

64. 缔约国会议可考虑:

- (a) **鼓励有关知识产权影响的案例研究。** 缔约国会议可考虑要求各国政府和保护及持久使用领域的政府间组织和其他组织, 自己进行并提请秘书处注意有关知识产权对公约目标影响的研究, 并通过资料交换所机制(CHM)将其广为传播。此种研究应该突出遗传资源、相关传统知识和/或生物资源在原地国外被使用的具体个案。此种研究还可对知识产权影响与第 8(j)、15 和 16 条规定的各项原则之间的关系做出分析。
- (b) **鼓励继续进行有关专利申请公布资料政策的研究。** 缔约国会议可考虑鼓励缔约各国有关组织继承并扩大进行研究, 以确定公约各项目标在多大程度上可以通过要求专利申请人公布资料得到推进; 此种资料包括发明过程中使用的生物资源原地以及土著及当地社区传统知识和习惯做法的资料, 或还可包括取得此种使用批准及分享利益的措施资料。此种研究可以考虑把此种程序正规化的可能影响, 包括确定把此种要求纳入专利审查范围的条件和可行性等实际问题。
- (c) **探索将传统知识纳入现行知识产权制度的备选方法。** 缔约国会议可考虑要求研究现行知识产权制度吸收和保护传统知识的潜力, 以促进第 8(j) 条的执行和公约各项目标的实现。
- (d) **审查原产地标识或商标与传统知识及习惯做法之间的关系。** 缔约国会议可考虑要求各国政府和有关组织进行研究, 以确定现行原产地标识或商标制度是否具有潜力保证土著及当地社区得以事先批准其传统知识和习惯做法的广泛使用并鼓励分享此种使用的利益。此种研究还可探讨修改或充实此种制度的备选方法, 以扩大大事先批准及分享利益的机会。
- (e) **资料交换所机制(CHM)有关信息的管理。** 缔约国会议可要求秘书处进行一项研究: 作为资料交换所机制试验阶段的一部分, 探讨实施科咨机构二次会议建议 11/6 第 4 段的实际选择方法, 亦即: 缔约国会议应“承认(通过资料交换所机制提供的)全部信息的所有权与控制权仍归提供者所有, 以尊重原产地国和土著及当地社区的权利”。具体而言, 秘书处可以探索资料交换所机制可用什么办法规范对于土著及当地社区的知识、创造和习惯做法的承认及利益分享, 以及保证此种知识、创造及做法的传播或使用须经过事先批准。
- (f) **鼓励缔约各国举行利害关系人协商会议。** 缔约国会议可考虑要求各国政府及政府间组织同利害关系人进行协商, 集中讨论具体种类的知识产权对具体部门的传统知识的影响, 或集中交流知识产权对具体社区造成影响的具

体经验。利害关系人可包括土著及当地社区，行业及公共部门研究人员。

- (g) **要求有关政府间组织参与。** 缔约国会议可考虑鼓励或要求有关政府间组织，特别是国际知识产权组织和世界贸易组织，以及有关非政府组织，并可酌情包括学术机构和专业协会，参与到各项备选行动中。
- (h) 通过秘书处和资料交换所机制公布成果。在执行上述各项备选行动中，缔约各国及其他行动参与者可将其工作结论和成果报告秘书处，交由资料交换所机制广为传播。

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注释

1 到本文编制日截止, 秘书处尚未收到政府或其他有关方面的案例研究报告; 但秘书处已考虑到各国政府在回复有关其他议程项目的资料要求时, 如促进技术取得和转让的方法, 就有关知识产权问题提交的意见。

2 第 16 条全文涉及缔约国间技术取得与转让问题, 承认此为“实现公约目标的关键内容”。第 1 款规定: 各缔约国“得向其他缔约国提供和/或促进取得及转让有关保护和持久使用生物多样性或利用遗传资源且不对环境造成重大破坏之技术。”该条其余部分则对该项普遍义务进行限定或详述, 例如强调把技术提供给发展中国家缔约方以及遗传资源原产地国缔约方。第 2 款与目前的讨论有特别关联, 该款规定: “受专利及其他知识产权保护之技术, 得按照承认并符合知识产权之充分和有效保护条件提供之。”

3 有关知识产权制度基本内容的进一步讨论, 请参阅知识产权, (UNEP/CBD/COP/2/17), 第 9-22 段。

4 然而, 有人担心生物技术领域某些新近出现的专利可能违背了这条原则。详见下文第 33 段。

5 应该指出, 虽然知识产权限制受保护信息的商业用途, 但也可促进信息的广泛传播以造福社会。例如, 专利申请人必须在申请书中公布可使得具有同行技能的另一人得以复制有关发明的充分资料。放弃对此种信息的控制权, 是发明人馈赠社会的一部分, 以换取其对复制(若属用途专利)或使用(若属工艺专利)该项发明的专属控制权。此种信息的传播可对有关行业进一步研究与发展起到支持作用。

6 有关与贸易有关的知识产权协定及其与生物多样性公约的关系的进一步资料, 请阅议程项目 14.2 项下之背景文件, 题目是: 生物多样性公约各项目标和与贸易有关的知识产权协定之间的协同作用及关系, UNEP/CBD/COP/3/23。

7 有关知识产权还有若干问题引起了重大关注, 但不属于缔约国会议确定的问题范围, 因而也在本文论述范围之外。此类问题包括对药物和其他关系公共健康和福祉的产品实行专利的社会经济影响, 以及对动、植物实行专利的道德影响等。同样, 本文也未就对人类基因实行专利的有关问题进行讨论, 因为缔约国会议第二次会议“重申人类遗传资源不属本公约规范之范围”。请阅决定 II/11, UNEP/CBD/COP/2/19, 附件 II。

8 但请注意，前段提引的扩大化专利申请现象使有些人怀疑此一原则能否一体适用于生物技术发明。

9 有关此种资源价值的进一步讨论，请参阅为科咨机构二次会议编写的：生物多样性的经济价值：秘书处的说明(UNEP/CBD/SBSTTA/2/13)。有关此种资源价值的进一步资料，还可参阅农民的权利及类似群体的权利，UNEP/CBD/IC/2/14，第7-10段；及土著及当地社区的知识、创造和习惯做法，UNEP/CBD/SBSTTA/2/7，第74-82段。

10 还请参阅生物多样性公约和与贸易有关的知识产权协定：关系及协同作用，UNEP/CBD/COP/3/23。

11 这种做法的一个范例，可在菲律宾执行第15条中找到。根据菲律宾法律，外国机构作为取得遗传资源的一个条件，必须同意允许在菲律宾境内使用此种遗传资源做出的任何发明。请阅UNEP/CBD/COP/3/20。还请参阅生物多样性公约和与贸易有关的知识产权协定：关系及协同作用，UNEP/CBD/COP/3/23。

12 这一主张，以及本节其后的引证和讨论一般源出于UNEP 1995：662-65。还请参阅生物多样性公约和与贸易有关的知识产权协定：关系及协同作用，UNEP/CBD/COP/3/23。