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AD HOC OPEN-ENDED INTER-SESSIONAL WORKING GROUP ON ARTICLE 8(j) AND RELATED PROVISIONS OF THE CONVENTION ON BIOLOGICAL DIVERSITY
Eighth meeting
Montreal, 7-11 October 2013

STUDY ON HOW TASKS 7, 10 AND 12 OF THE REVISED PROGRAMME OF WORK ON ARTICLE 8(j) AND RELATED PROVISIONS COULD BEST CONTRIBUTE TO WORK UNDER THE CONVENTION AND THE NAGOYA PROTOCOL

Note by the Executive Secretary

INTRODUCTION

1. At its eleventh meeting, the Conference of the Parties, in paragraph 2 of decision XI/14 C on the revised Multi-Year Programme of Work on Article 8(j), requested the Executive Secretary to commission three studies on tasks 7, 10 and 12, respectively, subject to the availability of financial resources and taking into account the work of relevant bodies, to identify how their implementation could best contribute to the work under the Convention and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.

2. In order to respond to this request, and thanks to the support of the Government of Japan, the Executive Secretary commissioned a single study on the three tasks in order to avoid overlap and duplication, as well as to promote harmonization between the tasks, and taking into account current work on both *sui generis* systems and terms and definitions.

3. This study was carried out by Mr. Kabir Bavikatte and Mr. J. Eli Makagon of Natural Justice.[1]

4. The views expressed are those of the authors and do not necessarily reflect the views of the Secretariat of the Convention on Biological Diversity. The study is reproduced in the form and language in which it was received by the Secretariat of the Convention.

[1] http://naturaljustice.org/.

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Expert study on tasks 7, 10 and 12 of the Programme of Work on Article 8(j) and related provisions, to identify how the implementation of these tasks could best contribute to work under the Convention and the Nagoya Protocol

I. INTRODUCTION

1. In 2000, in decision V/16 (Article 8(j) and related provisions), the Conference of the Parties (COP) recognized the need to respect, preserve and maintain the traditional knowledge of indigenous and local communities[2] and noted the need for a long-term approach to the programme of work on implementation of Article 8(j) and related provisions of the Convention on Biological Diversity (the Convention).[3] In the same decision, it endorsed the programme of work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity (Programme of Work).[4] The Programme of Work set forth seventeen tasks grouped under seven elements, which include equitable sharing of benefits (Element 4), monitoring elements (Element 6), and legal elements (Element 7). The objective of this programme of work is to promote within the framework of the Convention a just implementation of Article 8(j) and related provisions, at local, national, regional and international levels and to ensure the full and effective participation of indigenous and local communities at all stages and levels of its implementation. In 2010, in decision X/43 (Multi-year programme of work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity) the COP retired certain tasks and maintained others, including tasks 7, 10 and 12.[5]

2. In 2012, in decision XI/14 C (Article 8(j) and related provisions, tasks 7, 10 and 12 of the revised Multi-Year Programme of Work), the COP took note of "recent developments" relevant to Article 8(j), including: the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol, decision X/1, annex I), the revised Strategic Plan for Biodiversity 2011–2020 (decision X/2, annex) and the Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities; and ongoing work of other relevant international bodies, in particular the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC), the United Nations Permanent Forum on Indigenous Issues and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

3. Other important developments in this context include the adoption in 2007 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the entry into force in 2006 of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (Convention on Intangible Cultural Heritage), and the entry into force in 2004 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

4. The COP decided to advance tasks 7 (part of Element 4), 10 (part of Element 6) and 12 (part of Element 7) of the Multi-year programme of work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity as revised in decision X/43 (Revised Programme of Work). In paragraph 2 of decision XI/14 C, the COP requested the Executive Secretary to commission three studies, on tasks 7, 10 and 12, respectively, subject to the availability of financial resources, taking into account the work of relevant bodies, **to identify how their implementation could best contribute to**

[2] The term "traditional knowledge" refers to "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application" Convention on Biological Diversity Article 8(j).

[3] Decision V/16, UNEP/CBD/COP/5/23 Preamble. Article 8(j) of the Convention provides that "Each Contracting Party shall, as far as possible and as appropriate: … (j) Subject to its 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 promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices … ."

[4] Decision V/16, UNEP/CBD/COP/5/23.

[5] Decision X/43, UNEP/CBD/COP/DEC/X/43 ¶5.

work under the Convention and the Nagoya Protocol. In paragraph 3, Parties, Governments, relevant international organizations and indigenous and local communities were requested to submit their views on the draft studies.

5. In order to work within available resources and to avoid overlap and duplication, and to promote harmonization between the tasks, and taking into account current work on both *sui generis* systems and terms and definitions, the Executive Secretary commissioned a single study on tasks 7, 10 and 12. In light of the recent developments noted above, as well as the fact that over a decade has passed since the Programme of Work was endorsed by the COP in 2000, this study will provide the opportunity to re-examine the tasks and organize the work requested in a more complementary manner.

