of the characteristics of biological material upon that land.

At an international level, the United Nations Convention to Combat Desertification states that:

> 'Traditional knowledge consists of practical (instrumental) and normative (enabling) knowledge about the ecological, socio-economic and cultural environment. Traditional knowledge is people centred (generated and transmitted by people as knowledgeable, competent and entitled actors), systemic (intersectional and holistic), experimental (empirical and practical), transmitted from one generation to the next and culturally valorized. This type of knowledge promotes diversity; it valorizes and reproduces the local (internal resource).'[1]

[1] See O'Bryan, Katie 'The Appropriation of Indigenous Ecological Knowledge – Recent Australian Developments' [2004] *Macquarie Journal of International and Comparative Environmental Law* 2 at p.3O

Traditional knowledge can relate to cultural and intellectual property or heritage and may include physical items of significance and also intangible property such as literary, performing or artistic works, spiritual knowledge and scientific, agricultural, technical and ecological knowledge. However, for the purpose of the ABS Regime, the focus is upon biological and ecological knowledge, which can be described as knowledge of natural resources, plants, animals, and their environments, and the use made of that knowledge.[2]

It is important to emphasise that there are a number of characteristics of indigenous knowledge which differentiate it from western concepts of intellectual property. As Davis notes, indigenous people often hold communal rights and interests in their knowledge. There is a close interdependence between knowledge, land and spirituality in indigenous societies. Knowledge, innovation and practices are often transmitted orally in accordance with customary rules and practices. In many instances there are rules regarding secrecy and the sacredness that govern the management of knowledge.[3] Indigenous heritage and knowledge is not static and must include items that may be created in the future.

These ideas and concepts should guide any definition of 'associated traditional knowledge' in the ABS Regime.

Negotiating access and use concurrently

DFAT has indicated that it seeks our views on whether it is acceptable that the use of associated traditional knowledge should be governed by the terms of contract negotiated between the user and provider of the knowledge at the time of access.

The EDO's position is that it is unacceptable for penultimate agreement on both the access and the use of associated traditional knowledge to be negotiated between user and provider upon entering into the initial agreement. At the time of negotiating access, in most circumstances it would be very unlikely for there to be a complete awareness of potential future uses that may be ascribed to the genetic resources and associated traditional knowledge. Indeed, the reason for providing initial access is to give the opportunity for the users to undertake research and development activities to determine possible uses of the resource.

Therefore, it is critical that there are requirements to negotiate in relation to use at a later point in time, once possible uses (such as pharmaceutical or chemical products) have been identified. This is particularly because there may be some uses of genetic resources and traditional knowledge which are not appropriate and would not be in conformity with indigenous customary laws or protocols, or respect traditional obligations associated with their use. For example, the genetic modification of genetic resources that have been developed with the assistance of traditional knowledge may not be a use for which the holders of the original knowledge consent to. The lack of opportunity to re-negotiate possible use could mean that the regime would fail to adequately protect indigenous rights and interests.

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[2] *Ibid.*

[3] Davis, M 'Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection' (1999) *Australian Indigenous Law Reporter* 40.

In respect of how these issues are dealt with in the text, we note that Article 5(bis) solely addresses access and that requirements in relation to utilization should be addressed subsequently, currently contained in Article 9 of the Cali Annex. This appropriately reflects the need for a 'two pronged' process of negotiating access as a preliminary matter, and then further use as a secondary matter.

Prior informed consent relating to indigenous rights to genetic resources

Article 5(2)(e) sets down criteria for obtaining PIC for access to genetic resources where national law recognises and affirms rights of indigenous peoples to genetic resources. The EDO supports this provision as it acknowledges the assertion of indigenous rights to genetic resources (rather than limiting it to 'associated traditional knowledge'). This right is also affirmed by Article 31 of UNDRIP.

Our primary concern here is that States do not always adequately represent the interests of indigenous peoples. We are concerned that the reliance on 'applicable national law' may be used by State parties to refuse to recognise indigenous peoples' rights to their genetic resources, and as a way to prioritise that State sovereignty over resources has precedence. This fails to acknowledge the international human rights law context which applies. We submit that a direct reference to applicable international human rights law, including UNDRIP, should be inserted into Article 5(1) to ensure that State sovereignty concerns do not automatically 'trump' the rights of indigenous peoples.

