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Sixth meeting

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Item 7 of the provisional agenda*

CONSIDERATIONS FOR DEVELOPING TECHNICAL GUIDELINES FOR RECORDING AND DOCUMENTING TRADITIONAL KNOWLEDGE AND THE POTENTIAL BENEFITS AND THREATS OF SUCH DOCUMENTATION

Note by the Executive Secretary

SUBMISSION BY THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

1. The Executive Secretary is circulating herewith, for the information of participants in the sixth meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions, a summary of the WIPO Toolkit – Ensuring that Traditional Knowledge Documentation Serves the Needs of the Traditional Knowledge Holders. This information document intended to assist the Working Group in its consideration of item 7 of the provisional agenda, and, in particular, those elements of the item relating to guidelines for documenting traditional knowledge.

2. The document is being circulated in the form and language in which it was provided to the Secretariat.

* UNEP/CBD/WG8J/6/1.

THE WIPO TK TOOLKIT: ENSURING THAT TK DOCUMENTATION SERVES THE NEEDS OF TK HOLDERS AN OVERVIEW OF THE PROJECT

Many initiatives are under way, or being planned, across the globe to preserve and document traditional knowledge (TK). Many TK holders have asked for information about the implications of documenting their TK, and how to safeguard their interests once their TK is documented. The WIPO TK toolkit project aims to respond to that call.

What is it for?

The TK toolkit project aims to inform and empower holders of TK, to help them plan and make choices, so that when their TK is documented the outcomes serve their interests and agree with their community values.

In the past, TK was mostly transmitted by oral and other traditional means, within communities, but the modern era has seen many initiatives to document TK in new formats – written down by researchers, published in books and journals, put on line in databases, or recorded on audio or video tape. Documentation valuably preserves and disseminates TK – including when traditional ways of transmitting TK are evolving or breaking down, with social change. But it also means that many others can use and profit from the TK without the involvement or consent of the original TK holders – they can access and use TK literally on the other side of the world, without any contact with or legal responsibility to the TK holder.

There is not a single, simple way of documenting TK. The practical options are as diverse as TK itself, and as diverse as the communities who hold TK. Depending on *how* TK is documented, it can reinforce and consolidate the role of TK holders and custodians; or it can accelerate the erosion of the customary systems of knowledge development and transmission that are the lifeblood of TK.

What is the problem?

At its worst, documenting TK without involving TK holders can fuel claims that TK is being misused and misappropriated by external parties, in violation of the customary laws, values and interests of the original community. In turn, this can lead to strong reluctance to divulge any more TK – tragically, whole systems of TK are at risk of dying out because of lack of confidence that the knowledge will be treated with due respect.

It is therefore vital for a TK documentation process to be seen as a genuine partnership, with the full involvement and informed consent of the TK holders,

reinforcing and respecting their systems of knowledge and their ways of maintaining and transmitting knowledge, rather than acting in tension with traditional and customary forms. Documentation should not become a detached, clinical exercise in noting down and recording TK as simple factual information, regardless of its context and without the involvement of traditional holders.

What makes traditional knowledge valuable is not merely its immediate use as utilitarian facts – its true value lies in the systems of knowledge of which it forms part, and without which it is difficult to use TK effectively.

- for example, just to record the fact that a certain plant is known to have certain medical properties is only a small part of the value of traditional medical knowledge – it includes systemic knowledge about harvesting the plant, diagnosing the medical condition, determining dosage regimes, using synergistic effects with other treatments, and learning from clinical experience in using the treatment (much traditional medical knowledge represents generations of such 'clinical trials').

So the WIPO TK toolkit does not encourage TK holders to document their TK, or not to document it. It just helps them, practically, to ensure that when they choose to document their TK, this will be done in a way that **preserves** and **promotes** TK, but also properly **protects** against unwanted use of TK by others and **respects** the inherent value of TK systems.

Who is it for?

The TK toolkit is developed as a direct response to the requests of many TK holders for practical information. It is therefore mainly addressed to TK holders and their representatives and advisors.

But many institutions, government authorities and private sector partners are concerned to ensure that they document and handle documented TK responsibly and in conformity with the wishes of the original holders of the TK – therefore the TK toolkit should also be useful for others, such as :

- institutions that document TK and biological resources (e.g. museums, archives, genebanks, botanical gardens, etc);
- research institutions (universities, medical research foundations, agricultural research institutes, etc.);
- government or public sector agencies undertaking or overseeing documentation projects; or
- private sector partners working with TK holders and concerned to ensure they work in accordance with the interests of the TK holders.

How should it be used?

The TK toolkit is not a legal textbook, and is not a piece of legalistic advice. It is a practical set of suggestions for TK holders, which should facilitate and inform consultations with TK holders, and facilitate planning and carrying out of documentation projects. It should enable TK holders to:

- define the proper objectives of the documentation, as the basis for planning and consultation;
- understand the full implications of documenting TK;
- be alert to the potential risks and unexpected negative outcomes from documentation;
- review the practical options available to ensure documentation serves their interests and values;
- learn from the practical experience of other TK holders;
- develop workable tools – consultative processes, checklists, protocols, agreements – to keep actual documentation activities in line with the agreed objectives.

The toolkit is just that – a set of tools – and it is not a stand-alone mechanism for documenting TK. Instead, it is intended to facilitate and support existing documentation projects. It doesn't advocate the documentation of TK as an end in itself. Of course, sometimes any kind of documentation is simply a bad idea, unwelcome to the TK holders and contrary to their interests, and should not be pursued at all.

How is it structured?

The toolkit has a central core that sets out the main considerations that apply in any documentation process. It will also have a series of additional modules that deal with specific areas that have been raised in consultations, such as customary law, biodiversity regulation, traditional medicine, indigenous names and geographical references, and TK in the patent system. Additional modules and case studies are being prepared to deal with the different national and regional contexts.