6. A single study on tasks 7, 10 and 12 maximizes efficiency because of the significant overlap among the three tasks and also with other ongoing work under the Working Group on Article 8(j) and Related Provisions. Task 12 broadly calls for the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity (Working Group) to develop guidelines to assist Parties and Governments in the development of legislation and other mechanisms (such as national actions plans) to implement Article 8(j) and related provisions.[6] Task 12 specifically states that these mechanisms could include *sui generis* systems.

7. Tasks 7 and 10 both call for specific actions that logically fall within the broad scope of task 12. Task 7 calls on the Working Group to develop guidelines for appropriate initiatives, such as legislation, to ensure (1) indigenous and local communities equitably share in benefits arising from the use of their traditional knowledge; and (2) that institutions interested in such knowledge obtain "prior informed approval" of indigenous and local communities.[7] Task 10 directs the Working Group to develop standards for reporting and prevention of unlawful appropriation of traditional knowledge and related genetic resources.[8]

8. Viewing the tasks in this light demonstrates that work under their mandate falls into three main categories that may best contribute to advancing the goals of the Convention and the Nagoya Protocol:

A. Prevent the unlawful appropriation/ misappropriation or unauthorized access of traditional knowledge;
B. Ensure that the right of indigenous and local communities to prior and informed consent or approval regarding their traditional knowledge, innovations and practices is respected; and
C. Ensure that indigenous and local communities obtain a fair and equitable share of benefits arising from the use of their traditional knowledge, innovations and practices.[9]

[6] Specifically, Task 12 provides as follows: "The Working Group to develop guidelines that will assist Parties and Governments in the development of legislation or other mechanisms, as appropriate, to implement Article 8(j) and its related provisions (which could include *sui generis* systems), and definitions of relevant key terms and concepts in Article 8(j) and related provisions at international, regional and national levels, that recognize, safeguard and fully guarantee the rights of indigenous and local communities over their traditional knowledge, innovations and practices, within the context of the Convention."

[7] Task 7 states "Based on Tasks 1, 2 and 4, the Working Group to develop guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure: (i) that indigenous and local communities obtain a fair and equitable share of benefits arising from the use and application of their knowledge, innovations and practices; (ii) that private and public institutions interested in using such knowledge, practices and innovations obtain the prior informed approval of the indigenous and local communities; (iii) advancement of the identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices and the associated genetic resources are used."

[8] Task 10 requires "[t]he Ad Hoc Working Group to develop standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge and related genetic resources."

[9] This report will also address the remaining aspects of Task 7 (advancement of identification of obligation of countries of origin, Parties and governments where traditional knowledge is used) and Task 12 (definitions of relevant key terms and concepts in Article 8(j) and related provisions at international, regional and national levels that guarantee rights of indigenous and local communities over traditional knowledge).

9. If the Working Group focuses on these three categories or goals, as priorities, it may be able to fulfil the combined mandate of tasks 7, 10 and 12 in a way that best contributes to work under the Convention, including the revised Strategic Plan (2011-2020), Aichi Target 18 (on traditional knowledge) and Aichi Target 16 (on the Nagoya Protocol).

10. This study will focus on the three goals discussed above, considering related work and the work that has been done so far in each area and offering a procedural and complementary way forward. The report will also propose a way forward with remaining sub-tasks including (under task 7) advancement of obligations of countries of origin as well parties and governments where such knowledge is used and key terms and concepts (under task 12).[10] Each of these three main goals may fall within the framework of *sui generis* systems and hence *sui generis* approaches to the protection, preservation and promotion of traditional knowledge will be dealt with in the context of each of these categories rather than as a separate category in itself. This approach will also harmonize the work of the Working Group on Article 8(j) and Related Provisions concerning ongoing work on *sui generis* systems for the protection and promotion of traditional knowledge.

11. The term "*sui generis*" means "[o]f its own kind or class; unique or peculiar."[11] It is used to indicate a concept or an idea that has a unique foundation that prevents it from being included as a part of the larger whole. In law, it is used as a term to indicate an independent category within legal classification that stands alone because of its peculiarity or the specific rights or entitlements it creates.

12. As stated in document UNEP/CBD/WG8J/7/4,[12] *sui generis* systems may be considered as means to achieve tasks 7, 10 and 12 "since the objective of task 7 is to ensure that indigenous and local communities obtain a fair and equitable share of benefits arising from the use of their traditional knowledge based on prior informed consent or approval and mutually agreed terms for the fair and equitable sharing of benefits." *Sui generis* systems are based on recognition that knowledge and related resources are collective property and hence *sui generis* systems could provide safeguards against claims of third parties to intellectual property rights over traditional knowledge. The aforementioned categories or goals in general fall outside of many current legal systems but can fall within the scope of *sui generis* systems since they could provide the means for indigenous and local communities to:

