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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

INTRODUCTION

1. In paragraph 5 of decision VIII/5 B, the Conference of the Parties requested the Working Group on Article 8(j) and Related Provisions to explore the possibility of developing technical guidelines for recording and documenting traditional knowledge, innovations and practices, and to analyse the potential threats of documentation to the rights of the holders of traditional knowledge, innovations and practices, with the full and effective participation of indigenous and local communities.
2. Further to this, taking into account the work of other international bodies, the Conference of the Parties, in decision IX/13 C, requested the Executive Secretary to collaborate with the United Nations Permanent Forum on Indigenous Issues (UNPFII), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Intellectual Property Organization (WIPO), to address both the potential benefits and threats of the documentation of traditional knowledge, and to make the results available to the Working Group on Article 8(j) and Related Provisions at its sixth meeting.
3. In the spirit of collaboration, the Secretariat has made available to WIPO, UNPFII and UNESCO, the relevant work carried out by the Convention on Biological Diversity on this issue, as contained in the consultant's *Report on the advantages and limitations of registers as a measure to protect traditional knowledge, innovations and practices* (UNEP/CBD/WG8J/4/INF/9), as well as the revised document contained in section II below.
4. The Secretariat has further consulted WIPO, UNPFII and UNESCO about this issue. UNPFII and UNESCO have supplied comments which have been used to revise the previous document (UNEP/CBD/WG8J/5/3/Add.2), which was considered at the fifth meeting of the Working Group on Article 8(j) and Related Provisions.

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5. After careful consideration, it was agreed by the agencies concerned that the WIPO Traditional Knowledge Toolkit project, which aims to inform and empower holders of traditional knowledge to help them plan and make informed choices so that, if and when their traditional knowledge is documented, the outcomes serve their interests and agree with their community values, contains comprehensive considerations covering both potential benefits and threats of documenting traditional knowledge and, when completed, will meet the request of decision IX/13 C. A summary of the WIPO Toolkit is made available as an information document (UNEP/CBD/WG8J/6/INF/12).

6. In light of the above, draft recommendations are provided in section II of this document for the consideration of the Parties, regarding this matter.

I. THE POTENTIAL BENEFITS AND THREATS OF THE DOCUMENTATION OF TRADITIONAL KNOWLEDGE

A. Introduction

7. In paragraph 5 of decision VIII/5 B, the Conference of the Parties requested the Executive Secretary to explore the possibility of developing technical guidelines for recording and documenting traditional knowledge, innovations and practices, and to analyse the potential threats of such documentation to the rights of holders of traditional knowledge, innovations and practices, with the full and effective participation of indigenous and local communities.

8. Further to this request, the present document reports on the potential benefits and threats of documenting traditional knowledge and the development of guidelines for documenting traditional knowledge. The report draws upon Mr. Preston Hardison's report prepared for the Secretariat and entitled "The Advantages and Limitations of Registers" (UNEP/CBD/WG8J/4/INF/9), principles enunciated by indigenous and local communities, as well as projects currently preparing guidelines for the documentation of traditional knowledge. The present report provides an analysis of the potential benefits and threats posed by the documentation of traditional knowledge and suggests draft recommendations for the consideration for the Working Group. Indigenous and local communities were also consulted through the Advisory Group on Article 8(j). The comments by the Advisory Group are recorded in the report of its second meeting (UNEP/CBD/WG8J/5/INF/11), and have also been taken into account in the preparation of this document.

9. The present report builds on the growing body of work on guidelines for documenting traditional knowledge. Programmes for the elaboration of guidelines are being undertaken by international organizations, Governments, professional associations and indigenous and local communities. Notably, the World Intellectual Property Organization is presently developing a toolkit for the collection and documentation of traditional knowledge. Projects by indigenous and local communities to develop guidelines for research and documentation have also informed the development of this document.¹ These guidelines provide a valuable perspective as to the needs of indigenous and local communities, which comprehensive international guidelines should reflect. Harmonization between existing guidelines and the work of other organizations will prevent duplication and overlap, and ensure a holistic approach it taken and that international guidelines add value to those already developed.

10. The most explicit provision for the protection of indigenous traditional knowledge is contained in the United Nations Declaration on the Rights of Indigenous Peoples.² Article 31 paragraph 1, of the Declaration states:

¹ In particular the research guidelines developed by the Australian Institute for Aboriginal and Torres Strait Islander Studies, the National Aboriginal Health Organization (NAHO) and its First Nations Centre and the Assembly of First Nations, as well as others have been studied and analysed.