In relation to the State establishing criteria on how to obtain consent to access genetic resources, we are supportive of such criteria being established as the current text reflects. However, we reiterate that this must include the engagement of appropriate indigenous institutions in approving such consultation, and provides scope for acknowledgment and application of relevant customary law and protocols. The text should clearly reflect these requirements. Further, we also emphasise that the initial determination of this criteria must be done in consultation with, and the prior informed consent of, indigenous peoples. This should be clearly reflected in the text.

Article 9

Traditional knowledge associated with genetic resources

In general terms, the EDO supports Article 9 of the Cali Annex, which amongst other things requires States to support the development by indigenous peoples of protocols and standards relating to obligations for access to and fair and equitable sharing of benefits arising from the utilisation of traditional knowledge. In particular, the EDO supports the acknowledgement of the importance and role of indigenous customary laws, protocols and procedures, although the text in Article 9(1) should place a more robust obligation on States than the requirement to only give 'due consideration'. We also support Article 9(3), which requires Parties to support the development *by* indigenous and local communities, although it would be improved with a clear acknowledgment that customary law and protocols may be utilised, as well as an explicit reference to procedures for PIC.

However, considering the current text, we submit that the following amendments are necessary:

- there should be an explicit reference for the need to obtain prior informed consent in relation to the terms of utilization of traditional knowledge associated with genetic resources (in establishing the mechanisms referred to in Article 9(2));
- the text specifically identify that customary law, protocols and procedures may be utilized in establishing these various protocols and minimum requirements of fair and equitable benefit sharing;
- a requirement for PIC of Indigenous peoples must be a precondition to establishing mechanisms referred to in 9(2), in accordance with Article 19 of UNDRIP, should also be inserted; and
- minimum standard terms for access and benefit sharing arrangements should be specified within Article 9 (as is contained in Article 5(2)(f) in relation to access to genetic resources), in order to guide the implementation of legislative measures at the domestic level. It would then be left for Parties to develop such legislation, in consultation with indigenous peoples, to tailor it appropriately to local circumstances in accordance with customary laws and protocols.

Publicly available traditional knowledge

In relation to publicly available traditional knowledge, the EDO submits that fair and equitable benefit sharing *must* be a part of the ABS Regime. Therefore while the EDO supports Article 9(5), stronger language should be inserted that reflects the position that publicly available traditional knowledge shouldn't be subject to less stringent requirements, while recognising that different mechanisms may be necessary as publicly available knowledge may be less suitable for setting out access and benefit sharing arrangements through contractual arrangements.

For example, it would be inequitable for one group or community to obtain benefits from the use of genetic resources and traditional knowledge, when that knowledge is held by a wider group of Indigenous people, simply because a bioprospector or research institution only consulted with one community or group. This could happen for example in instances of 'forum shopping' if the genetic resources are held in different jurisdictions (for example across state borders in Australia) and those jurisdictions have varying regulatory regimes for bioprospecting.

To this end, a minimum requirement of prior informed consent must be included in Article 9(5). It may also be necessary to require an indigenous institution to act as a 'broker' or intermediary in these circumstances. That institution would be charged with approving the efforts of users to identify and enter into fair and equitable benefit sharing arrangements. For example, one suggestion is that this institution (identified through consultation with indigenous peoples) could be charged with keeping a register of all publicly available traditional knowledge within the relevant jurisdiction, which would contain information detailing when the particular knowledge can be utilised, under what conditions, whose consent is required, and should be able to apply customary law to resolve any conflicts or disputes that arise. These matters could be better elucidated in more detailed text in the Cali Annex.

2.3 Compliance

In addition to our focus on traditional knowledge associated with genetic resources, we also provide the following comments on compliance issues raised by the Cali Annex.

This is because compliance mechanisms play an overarching and critically important role in the ABS Regime.

Without strong compliance and enforcement mechanisms, the EDO submits that the ABS Regime will have limited impact, and in practice may have no greater impact than the existing, non-binding Bonn Guidelines. The Bonn Guidelines have also been criticized (including by the 'Like Minded Megadiverse Countries') for their focus on obligations and responsibilities of countries with significant genetic resources, rather than regulating the users of genetic resources.

Indeed, it is important to remember that the primary reason for the development of the ABS Regime was to address the failure of Parties to adequately implement the third objective of the CBD, being the fair and equitable sharing of benefits derived from the use of biodiversity. Australia seems to be a case in point in this regard. While the Federal Government has made efforts to implement the Bonn Guidelines, there has been limited implementation of the 'Nationally Consistent Approach' by the States and Territories and, anecdotally, limited 'take up' for example of the model access and benefit sharing agreements developed by the Federal Government.