(a) Control access to, disclosure and use of their knowledge, innovations and practices (referred to as traditional knowledge);
(b) Exercise their collective prior informed consent/approval for any access to or disclosure and use of traditional knowledge;
(c) Ensure that they obtain fair and equitable benefits derived from the wider application of their traditional knowledge, innovations and practices;
(d) Ensure continued customary use of traditional knowledge, innovations and practices and avoid negative effects thereon;
(e) Assist in the intergenerational transmission and traditional exchange of traditional knowledge and its application on traditional lands and waters through customary sustainable use;
(f) Ensure obligations arising from customary law are transmitted to potential users of traditional knowledge (i.e., through community protocols or processes and mutually agreed terms).[13]

[10] The authors are grateful for the comments on the study provided by the Assembly of First Nations, the World Intellectual Property Organization, and the governments of Brazil, India, and Lithuania, as well as the valuable contributions of other reviewers.

[11] Black's Law Dictionary 1572 (9th ed. 2009).

[12] UNEP/CBD/WG8J/7/4 at para.11.

[13] Development of Elements of *Sui Generis* Systems for the Protection of Traditional Knowledge, Innovations and Practices to Identify Priority Elements, para. 21, UNEP/CBD/WG8J/7/3.

The United Nations Educational, Scientific and Cultural Organization (UNESCO)

13. As noted above, an important occurrence since the endorsement of the Programme of Work in 2000 was the adoption (2003) and entry into force (2006) of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (Convention on Intangible Cultural Heritage). The Convention on Intangible Cultural Heritage defines "intangible cultural heritage" as "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage" (Article 2(1)). It calls on States Parties to take measures to ensure the safeguarding of the intangible cultural heritage present in their territory and to identify and define the various elements of the intangible cultural heritage present in their territory, with the participation of communities, groups and relevant non-governmental organizations (Article 11).

14. In 2008, the General Assembly approved a first version of the Operational Directives (amended in 2010 and 2012) for the Implementation of the Convention on Intangible Cultural Heritage which defines, among others, the modalities for the inscription on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding, the granting of financial assistance or the submission of periodic reports from the States Parties on the implementation of the Convention on Intangible Cultural Heritage. In 2009, the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (Intangible Cultural Heritage Committee) proceeded with the first inscriptions on the Representative List and on the Urgent Safeguarding List. In 2011, the Intangible Cultural Heritage Committee began receiving periodic reports from States Parties. In June 2013, the Chengdu International Conference on Intangible Cultural Heritage in Celebration of the Tenth Anniversary of UNESCO's Convention for the Safeguarding of the Intangible Cultural Heritage was held, resulting in the Chengdu Recommendations (ITH/13/EXP/8). The Chengdu Recommendations which "acknowledge the central role that knowledge and practices concerning nature and the universe play in maintaining sustainable ecosystems and biodiversity and in helping communities to ensure food security and health", state that commercial use of intangible cultural heritage "must never threaten the viability of the heritage and should benefit first and foremost the communities concerned".

II. TRADITIONAL KNOWLEDGE AND *SUI GENERIS* PROTECTION

15. One approach to protecting[14] traditional knowledge involves the use or adaptation of the existing system of intellectual property rights (IPRs). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) covers several areas of IPRs that could be relevant to this issue, including the protection of inventions through patents, copyright, and trademarks. Some States have reformed copyright acts (Australia) and patents (New Zealand) in efforts to extend protection to traditional knowledge and to avoid extending copyright or patent protections which may be offensive for indigenous and local communities, with some success.

[14] In regard to protection of traditional knowledge, the Assembly of First Nations (AFN) sought to look beyond "protection" under tasks 7, 10 and 12, to promotion and application of traditional knowledge: "Parties are urged to focus discussions around tasks 7, 10 & 12 issues of promotion and application of traditional knowledge; in addition to protection systems. Meaningful discussion should take place around the creation and implementation of mechanisms that effectively support the promotion and application of traditional knowledge in biological diversity conservation processes, with full and effective participation of Indigenous Peoples." The AFN noted that "Even in terms of protection, one challenge faced by First Nations is preventing misappropriation or misinterpretation of traditional knowledge which is shared in the context of conservation or regulatory approval processes."

16. However, traditional knowledge is difficult to fit into the existing system of IPRs because it does not lend itself to the requirements of copyrights, patents, trademarks and designs of the intellectual property (IP) system.[15] The conventional IP system is based on four key assumptions:

1) It is possible to clearly identify the owners or progenitors of knowledge;
2) It is possible to clearly distinguish "new" from "old" knowledge;
3) Those who develop "new" knowledge are motivated primarily by the potential of future rewards and would be willing to share their knowledge with society in exchange for such rewards; and
4) IPRs adequately reward developers of "new" knowledge by guaranteeing them exclusive and time-bound use of such knowledge in exchange for sharing the knowledge with society.