² General Assembly resolution 61/295, annex.

“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.”

11. Further, paragraph 2 of article 31 urges States to “take effective measures to recognize and protect the exercise of these rights”. In addition to article 31 of the Declaration, article 11 emphasizes the right to practice and revitalize cultural traditions and customs and urges States to provide redress through effective mechanisms, with regard to indigenous, “cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs”.³ The preamble of the Declaration also adds support to the protection of indigenous traditional knowledge by recognizing “that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.”⁴

12. To explore the possibility of, and rationale for, developing technical guidelines for recording and documenting traditional knowledge, innovations and practices, Section B below presents the aims which currently motivate the documentation of traditional knowledge; section C provides an overview of the benefits of establishing recording and documenting mechanisms, as well as some concepts and ideas that should be taken into account.⁵ Existing guidelines and handbooks on the topic are also examined in this section. Section D examines issues, concerns and possible threats regarding documenting and recording of traditional knowledge.

B. The meaning of recording and documenting traditional knowledge

13. According to the World Intellectual Property Organization (WIPO),⁶ documenting traditional knowledge includes anything that involves recording such knowledge in a way that preserves it and could make it available to others. Documentation can mean recording both the knowledge itself and the traditional way it is expressed. In this document, “database” is used to refer to any compilation of data from documenting and recording traditional knowledge. A comprehensive elaboration of potential threats and the various meanings of “protection” of knowledge, innovations and practices, is expanded on by Hardison in an information document on the advantages and limitations of registers (UNEP/CBD/WG8J/4/INF/9), which is available at <http://www.cbd.int/doc/meetings/tk/wg8j-04/information/wg8j-04-inf-09-en.doc>

14. The protection aimed at by documenting and recording traditional knowledge can be protection from extinction, protection from privatization and unjust enrichment, protection from unauthorized use, and protection for access and benefit-sharing, among others. However, despite the potential benefits of documenting and recording traditional knowledge, the topic has been controversial, namely in terms of whether documenting traditional knowledge may itself constitute a threat to the preservation and nature of traditional knowledge and of whether it may, in practice, facilitate misuse and unauthorized use of such knowledge.

³ *Ibid.*, at Article 11(2) and 24(1).

⁴ *Ibid.*, eleventh preambular paragraph.

⁵ Extensive reference is made to the earlier report on traditional knowledge registers and databases by Preston Hardison (UNEP/CBD/WG8J/4/INF/9).

⁶ See document WIPO/GRTKF/IC/4/5 "Draft outline of an intellectual property management toolkit for documentation of traditional knowledge", and WIPO/GRTKF/IC/5/5, "Report on the toolkit for managing intellectual property when documenting traditional knowledge and genetic resources".

C. *Exploring the possibility of developing technical guidelines for recording and documenting traditional knowledge*

1. *Principles and purposes*

15. The OCAP principles⁷ are a useful guide to the basic considerations that should underpin any recording and documenting system, as they provide an insight on the relationship between indigenous and local communities and their traditional knowledge. “OCAP” stands for ownership, control, access and possession. This means that (i) the community or group owns information collectively in the same way that an individual owns his/her personal information; (ii) indigenous and local communities are within their rights in seeking to control all aspects of research and information management that impact them; (iii) indigenous and local communities must have access to information and data about themselves and their communities, regardless of where it is actually held, and they have the right to manage and make decisions regarding access to their collective information; and (iv) indigenous and local communities should have possession or physical control of the data.

16. Indigenous and local communities and others seek to reach various goals in establishing databases and registers. For instance, registers, as one form of documenting and recording, have been created for the purpose of organizing knowledge to enable better protection and improved management of community resources. As discussed above, documentation may be implemented as method of protecting traditional knowledge against a variety of threats. The type of protection sought must be considered in the elaboration of documenting and recording schemes, in order to respond to the targeted needs. Flexibility may be necessary to ensure that a documentation or recording scheme can adapt to meet the needs of each community. Further, a distinction needs to be made between the different kinds and levels of traditional knowledge.

17. Some of the purposes of existing databases are the maintenance and preservation of traditional knowledge by recording and documenting it, protection against inappropriate granting of intellectual property rights by providing evidence of prior art, raising awareness of communities with respect to the values of traditional knowledge, encouraging long-term conservation and promotion of natural resources and their related traditional knowledge, providing information to parties who may be interested in obtaining information available in the registry in exchange for a fee, and use as part of a legislative system for the assertion of rights over traditional knowledge including intellectual property based rights and non-intellectual property based rights (such as various *sui generis* systems of protection).