An ABS Regime in the form of a Protocol that is not legally binding, does not have robust compliance mechanisms and is subsequently difficult to enforce may therefore have little impact, and provide no additional measures for Parties to the CBD to regulate, and receive fair benefits from (and then enforce any breach of their rights) the commercial exploitation of their biodiversity.

Compliance mechanisms for traditional knowledge

As an initial point, we reiterate that we are particularly troubled by the lack of reference to associated traditional knowledge within the articles in the Cali Annex that address compliance (Articles 12, 13 and 14). We strongly submit that compliance measures must apply equally to access and benefit sharing of genetic resources and associated traditional knowledge.

The exclusion of traditional knowledge within the ABS Regime would render the protection of indigenous rights as tokenistic, and largely ineffectual, and would contradict the major purpose of developing a *binding* Protocol.

Inclusion of references to traditional knowledge in the Cali Annex would also be consistent with the inclusion of indigenous peoples throughout other articles of the Cali Annex, including in particular Article 3 which acknowledges that the scope of the Protocol extends to traditional knowledge associated with genetic resources and to the benefits arising from its utilization.

Compliance measures

Broadly, the EDO supports the proposed compliance mechanisms that are contained in the Cali Annex.

In relation to Article 12, which requires Parties to take appropriate measures to ensure that genetic resources (and traditional knowledge) utilized within their jurisdiction, we support the position that States must ensure that PIC and MAT have been obtained.

However, we would also call for a reference to be made to ensuring that PIC and MAT have been appropriately obtained in accordance with customary laws and protocols, in cases involving the genetic resources and traditional knowledge of indigenous peoples. To ensure that this Article is effective, it is necessary to ensure that these minimum standards for domestic legislation are contained in the Protocol (as currently alluded to in Article 5 (*bis)*).

The EDO supports the use of checkpoints, disclosure and certificates of compliance as articulated in Article 13, as critical aspects of compliance within the ABS Regime.

In relation to the specific matters set down in Article 13 (4), we assert that the following requirements should also be included in a certificate of compliance:

- Identification of the Indigenous rights holder of genetic resources, as appropriate (rather than limiting this requirement to traditional knowledge);
- A link to evidence that prior informed consent has been obtained in accordance with national legislation;
- A link to evidence that decision making processes involving indigenous people (including prior informed consent and agreement on mutually agreed terms) have been conducted in accordance with customary laws, where appropriate.

In relation to Article 14, which addresses measures for compliance with mutually agreed terms, our position is that the text should be more robust and go beyond encouraging users and providers to include provisions in benefit sharing arrangements to address dispute resolution. Instead, the proposed dispute resolution terms set out in Article 14(1) should be minimum standards for inclusion in domestic legislation. We also support the inclusion here of a specific reference to the rights of indigenous peoples to have a dispute resolved in accordance with customary laws and protocols, and that this right should be given equal weight to other dispute resolution options.

Enforcement

The EDO submits that there should be more robust and specific enforcement measures to be included in the compliance measures of the ABS Regime. In particular, the Protocol should identify that it is the national competent authority is responsible for certifying compliance with national legislation, enforcing national laws and that ABS arrangements are undertaken in accordance with the minimum standards required for ABS arrangements. It may be that indigenous authorities also have a role to play with regard to enforcement, at the domestic level, particularly given that it would be in a position to monitor compliance with prior informed consent and mutually agreed terms in accordance with relevant Indigenous customary law.

Further, we also support the introduction of an 'international competent authority' or 'international ombudsman', which has been suggested by a number of Parties throughout the negotiations on the ABS Regime to date. Our opinion is that an international authority would be mandated to resolve disputes between Parties, as well as hear complaints and resolve disputes directly between user and provider, and enforce compliance with domestic legislation where a national competent authority fails to do so.

This authority is particularly important for indigenous peoples, whose rights may not always be adequately protected by States. In circumstances where an indigenous

community or group is concerned that a user of their traditional knowledge is breaching mutually agreed terms set out in a contract between the indigenous providers and the users, and where the State's domestic laws are failing to respond adequately to this breach, the international authority would have powers to receive complaints and arbitrate such disputes.

In this context, we also support the creation of an offence of 'misappropriation,' although this does not explicitly appear in the text of the Cali Annex. This offence would be committed where a user fails to comply with the domestic ABS legislation governing access to and use of genetic resources and associated traditional in provider country, including where relevant, obligations in relation to indigenous peoples. The offence should be enforceable by the international authority, which would have relevant powers to adjudicate on and make orders in relation to alleged offences.

For more information relating to this submission please contact Neva Collings on (02) 9262 6989.