17. Traditional knowledge however belies all these four key foundational assumptions of the IP system[16] because:

1) Traditional knowledge is collectively held by communities and in many cases widely shared, thereby making it difficult to identify exclusive owners;[17]
2) Traditional knowledge in general is often not "owned" in the conventional sense, but collectively held, developed and shared in accordance with customary norms and laws;[18]
3) Traditional knowledge in many instances is holistic[19] and develops organically thereby making it difficult to distinguish between "new" and "old" knowledge;
4) Traditional knowledge is integrally connected to a way of life - its development is not motivated by the possibility of personal reward but on the contrary, it develops in response to the needs of the community; and
5) The sharing and exchange of traditional knowledge builds and binds community and the rules that govern its use are not based on "ownership rights" but on "stewardship duties or obligations";
6) Indigenous and local communities regard their rights to their knowledge as inalienable and held in perpetuity for future generations;
7) Traditional knowledge is often transferred from between generations in a social context to recipients who earn the right to acquire the knowledge, which carries with it obligations.

18. The limitations of conventional IPRs are often revealed when they are applied to traditional knowledge. It is also important to recall that even after years of deliberation and discussion within the World Intellectual Property Organization (WIPO), there is no agreement on the definition of traditional knowledge.[20]

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[15] *See* Oguamanam, Chidi, The Collection of Traditional Knowledge: Toward a Cross-Cultural Dialogue on Intellectual Property Rights, Australian Intellectual Property Journal 15:1 (2004) at 35 (stating that conforming traditional knowledge to conventional intellectual property systems undermines the fact that virtually all cultures have their own knowledge protection protocols).

[16] "Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions", available at: http://www.wipo.int/export/sites/www/freepublications/en/tk/933/wipo_pub_933.pdf.

[17] The Tkarihwaié:ri Code of Ethical Conduct paragraph 13 states that "[t]he resources and knowledge of indigenous and local communities can be collectively **or individually** owned." (Emphasis added.) Where traditional knowledge is individually owned, however, the need for a *sui generis* system becomes moot. That is because standard IP frameworks can address traditional knowledge at least in part, that is individually owned.

[18] This is not to say that the concept of ownership of traditional knowledge is entirely absent in indigenous and local communities. Instead, "[b]iological cultural heritage resources are more closely associated to concepts of guardianship and kinship rather than alienable property and resources." Document UNEP/CBD/WG8J/4/INF/9, "Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities: The Advantages and Limitations of Registers," prepared by Preston Hardison (Hardison Report), at ¶11.

[19] Hardison Report at ¶10.

[20] Nevertheless, it is important to note that there is some progress being made within WIPO. For example, negotiations are currently underway in the IGC towards the development of an international legal instrument or instruments for the effective

19. WIPO's current proposed "working" definition of traditional knowledge provides as follows:

> "Traditional knowledge," as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (traditional knowledge in a general sense or *lato sensu*). In other words, traditional knowledge in a general sense embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge.
>
> In international debate, "traditional knowledge" in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc.[21]

20. A report of the Executive Secretary (UNEP/CBD/WG8J/5/6[22]) prepared for the fifth meeting of the Working Group on Article 8(j) and Related Provisions describes traditional knowledge as having cultural, temporal and spatial aspects. The cultural aspect of traditional knowledge describes the culture and values of a community, the temporal aspect of traditional knowledge points to its intergenerational nature and its gradual adaption to changing the realities of a community and the spatial aspect of traditional knowledge relates it to the community's territory or the lands and waters traditionally occupied and used by the community.

21. Besides this, the nature of traditional knowledge is one of cultural patrimony[23] ensuring that it is collectively held and governed by customary laws. Ideas of ownership, easily applied to other kinds of knowledge, do not work as well with traditional knowledge, which is often collectively held even in instances where there are individuals within a community who are its custodians. For example, the traditional healers who are members of the Bushbuckridge Traditional Healers Association in the Kruger to Canyons Biosphere Reserve in South Africa see themselves as custodians with duties/obligations rather than owners with absolute rights over their traditional knowledge, despite the fact that not all their traditional knowledge is collectively held.[24]

22. The difference between traditional knowledge and other kinds of knowledge is most evident when it comes to its non-fungible nature.[25] Traditional knowledge is embedded within the community and in

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protection of traditional cultural expressions and traditional knowledge, and to address the intellectual property aspects of access to and benefit-sharing in genetic resources.

[21] WIPO/GRTKF/IC/25/INF/7 (WIPO Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions) available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=237902.

[22] UNEP/CBD/WG8J/5/6 (Development of Elements of *Sui Generis* Systems for the Protection of Traditional Knowledge, Innovations and Practices to Identify Priority Elements) p.4, available at http://www.cbd.int/doc/meetings/tk/wg8j-05/official/wg8j-05-06-en.pdf.

[23] In comments regarding traditional knowledge as cultural patrimony, Brazil stated: As an example, it could be mentioned that, according to the Brazilian legislation (MP 2186-16, art. 8, § 2), traditional knowledge associated with genetic resources is part of the Brazilian cultural heritage and may be subject to registration. The English version of the Brazilian legislation can be found in the following address:http://www.mma.gov.br/estruturas/sbf_dpg/_arquivos/mp2186i.pdf.