18. Certain databases, like community traditional knowledge databases, serve multiple purposes such as support for and input to government planning, furthering community education, management of knowledge, revitalization of traditional practices and revitalization of traditional languages. Furthermore, it appears that the development of such databases has contributed to the development of communication and knowledge exchange between indigenous and local communities. Such exchange might be, for instance, exchange of technologies used to record and manage traditional knowledge.

19. As an example, the Gwich'in Environmental Knowledge Project in northwestern Canada seeks to document and record elders' traditional knowledge in order to maintain it for future generations, but also in order to allow more informed decision-making regarding resource management and other matters. The project has produced books and a database of information. Intellectual property rights do not seem to be a chief concern for establishing the system but, as such, the project and database may certainly be useful in asserting intellectual property rights.

20. These databases and others, such as external traditional knowledge databases, may also provide protection from unwanted intellectual property rights claims filed by entities external to indigenous and local communities. This protection is made possible for patent reviews because the database provides

⁷ The OCAP principles were set forth by the National Aboriginal Health Organization (NAHO) and its First Nations Centre. NAHO is a Canadian organization. More information on the OCAP principles is available at: http://www.naho.ca/firstnations/english/ocap_principles.php

evidence of prior art. Furthermore, databases may provide evidence for collective rights to innovations, should such rights be recognized by national or international law. They may also be an efficient means through which local innovators and entrepreneurs can connect with investors. Documenting and recording knowledge may furthermore be used within an intellectual property regime namely as a tool for access and benefit-sharing or in the context of trade secrets. However, the important issue in such protection from patents and other intellectual property rights is that of the public domain, which is discussed below.

21. In his report on traditional knowledge registers and databases, Hardison makes several observations, which are helpful for the consideration of guidelines for documentation. Hardison finds that registers and databases were most useful in the national context, where countries have sovereign control and work within the context of constructive arrangements with Indigenous and local communities, within their territories, concerning elements of the intellectual property system. Further, such registers and databases were best employed as part of a framework designed to protect traditional knowledge. Hardison emphasizes that the databases and registers should respond to the indigenous and local community goals of protection. He suggests that a mix of non-property and property rights measures can be used to achieve the selected goals, making use of traditional-knowledge distinctions acceptable to the indigenous and local communities themselves and disaggregating roles. Recording and documenting traditional knowledge should normally imply collaboration with the indigenous and local communities involved and ideally ownership by those communities, although it has not always been so in the past. Some databases have been elaborated with little or no input from indigenous and local communities, and this remains a great concern to them.

22. Databases and other documenting projects are most useful when they are part of a larger framework for the protection of traditional knowledge. Although the above-mentioned characteristics and workings of documenting and recording schemes seem appealing, it has been pointed out by many that such projects should not stand alone in a legal vacuum. As such, any Government or entity external to the indigenous and local communities that wishes to establish documenting and recording projects should consider the national intellectual property framework and other related matters. The intellectual property laws and regulations may frustrate the purpose of the documenting and recording project if they are not fully taken into consideration from the beginning. It is highly desirable that documentation projects are driven by the indigenous and local communities and that ownership should rest with the relevant communities. Such projects would require capacity-building and resourcing of interested communities.

23. The regional dimensions of traditional knowledge must also be recognized. Existing regimes that operate, particularly in South America, Africa and Asia, are cognizant of the regional dimension of this issue. Simply put, indigenous and local communities are not necessarily located within national borders. Indigenous customary legal systems may cross-borders and interactions between indigenous and local communities, such as through trade, may occur across national borders. For these and other similar reasons, the regional aspect of traditional knowledge must be taken into account by any proposed model of protection.

24. The principal challenge is determining how the intersections between communities, States, regions and the international system should be resolved. Providing the backdrop to this challenge is the issue of uniformity. No matter what mechanisms of protection are considered, the question of uniformity will need to be addressed. Obviously the benefits of uniformity are many, including clarity and consistency of law. However, in this instance, a tension exists between uniformity and the recognition of the variety and diversity of customary laws and indigenous traditional knowledge. If uniformity is given primacy over and above the protection of diversity, then any protection afforded to traditional knowledge may be at the expense of recognizing customary laws or their dynamic nature. It seems that such an outcome would be a hollow victory. On the other hand, if the diversity of customary legal systems is given primacy over uniformity, it is likely that a complex legal web would be woven, which may ultimately result in varying levels of protection for indigenous peoples.