The central core introduces the general issues, and is then structured in three main sections, setting out the principal practical considerations that apply:

- Before documentation: assessing options and setting objectives;
- During the documentation process: how to take care of your interests in practice; and

- After documentation: managing the use of documented TK to fulfil the purpose of the documentation project

Case studies: The toolkit includes many case studies – some very brief, some more extended - to show how different communities and different projects have undertaken TK documentation. The case studies:

- illustrate the practical context of documenting TK
- show the range of options available, and help to assess the right option for a particular documentation project
- promote networks between TK holders, and mutual learning between communities, often facing similar challenges even in very different locations

Special modules: To keep the central core of the toolkit as simple and direct as possible, technical details and more specialist material will be set out in a series of specialised modules. These are being developed following specific requests and proposals from many TK holders and other representatives. They fall into two general categories:

- special subject matter: detailed information on specific aspects of TK documentation (e.g. indigenous names, the patent system, medical knowledge, agricultural knowledge)
- local/national/regional modules: providing detailed context concerning certain local environments (e.g. concerning local customary law), for specific national systems (e.g. for those countries with biodiversity regulations and a sui generis TK protection system) and for specific regional contexts (e.g. for regions with common legal traditions and shared cultural and social backgrounds).

INTRODUCTION

- What is this toolkit for?
- Who should use it?
- How should it be used?

BEFORE DOCUMENTATION

consulting with communities & TK holders

- clarifying objectives: what is documentation for?
- what does this mean for
 - *how it should be documented?*
 - *how it would be used once documented?*
- developing practical guidelines:
 - a documentation protocol,
 - checklists
 - a formal agreement

DURING DOCUMENTATION

keeping true to the objectives

- practical steps to ensure documentation follows the agreed approach
- managing confidentiality and guarding against unwanted disclosure
- continuing consultation with TK holders
- recording not just TK, but associated customary law and practices

AFTER DOCUMENTATION

fulfilling the purposes of documentation

- Management of the documented TK
- Selective disclosure, including deliberate release of some TK into public domain
- Other sharing of TK for specific purposes, such as environmental regulation or commercial partnerships, subject to confidentiality arrangements as necessary
- Maintaining access controls over secret or sacred TK in line with existing customary law and community practices
- Further protection if required through IP system, e.g. patents, plant variety protection, sui generis TK protection (where available), copyright and related rights
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ADDITIONAL MODULES

responding to needs expressed in consultations

TRADITIONAL MEDICAL KNOWLEDGE:

Special considerations applying to medical knowledge, including valuation, regulation for efficacy and safety, and protection of clinical information

TRADITIONAL AGRICULTURAL KNOWLEDGE:

Special considerations applying to agricultural knowledge, including regulation and linkages with variety rights, farmers' rights and FAO International Treaty

INDIGENOUS NAMES

Practical options for protection and management of indigenous names, geographical references & other terms associated with TK

CUSTOMARY LAW & PRACTICES

Special considerations applying when TK being documented is subject to the customary law of a community, or is managed through customary practices

TK IN THE PATENT SYSTEM

Practical considerations when considering links with the patent system:

- defensive use to forestall illegitimate patents over TK
- patenting strategies for indigenous innovations
- technical links to patent information systems

TK & BIODIVERSITY REGULATION

Outline of the links between protection of TK and access and benefit sharing regimes, under the Convention on Biological Diversity

GENETIC RESOURCES AND EQUITABLE BENEFIT-SHARING

- Guidelines on the possible options for managing IP in settling arrangements for the sharing of benefits from the use of genetic resources
- Links to the WIPO database containing examples of IP clauses from mutually agreed terms for benefit sharing

ROLE OF RESEARCH & ACADEMIC INSTITUTIONS

- Focus on the role of researchers and other experts working within research and academic institutions, and other public institutions such as botanical gardens and ethnobotanical collections.
- How to develop appropriate institutional policies and guidelines, and how to consult upon and develop appropriate partnership arrangements with TK holders
- Link to database of samples of collection protocols, guidelines and policies for collection of TK and genetic resources

Some sample checklists, drawn from the draft toolkit

CHECKLIST

Before documenting TK and associated biological or genetic resources

- Consult widely and set your collective IP objectives;
- Consider the range of options available to meet those objectives;
- Carefully assess the implications of each option, with expert advice if possible;
- Develop your IP strategy, based on your objectives;
- Ensure full stakeholder involvement from an early planning stage;
- Address prior informed consent of TK holders, if documentation is undertaken by parties other than the TK holders;
- Document everything you can in a precise and standardized manner;
- Do not disclose any undisclosed TK;
- Check and clarify the role and responsibilities of other partners, such as researchers, government agencies, and any commercial partners.

CHECKLIST

During the documentation process

1. Do not disclose your documentation data, unless the firm decision has been made by TK holders to publish it;
2. Identify those who provided the information and who claim ownership, and record this information unless they prefer not to have it recorded;
3. Prioritize defined types of TK and associated biological/genetic resources during the documentation (e.g. TK and biological/genetic resources at risk of disappearance, TK and biological/genetic resources susceptible of commercial use, TK involving the useful arts, etc); and
4. Manage relationships with other parties through confidentiality and other contractual agreements.

CHECKLIST

After documentation

1. Don't disclose documented TK unless there has been a clear decision, based on the agreed strategy, that those elements should be disclosed;
2. Only disclose it for the agreed purposes, and use confidentiality agreements if you need to stop it from being disclosed further; and
3. Review the possibilities of positive IP protection of your documented TK, and don't forget that innovative developments of TK can be eligible for IP protection.