[24] See the biocultural community protocol of the Bushbuckridge Traditional Healers Association at http://community-protocols.org/wp-content/uploads/documents/South_Africa-Bushbuckridge_Biocultural_Protocol.pdf, accessed 29th April 2013.

[25] Radin, Margaret Jane (1987) "Market inalienability", *Harvard Law Review* 100 (8): 1849-1937. "Fungible" is defined as "regarded as commercially interchangeable with other property of the same kind." Black's Law Dictionary 698 (8th ed. 2004).

many ways the very identity of the community is tied to it.[26] The community's use of traditional knowledge is usually specific and is accompanied by customary laws. This non-fungible nature of traditional knowledge limits its market alienability, thereby distinguishing it from other forms of knowledge that can be freely used and traded without any limitations.[27] For example, certain traditional sacred symbols such as masks, carvings and paintings, despite their mass production for the tourist market, cannot be used by purchasers in ways that profane the symbol without invoking the ire of the community to whom the symbol is sacred.

23. Traditional knowledge is not "traditional" because of its antiquity but rather because of its link to the identity of a "community".[28] Traditional knowledge is dynamic, and "community" or "communal bonds" are built and affirmed through the circulation and growth of collectively held knowledge. To *protect* traditional knowledge then is different from the *preservation* of traditional knowledge, because the former requires the protection of something that lives and grows through a community's patterns of collective use and sharing.[29] The essence of protecting traditional knowledge is thus to protect a communal way of life and the practicing of such knowledge, most likely through customary sustainable use. This concept underpins Article 8(j) whose mandate is to respect, preserve, maintain and promote the knowledge innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity. In essence Article 8(j) thus also commits to protecting and encouraging traditional lifestyles (relevant to the conservation and sustainable use of biological diversity). Therefore the policy question that needs to be asked within the context of the CBD, prior to undertaking any action regarding traditional knowledge protection is: *How do efforts to protect traditional knowledge affirm the community/community life-style that embodies such traditional knowledge?*

III. GOALS FOR WORKING GROUP TO FOCUS ON

A. Goal 1: Reporting on and preventing the unlawful appropriation of traditional knowledge and related genetic resources (task 10)

24. Article 8(j) of the Convention calls on Parties to "respect, preserve, maintain and promote[30] knowledge, innovations and practices of indigenous and local communities". The Nagoya Protocol, in its Preamble, recalls "the relevance of Article 8(j) of the Convention as it relates to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising from the utilization of such knowledge". Article 5(5) of the Nagoya Protocol provides that Parties shall take measures in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge.

25. By developing "standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge and related genetic resources" as called for in task 10, the Working Group will contribute to work under the Convention because reporting on and preventing unlawful appropriation of traditional knowledge will help to respect, preserve and maintain knowledge, innovations

[26] For instance, the Nagoya Protocol recognizes the inseparability of traditional knowledge and genetic resources in its preamblar paragraphs.

[27] UNEP/CBD/WG8J/6/2/Add.3 ¶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.").

[28] UNEP/CBD/WG8J/6/2/Add.3 ¶35 ("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.").

[29] Hyde, Lewis, The Gift: Imagination and the Erotic Life of Property, Random House: New York, 1983.

[30] Promote with the approval and involvement of the knowledge holders.

and practices of indigenous and local communities, as well as encourage promotion of such knowledge based on the approval and involvement of the knowledge holders. It will also contribute to work under the Nagoya Protocol because it will help ensure that benefits arising from the use of traditional knowledge are shared fairly and equitably with indigenous and local communities, as well as possibly contribute to monitoring[31] the use of traditional knowledge.

26. As an initial matter, task 10 has the potential to create confusion because of its reference to "traditional knowledge and related genetic resources." This particular terminology is not used in the Convention or the Nagoya Protocol. The terminology used in the Convention is "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity" (Article 8(j)), while that used in the Nagoya Protocol is somewhat narrower, limiting traditional knowledge to "traditional knowledge associated with genetic resources".[32] It is recommended that the Working Group decide the focus of task 10 in this context. Looking carefully at the language of task 10, the term "genetic resources" is qualified (to those related to traditional knowledge), whilst the term "traditional knowledge" is not. Thus, it is further recommended that the Working Group apply task 10 broadly to the category set forth in Article 8(j) of the Convention, *i.e.*, knowledge relevant for the conservation and sustainable use of biological diversity.