25. *Sui generis* protection mechanisms should be considered as a necessary co-requirement for documenting and recording traditional knowledge. Some have suggested that *sui generis* systems of protection of traditional knowledge would be desirable for such purposes as overcoming the difficulty brought about by the public and private domain distinction. These unique legal systems would most likely provide better protection for indigenous and local communities and their traditional knowledge because they would be better adapted to the nature of traditional knowledge and its protection requirements. *Sui generis* systems are likely to render traditional knowledge databases more purposeful.

2. Existing work on guidelines

26. Before Parties to the Convention or indigenous and local communities consider whether to pursue guidelines for documenting traditional knowledge, it is important to note that several other organizations and groups are in the process of producing guidelines or have already produced documents to guide documenting and recording projects relating to traditional knowledge. Any undertaking of the Convention on the elaboration of guidelines should be carried out in harmony with existing guidelines for documentation and the work of other organizations.

27. The World Intellectual Property Organization (WIPO) is producing a toolkit to guide documenting and recording of traditional knowledge. WIPO has provided a useful consultation draft of the toolkit outline for consultations with stakeholders. Finalization of the toolkit will be based on continuous input from member States, other participants in the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, including indigenous and local community representatives and a wide range of other stakeholders, with an emphasis on field-testing the toolkit in cooperation with the communities concerned and with other traditional knowledge and genetic resource-related initiatives. The toolkit focuses on management of intellectual property concerns during the documentation process, and also takes the documentation process as a starting point for a more beneficial management of traditional knowledge as a community's intellectual and cultural asset. The next steps in developing the WIPO toolkit are consultations, field-testing, translation and dissemination. Interestingly, it has been stated that this toolkit aims to formulate the questions that need to be reflected upon in such a venture and assist in finding answers, rather than providing ready-made answers to presumed questions. In the consultation draft toolkit, the definition of objectives of the documenting and recording project is emphasized in all sections. The other element that is emphasized is control of access to the information or disclosure. Intellectual property elements are examined in parallel. The Conference of the Parties has already agreed to disseminate relevant information from WIPO on the protection of traditional knowledge (such as the toolkit) available through its clearing-house mechanism.⁸ It goes without saying that any guidelines elaborated by the Convention should not duplicate the work of WIPO.

28. The American Association for the Advancement of Science has also produced a handbook on how to document and protect traditional knowledge through intellectual property rights and other legal tools. The project, entitled "A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity" was designed to make intellectual property protection issues and options more understandable to traditional-knowledge holders, human rights organizations and legal professionals working with indigenous and local communities. It is meant to help traditional-knowledge holders in identifying potentially applicable protection mechanisms in the current intellectual property rights regime. Documenting and recording are overviewed in relation to the relevant intellectual-property-protection mechanisms. There are also suggestions relating to documenting knowledge.

29. The International Institute on Rural Reconstruction, supported by the International Development Research Centre and the Heifer Project International, published a book titled "Recording and Using

⁸ In paragraphs 35-38 of its decision VI/10, the Conference of the Parties requests WIPO to make relevant information on the protection of traditional knowledge available through the clearing house mechanism.

Indigenous Knowledge: A Manual”,⁹ commonly called the IK Manual. Among other issues, the book discusses thirty methods of recording and assessing indigenous knowledge and contains more than twenty question guides that outline content areas to be considered when recording indigenous knowledge.

30. The Canadian Department of Indian Affairs and Northern Development has developed the “Community Guide to Protecting Indigenous Knowledge”. Documenting and recording are discussed to some extent, although they are not the main focus of the Guide. The stated objective of the Guide is to empower communities to recognize, protect, preserve and share their knowledge in keeping with their goals and traditions. The Guide focuses on community organization and planning, gathering and assessing information, and developing and implementing a community-based action plan.

31. Furthermore, many indigenous and local communities have elaborated their own guidelines for conducting research and documenting knowledge in their community¹⁰. Additionally, there are a few post-graduate students currently working or seeking to work on projects relating to the creation of guidelines or databases for documenting and recording traditional knowledge in various regions of the world.

32. Given the amount of activity concerning guidelines for documenting traditional knowledge it is important to consider what would be the “value added” of also pursuing the development of guidelines for knowledge innovations and practices of indigenous and local communities, within the framework of the Convention.