27. Additionally, it should be noted that the term "unlawful appropriation" is not defined in the Convention or the Nagoya Protocol. However, the WIPO IGC is considering the following definition of a closely related term, "misappropriation," in the context of genetic resources:[33] "'Misappropriation' is the [acquisition] [utilization] of genetic resources [and] [or] associated traditional knowledge without the [free] [prior informed] consent of [those who are authorized to give [such] consent] [competent authority] to such [acquisition] [utilization], [[in accordance with national legislation] [of the country of origin or providing country]]."[34]

28. To date, the Working Group has not addressed the definition of "unlawful appropriation." It is recognized that defining this term is controversial,[35] and could have different ramifications for different Parties. For an act to be "unlawful" suggests that such action has broken a national law or perhaps a domestically implemented international law. Parties may wish to consider other terms such as "misappropriation" or "unauthorized access", which has gained some acceptance within WIPO and IUCN. Alternatively it may be helpful for the Working Group to discuss parameters of what might constitute unlawful appropriation, perhaps focusing on the concept of prior informed consent. Defining such parameters could help clarify the scope of task 10. Thus, it is recommended that the Working Group decide on a consistent use of terms regarding these tasks, especially considering in light of task 10 and also consider whether there is a need to develop a definition of "unlawful appropriation" or perhaps replace the term with "misappropriation" or "unauthorized access" of traditional knowledge in order to advance the implementation of task 10.

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[31] However, it should be noted that Article 17 of the Nagoya Protocol, which deals with monitoring of the utilization of genetic resources, does not include the monitoring of associated traditional knowledge.

[32] This difference between the Convention and the Nagoya Protocol has been implicitly acknowledged in document UNEP/CBD/WG8J/7/4 (Tasks 7, 10, and 12 of the Revised Multi-Year Programme of Work) ¶9. Brazil commented that the guidelines to be developed under Task 7 "should also address the protection of traditional knowledge that is not associated with genetic resources and is covered by Art. 8 (j). In order not to duplicate efforts, before the elaboration of the guidelines referred in task 7, the CBD Secretariat could be requested to compile and synthesize existing guidelines on the subject."

[33] It has also considered the definition in regard to traditional knowledge in general, *see* WIPO/GRTKF/IC/7/5 (Protection of Traditional Knowledge: Overview of Policy Objectives and Core Principles).

[34] WIPO/GRTKF/IC/23/WWW/230222 (Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2). The concept of misappropriation is also discussed in WIPO/GRTKF/IC/25/INF/7 (WIPO Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions).

[35] UNEP/CBD/WG-ABS/4/INF/6 (Analysis of Claims of 'Unauthorised Access and Misappropriation of Genetic Resources and Associated Traditional Knowledge') (hereinafter "IUCN Misappropriation Study").

29. As a practical matter, timely and accurate reporting of the unlawful appropriation of traditional knowledge is an essential aspect of preventing such unlawful appropriation. However, as the IUCN Misappropriation Study noted, "The initial process of obtaining information illustrates a more general problem relating to ABS – the manner in which information on ABS issues and genetic resource use can be found." The IUCN Misappropriation Study describes difficulty in obtaining information regarding unlawful appropriation, stating that: "if you do not have specific information about a particular claim of misappropriation, it may not be possible to find it."[36]

30. At present, there is no centralized mechanism for indigenous and local communities to report unlawful appropriation of traditional knowledge. Thus, it is recommended that the Working Group consider the usefulness of an international mechanism or national mechanisms that would allow indigenous and local communities to report potential unlawful appropriation of traditional knowledge. One issue for the Working Group to consider is the fact that often indigenous and local communities will be unaware that unlawful appropriation has occurred. Regardless, it might still be useful for indigenous and local communities to have a way of reporting unlawful appropriation, perhaps through the CBD's Traditional Knowledge Portal or another mechanism. Parties may envisage a similar mechanism at the national level. Such mechanisms at minimum could assist in monitoring the use (or misuse) of traditional knowledge and at most may include compliance mechanisms or disincentives for unauthorized access.

31. In regard to preventing the unlawful appropriation of traditional knowledge, the 2010 Tkarihwaié:ri Code of Ethical Conduct (document UNEP/CBD/COP/DEC/X/42 Annex) is a particularly relevant. As stated in the Tkarihwaié:ri Code of Ethical Conduct, "[t]he right of indigenous and local communities to safeguard, collectively or otherwise, their cultural and intellectual heritage, tangible and intangible, should be respected."[37] This is consistent with Aichi Target 18, which calls for traditional knowledge to be respected at all relevant levels by 2020, and assists with the implementation of the UNDRIP, which recognizes "that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment" (Preamble) and well as *Article 31.1* which states:

> *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.*

32. An important element in ensuring respect for traditional knowledge of indigenous and local communities is by preventing the unlawful appropriation of such knowledge. The Working Group has considered that "the misappropriation that most offends communities may be cultural and spiritual, more than economic" because "spiritual values and beliefs are closely interlinked with, or expressed in, customary laws relating to the rights and obligations over biological resources."[38]

33. The Tkarihwaié:ri Code of Ethical Conduct contains several principles that, if applied, can prevent traditional knowledge from being unlawfully appropriated. For example, it calls for transparency and full disclosure, prior informed consent and/or approval and involvement, and for fair and equitable sharing of benefits.

[36] IUCN Misappropriation Study at 102-3.