D. Issues and concerns regarding documenting and recording traditional knowledge

33. Although recording and documenting traditional knowledge may present some advantages, it is important to note that the manner in which it is carried out determines whether the community will effectively benefit from it or whether it will, conversely, be prejudicial to the community’s interests and knowledge. Furthermore, external factors, such as national intellectual property laws and regulations, need to be taken into account before they become a threat to the goals of any particular documenting and recording project. According to Hardison, the issues raised by traditional knowledge registers are: the free prior informed consent from communities; the process of how knowledge becomes registered and validated; the ownership of the data in the databases; and the locus of control over access to information recorded. Those issues and others will be briefly addressed below.

34. Taking into account the concerns raised in this document, it may be necessary to elaborate guidelines particularly to highlight issues of free prior informed consent, full and effective participation and mutually agreed terms, in the context of access and benefit sharing of genetic resources and associated traditional knowledge and the development of an international regime. The considerations and variety of purposes mentioned above illustrate that if there is indeed an interest in creating databases of traditional knowledge, there are several elements that must be taken into account. The ultimate workings of a documenting and recording project rests with the ones who elaborate it and it is highly desirable that indigenous and local communities themselves are the developers and owners of any such documenting system. Therefore, the use of such documentation or recording schemes should be optional for the indigenous and local communities they are intended to benefit. Guidelines should emphasize that such voluntary documentation or recording schemes should not become a compulsory requirement for national or international legal protection of traditional knowledge. In order to render the potential guidelines useful to as many indigenous and local communities as possible, translation into local languages would be highly desirable. In fact, indigenous and local communities who make a fully informed decision to

⁹ The book can be ordered at: http://www.iirr.org/bookstore/index.php?product_id=27.

¹⁰ For instance the Traditional Knowledge Research Guidelines of the West Kitikmeot Slave Study, online at: http://www.wkss.nt.ca/HTML/06_Research/06_tkResearchGuide.htm and the Australian Institute for Aboriginal and Torres Strait Islander Studies – Guidelines for Ethical Research in Indigenous Studies at http://www.aiatsis.gov.au/_data/assets/pdf_file/2290/ethics_guidelines.pdf

document their own knowledge, innovations and practices may consider doing so in their own languages to ensure the system is most effective as a community tool.

1. Issues of culture

35. One fundamental issue in the recording and documenting of traditional knowledge revolves around cultural views attached to such knowledge and the inevitable clash between customary legal systems and national legal systems, as well as the risk of cultural exploitation linked to the dissemination of the knowledge. Traditional knowledge is at the core of, or at least an important part of, the identity of indigenous and local communities. It is apparent that such knowledge has been gathered and maintained by the indigenous and local communities as the result of long experience in a particular place. It also defines and informs a particular way of life. As such, traditional knowledge cannot be dissociated from the cultural and environmental context in which it evolved. This context needs to be taken into account in documenting and recording projects, and it may lead to certain complexities. Furthermore, because of its cultural importance, it requires a high degree of respect from anyone using it, documenting it or disseminating it.

36. To illustrate the problems that may arise from this clash of perspectives, indigenous and local communities do not universally view their biological cultural heritage as alienable “resources”, but more commonly believe them to be a part of a sacred heritage that is regulated by customary law and that specifies the limits of its acceptable uses. Biological resources are more closely associated to concepts of guardianship and kinship rather than alienable property and resources. As such, the registration and documentation destined for “intangible” knowledge may not be adequate to provide for the whole of the knowledge and its relationship to its surroundings.

37. Another issue of concern relates to the flexible and adaptable nature of traditional knowledge. Traditional knowledge is generally transmitted through oral tradition, strongly interconnected with its surrounding environment and resources and adaptable to changing circumstances. It thus appears that documenting and recording traditional knowledge would be essentially incompatible with its flexible and adaptable nature. Holders of traditional knowledge fear that documentation would freeze both culture and knowledge and would impede their constant evolution, including innovations.

38. A similar debate exists in the sphere of traditional cultural expressions and intellectual property rights such as copyright. In the sphere of traditional cultural expressions, it has also been mentioned that copyrighting and other forms of intellectual property protection may actually impede the transmission of those traditional cultural expressions. Copyright, however, is not generally viewed as a relevant intellectual property mechanism to protect traditional knowledge that is not a traditional cultural expression.

39. A traditional language used to describe the resource, or the uses made of it, may also not be adaptable to documentation, if the required software does not exist. It may also not be appropriate to record the knowledge in a language other than that spoken by the relevant communities as certain concepts may be lost in translation. For instance, the traditional description of the uses made of a given resource may not be specific enough in order to protect it from being patented, namely because the traditional description will likely not use Western medical terms to describe the uses. It must also be noted that translation, no matter how careful, is bound to lose some of the original meaning of the terms used as some concepts and words in the traditional language may not exist in the language of the database.

40. The above cultural issues illustrate the importance of full and effective participation of indigenous and local communities in the documenting and recording process, as well as in the elaboration of guidelines or an underlying legal framework relating to traditional knowledge. Guidelines should be developed in collaboration with indigenous and local communities and should reflect the principle of full and effective participation and control by the communities over documenting and recording schemes. Full and effective participation by the indigenous and local communities also helps diminish the risk of

exploitation of the given culture. Guidelines may address how documenting and recording projects can be adapted to the needs and concerns of the indigenous and local communities, and thus more likely to meet the goals of the project with regards to the preservation and protection of traditional knowledge.

2. Issues of property

41. Similarly, the issues relating to property and its definition are also of great concern. For instance, it seems inadequate that resources deemed communally owned could be privatized and commercialized. The way resources are “owned”, managed or transferred in and between indigenous and local communities, as well as concepts such as the public domain are generally incompatible with Western notions of property. This issue of property is rooted in cultural perspectives, as illustrated above.

42. Further issues regarding property relate to who should own the knowledge contained within the database and who should benefit from it. Problems may potentially arise, for instance, when some traditional knowledge is common to several communities, when the traditional knowledge pertains to ecosystems that exist in more than one State (across borders) or should the benefits from the use of the protected traditional knowledge flow back to the State and not to the communities concerned. Concern has been expressed regarding the legal vacuum in which current biodiversity and knowledge registers exist. It is feared that documentation without a clear legal resolution as to the control over the information could have potentially serious and undesirable consequences.

43. As emphasized by Hardison, there is a debate concerning the differences between rights holders and stakeholders. In national and international intellectual property law, there is generally a balance struck in the allocation of rights to users and producers of the knowledge. However, regarding the question of traditional knowledge, it is not a question of granting rights, but of recognizing rights, which renders the said balance difficult to achieve, especially if issues of sovereignty and self-determination of indigenous and local communities are added to the equation. It must be noted that some States and international standards such as ILO 169, recognize indigenous peoples and recognize prior indigenous rights to ownership and control of their traditional knowledge and culture and the validity of customary law in decisions regarding their use.

3. Issues of access

44. The issues related to access to the documented traditional knowledge and to such issues as prior informed consent, mutually agreed terms and full and effective participation are complex ones that have been referred to in the Convention on Biological Diversity, decisions of the Conference of the Parties and explored by numerous documents prepared within the framework of the Convention. These issues may be the most important matters to be addressed in terms of enabling indigenous and local communities to document and record their knowledge. Certainly, these concepts should inform any documenting and recording process carried out in indigenous and local communities. Numerous documents, protocols and guidelines concerning research to be carried out within communities have been produced by various indigenous and local communities throughout the world and these should be the starting point for Parties interested in pursuing the documentation of traditional knowledge.

45. As stated in the draft WIPO toolkit, the point of access to the traditional knowledge and associated genetic resources is pivotal in determining whether documentation is beneficial or injurious. Free prior informed consent plays an important role in this access and touches upon many aspects of the documenting and recording process. For instance, as pointed out by Hardison, the concept of free prior informed consent comes into play regarding knowledge that is intended to be kept secret, but that is recorded and documented for the benefit of future generations. Free prior informed consent determines who may gain access to the knowledge and under what terms. However, controlling access is not only important for secret knowledge, but also for any type of knowledge that the community seeks to keep control over, and especially knowledge that is not intended to be part of the public domain. Control over access to the knowledge is also an important element of ownership and possession.

46. However, some databases have been established without the free prior informed consent of indigenous and local communities because the creators felt that the knowledge was part of the public domain and thus revealing it to non-members of the relevant indigenous and local communities did not require such consent. Other databases offer no indication as to whether they were created with the prior informed consent of knowledge holders. This of course raises issues of misuse of traditional knowledge and of the respect of indigenous and local communities and their culture, in addition to precluding indigenous and local communities from intellectual-property benefits.