[37] Tkarihwaié:ri Code of Ethical Conduct ¶13.

[38] UNEP/CBD/WG8J/4/7 at ¶32.

34. The Tkarihwaié:ri Code of Ethical Conduct also states in paragraph 23 that "Repatriation efforts ought to be made to facilitate the repatriation of information in order to facilitate the recovery of traditional knowledge of biological diversity." It is important to note that misappropriation of genetic resources has already taken place on a large scale, and those genetic resources are often held in museums, and zoological and botanical gardens. Some commentators have noted that "[u]nfortunately, these old collections set the stage for further collecting without respectfully asking permission to do so" and have suggested that "admission of misappropriation would be an important step towards trust and cooperation."[39]

35. This issue is particularly important in light of current efforts on the part of Parties to develop national ABS laws implementing the Nagoya Protocol. There are different interpretations about whether the Nagoya Protocol's obligations to share benefits are triggered by the fact that a genetic resource and associated traditional knowledge is *utilized,* independently of when the genetic resource is accessed; or whether the obligation to share benefits only arises when the genetic resource or associated traditional knowledge is *accessed,* in which case the Nagoya Protocol cannot be applied retroactively. If countries choose to pass laws implementing the Nagoya Protocol that focus their scope on when the genetic resource or associated traditional knowledge is accessed instead of when the resource or knowledge is utilized (whether these are new or ongoing uses), genetic resources and associated traditional knowledge accessed prior to the entry into force of the Nagoya Protocol will be excluded from the scope of the ABS legislation.[40]

36. Such an approach may undermine one of the main objectives of the Convention and the Nagoya Protocol's principles in relation to the fair and equitable sharing of benefits. Thus, it is recommended that the Working Group, in developing guidelines related to this issue, call for Parties to adopt ABS legislation that applies based on when genetic resources and associated traditional knowledge are used, rather than accessed.[41]

Recognized Approaches to Preventing Unlawful Appropriation of Traditional Knowledge

37. In the ongoing discussion of how to protect traditional knowledge, reference is often made to defensive and positive methods of protection. "Defensive protection refers to provisions adopted in the law or by the regulatory authorities to prevent IPR claims to knowledge, a cultural expression or a product being granted to unauthorised persons or organizations", whilst "[p]ositive protection refers to the acquisition by the [traditional knowledge] holders themselves of an IPR such as a patent or an alternative right provided in a *sui generis* system."[42] In essence, both defensive protection and positive protection aim to prevent the unlawful appropriation of traditional knowledge.

38. Also relevant in the context of defensive and positive protection are the different but commonly confused concepts of "public domain" and "publicly available." The phrase "public domain" as described by WIPO "is generally said to consist of intangible materials that are not subject to exclusive IP rights and which are, therefore, freely available to be used or exploited by any person."[43] A strict legal interpretation

[39] Meyer, H. et al., Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization: Background and Analysis (2013), at 2, available at http://www.evb.ch/cm_data/Nagoya_Protocol_complete_final.pdf..

[40] Such a debate regarding the scope of a regional ABS law is currently ongoing in the European Union. *See* Proposal for a Regulation of the European Parliament and of the Council on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union (2012/0278 (COD)).

[41] For a detailed discussion of this issue, *see* Johanna von Braun, Alice Bisiaux, and François Meienberg, *Access or utilisation – Who will pull the ABS trigger?*, Bridges Trade BioRes Review, Volume 7, Number 3 (July 2013), available at http://ictsd.org/i/news/bioresreview/173367/.

[42] Graham Dutfield, "Protecting Traditional Knowledge: Pathways to the Future" (ICTSD, 2006).

[43] WIPO/GRTKF/IC/17/INF/8 (Note on the Meaning of the Term "Public Domain" in the Intellectual Property System With Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore) ¶1

may consider the concept of public domain to be restricted to expired copyrights and patents, as opposed to all publically available knowledge. In regard to traditional knowledge, "the 'public domain' operates to exclude [traditional knowledge] and [traditional cultural expressions] from protection and can be used to justify their misappropriation."[44] On the other hand, the phrase "publicly available" (sometimes stated as "publicly accessible") "denotes only a fact – namely, that traditional knowledge has been disseminated to a wider public. Unlike 'public domain', 'publically available' does not infer that it follows from this fact that the traditional knowledge is legally free to use."[45] In other words, the fact that some traditional knowledge might be publicly available does not mean that it is, for purposes of IPR law, in the public domain.