47. Opponents of documenting and recording traditional knowledge argue that databases and other such support renders access to traditional knowledge easier for private entities seeking to capitalize on the knowledge and resources. The knowledge may be used as the basis for research and development of or the fast tracking of new products (such as pharmaceuticals and cosmetics) that fulfil the criteria of patent applications and which do not create obligations for those companies to share any part of their profit with the communities concerned. As such, databases may facilitate access for private entities without guaranteeing complete protection and benefit-sharing for the relevant communities.

48. The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits,¹¹ provide that indigenous and local communities should be free to grant or deny access to any external entity that wishes to use their traditional knowledge.¹² It has also been noted that a number of databases being developed by entities external to the indigenous and local communities are in harmony with the Bonn Guidelines concerning requirements for free prior informed consent or with related decisions of the Convention.

49. A related concern is that recording and documentation could place the knowledge in the public domain and thus affect confidentiality and other rights, including intellectual property rights. For instance, knowledge that is in the public domain may no longer be eligible for intellectual property rights, which may preclude the holders of the knowledge from also accessing intellectual property benefits as the knowledge holders would no longer be able to apply for patents, copyright or other forms of intellectual property protection. A similar question raised in discussions both within WIPO and under the Convention on Biological Diversity has been what should be done with traditional knowledge that is already in the public domain and whether protection can be granted for it. However, documenting traditional knowledge does not mean that it automatically becomes part of the public domain. There is room for confidentiality and restricted use. Some public databases and registries are meant to place knowledge in the public domain in order to serve as evidence of prior art or defensive disclosure. A private database can remain confidential, but does not place the knowledge in the public domain and thus cannot constitute evidence of prior art. Thus in this regard, it is important that the documenting and recording be done in accordance with some intellectual property scheme or plan that allows confidentiality and restricted use. As such, documenting and recording traditional knowledge should be carried out with consideration for the existing relevant intellectual property regime, in order to adequately protect the interests of the ILC and the traditional knowledge.

50. The repatriation of traditional knowledge collected in databases that have been compiled by entities external to the indigenous and local communities is an important aspect of the ownership and control over traditional knowledge by indigenous and local communities. An examination of many external databases provides no indication of how they were compiled, whether or not indigenous and local communities were consulted or had given free prior informed consent for the dissemination of their knowledge and whether this use is derived from traditional knowledge documented in development projects. In task 15 of the programme of work on the implementation of Article 8(j) and related provisions,¹³ the Conference of the Parties mandated the Working Group with developing guidelines that would facilitate the repatriation of knowledge, including indigenous and traditional knowledge.

¹¹ Decision VI/24, annex.

¹² *Ibid.*, para. 31.

¹³ Decision V/16, annex.

Consequently, guidelines for the documentation of traditional knowledge should emphasize the principles of ownership and control of indigenous and local communities over traditional knowledge and set out guidelines for the repatriation of traditional knowledge in national and private databases.

51. Equitable sharing of benefits is also an area of concern for indigenous and local communities. Indeed, it usually becomes an issue after the fact. The above analysis of access to documented knowledge has already pointed out instances where there are simply no benefits flowing back to the relevant communities or knowledge holders. In cases where some benefits are granted to indigenous and local communities, it appears that Governments and companies assume that financial compensation or benefits are sufficient to satisfy the communities concerned. Little consideration is generally given to other benefits that may be desired by the community. A more comprehensive approach to meeting the needs of indigenous and local communities should be adopted. Also, as before mentioned, it is important to examine to whom the benefits actually flow. Given this, it may be beneficial for Parties to the Convention to consider initiating element 4 of the first phase of the programme of work, which concerns equitable sharing of benefits.

4. *Other issues*

52. Along with the issues described above comes the need to improve the community's knowledge of intellectual property rights and of other workings of the relevant legal systems. Indigenous and local communities often feel that they do not have adequate knowledge of relevant law or adequate legal advice when dealing with such matters. Thus, the purposes of the database could be frustrated by inadequate harmonization with applicable laws and existing frameworks. Indigenous and local communities involved in documentation of knowledge need to be aware of external considerations applicable to their project.

53. Another concern is misappropriation of knowledge or the related resources, especially when the knowledge or resources are used for purposes other than those agreed upon or anticipated by the knowledge holders. There have been numerous alleged incidents of breach of agreements with indigenous and local communities as to confidentiality or simply low security measures of databases, which were meant to provide limited access but have led to the dissemination of that knowledge. Sometimes, such dissemination has occurred even after consultation and agreement with the communities involved and despite the good faith of the creators of the database.

54. There have also been some discussions as to what needs to be protected in a database. Legal measures should focus on the protection of the traditional knowledge contained in the databases, rather than on the protection of database technologies. As such, protection of the database may not necessarily mean protection of its contents. This distinction needs to be pointed out in order to preclude unwanted consequences.

55. It has been recommended by Hardison that registers or other forms of documentation could be part of a larger scheme of protection of traditional knowledge and not an end in themselves. However, some indigenous and local communities have expressed concern that the legal context (relevant laws) has not been developed with the full participation of indigenous and local communities. Furthermore, even when the database is part of a broader regime, existence as prior art in the database does not guarantee protection against unwanted patents. Indeed, violations of relevant laws or guidelines may be buried in complex patent applications. Comparisons with prior art may be time-consuming and expensive, as well as difficult. Needless to say, defeating existing patents is equally, if not more, so. As such, the database, although it is meant to protect traditional knowledge from unwanted patents may actually fail to do so, while still revealing the knowledge to the rest of the world. Some have suggested restricting access to those databases to patent offices. Again, this issue highlights the need to know the objectives of the database as well as the framework it will operate in. It also highlights the need to create *sui generis* systems of protection with the full and effective participation of the relevant communities to ensure the legal context of databases achieves the goal of protecting traditional knowledge.

56. Some have also argued that the creation of databases may place undue burden on the communities involved. Indeed, it appears to be relatively rare that an item of cultural heritage will be used as patentable property. As such, requiring indigenous and local communities to reveal, register and potentially lose control of their traditional knowledge to protect it against a rare form of exploitation may be deemed too burdensome. The use of registers should therefore be proportional to the problems that the registers are expected to resolve. In the end, it should be up to indigenous and local communities to determine whether such a database would be useful or not.

57. Finally, some have suggested that poorly managed documentation and recording projects have the effect of discrediting traditional knowledge rather than protecting and maintaining it. This raises the need to ensure that indigenous and local communities that want to pursue the option of documenting their knowledge are provided with capacity-building and resources to do so.

5. Conclusion

58. Documenting and recording traditional knowledge as a means of preservation and protection has been the object of numerous papers and studies over the past few years. Although the benefits of documenting traditional knowledge may be substantial, there are also many issues and concerns that affect indigenous and local communities in different ways, be it through matters of access, property, culture or others, and that have the potential of frustrating the purposes of a documenting project. The benefits and drawbacks of documenting traditional knowledge in a given community need to be carefully examined and balanced. Hence, there may be a need for guidelines regarding documenting and recording traditional knowledge, which highlight both the benefits and potential threats, to ensure that indigenous and local communities make informed decisions. However, various projects in other forums have already addressed and discussed many of the issues raised in the present document.

II DRAFT RECOMMENDATIONS REGARDING THE POSSIBILITY OF DEVELOPING TECHNICAL GUIDELINES FOR RECORDING AND DOCUMENTING TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES

59. The Working Group on Article 8(j) and Related Provisions may wish to recommend that the Conference of the Parties adopt a decision along the following lines:

The Conference of the Parties,

Recognizing that the documentation and recording of traditional knowledge should primarily benefit indigenous and local communities and that their participation in such schemes should be voluntary and not a prerequisite for the protection of traditional knowledge,

Noting the work of other organizations concerning guidelines for documentation of traditional knowledge, such as the development of a toolkit for the documentation of traditional knowledge by WIPO, and documentation and traditional knowledge projects proposed by UNESCO and the desirability of harmonization of this work within the international system,

Further noting that documentation of the knowledge, innovations and practices of indigenous and local communities for the purpose of protecting traditional knowledge should, where possible, be conducted by the knowledge holders and/or with their prior and informed consent and remain under their ownership,

1. *Requests* Parties and Governments and international organizations to support and assist indigenous and local communities to retain control and ownership of their traditional knowledge, innovations and practices, through the repatriation of traditional knowledge in national and private databases, and by supporting capacity-building and the development of necessary infrastructure and resources with the aim of enabling indigenous and local communities to make informed decisions regarding the documentation of traditional knowledge.

2. *Requests* the Executive Secretary to continue to collaborate with UNPFII, UNESCO and WIPO, to assist WIPO in completing its work on the development of the WIPO toolkit on the documentation of traditional knowledge, addressing both the potential benefits and threats of the documentation of traditional knowledge and in collaboration with WIPO, to make the toolkit available through the clearing-house mechanism and the Traditional Knowledge Information Portal.