39. One method of defensive protection involves the development of traditional knowledge databases that can be used as evidence to defeat claims involving patents on traditional knowledge. In order to protect an invention with a patent, the invention must fulfil certain criteria: it must be of practical use; it must show an element of novelty, that is, some new characteristic which is not known in the body of existing knowledge in its technical field. This body of existing knowledge is called "prior art". The invention must show an inventive step which could not be deduced by a person with average knowledge of the technical field.[46]

40. To respond to the difficulties patent examiners face in determining the existence of prior art, especially when patent application are based on traditional knowledge, countries like India and South Africa are developing databases of their traditional knowledge.[47] The Indian Traditional Knowledge Digital Library (TKDL) initially started out to document publicly available knowledge covering an ancient Indian system of medicine known as "Ayurveda".[48] The TKDL contains information on traditional medicinal knowledge of Ayurveda, Unani and Siddha in 34 million pages in a patent application format, which is accessible to patent examiners in five international languages (English, French, German, Japanese and Spanish) on 0.270 million medicinal formations (Ayurveda - 96,375, Unani - 1, 54, 015, Siddha - 22,000, Yoga - 1,630 formulations) similar to Turmeric and Neem which can be retrieved digitally by Patent Examiners. It also contains 1500 yoga postures and 250 yoga videos.

41. The TKDL also seeks to overcome the limitations of Rule 33.1 of the Patent Cooperation Treaty (PCT) Regulations that requires prior art to be made available in the form of a "written disclosure" thereby overcoming the problem posed by the fact that much of traditional knowledge is of an oral nature. The

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(hereinafter "WIPO Note on Public Domain)", available at http://www.wipo.int/copyright/en/activities/public_domain.html. WIPO is careful to point out, however, that the concept is "elastic" and difficult to define.

[44] WIPO Note on Public Domain ¶5.

[45] IUCN, An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing (IUCN Environmental Policy and Law Paper No. 83, 2012) page 114 note 3.

[46] There have been a number of applications for patents that are based on traditional knowledge but fail to display sufficient novelty. For example, in 1997 the United States Patent and Trademark Office (USPTO) revoked a turmeric patent challenged by the Delhi based Council for Scientific and Industrial Research on the grounds that the patent did not satisfy the criteria of novelty because it was entirely based on documented Ayurveda traditional knowledge. See http://www.twnside.org.sg/title/tur-cn.htm for more information. Other notable examples include the 2005 revocation of a patent on a fungicide made from Neem seeds by the European Patent Office on the grounds of lack of novelty and the fact that the fungicidal properties of Neem was widely held traditional knowledge in India.

[47] However, as has been pointed out in the context of databases, there is concern regarding "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 lead 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." UNEP/CBD/WG8J/6/2/Add.3 ¶53.

[48] Initially India envisaged a "public" database and changed this to a secure database accessible by patent officers – which shows an interesting development in their thinking during this exercise.

TKDL is also an effort to facilitate the easy inclusion of traditional knowledge in the "minimum documentation" (Article 15.4 of the PCT) that will be searched by the International Searching Authority under the PCT to establish prior art.[49]

42. The TKDL utilizes flexibilities of the International Patent System concerning submission of evidences for prior art. India has signed TKDL Access (Non-disclosure) Agreements with the (i) European Patent Office (Feb 2009) (ii) United States Patent & Trademark Office (Nov 2009) (iii) Indian Patent Office (July 2009), (iv) Canadian Intellectual Property Office (Sep 2010) (v) German Patent Office (Oct 2009) (vi) United Kingdom Patent Office (Feb 2010) (vii) Intellectual Property Australia (Jan 2011) and (viii) Japan Patent Office (April 2011). Under the agreement, examiners from patent offices can extensively utilize the TKDL for search and examination purposes only and cannot reveal the contents of the TKDL to any third party unless it is necessary for the purposes of citation. The TKDL is proving to be an extremely useful tool in protecting India's cultural heritage.

43. Nevertheless, in general many challenges remain in regard to developing traditional knowledge databases. The Hardison Report[50] notes that "[t]he existence of prior art in a database does not guarantee its discovery or inclusion in a patent review. Violations of access and benefit sharing laws and guidelines may be buried in complex, lengthy applications that can make comparisons with existing prior art difficult, time consuming and/or costly. The monitoring of possible violations could also be made more costly and difficult as access restrictions to prior art databases are put into place. Defeating already issued patents can be quite costly, both for national governments and for indigenous and local communities".[51] Additionally, traditional knowledge may be placed in a database without the prior informed consent of indigenous and local communities.

44. Whatever documentation system is developed "it is highly desirable that indigenous and local communities themselves are the developers and owners of any such documenting system."[52] To help indigenous and local communities in this regard, organizations are developing systems to allow communities to document their own traditional knowledge. For example, a group based out of the University of Massachusetts has developed a new legal and educational framework to try to deal with traditional knowledge materials in the digital environment called Local Contexts.[53] Local Contexts is an open forum for the testing and application of traditional knowledge licenses and labels to digital cultural content. In particular the licenses are designed for traditional knowledge owners and custodians who are documenting and recording culturally specific materials and either seeking to share it with external parties or placing that material within locally developed archives. The labels are a specific strategy to try to address the enormous amounts of traditional knowledge materials in the public domain, especially material that might not have been collected with appropriate consents, or that normally, within the context it was developed, would have restrictions regarding access, use and circulation.

45. According to document UNEP/CBD/WG8J/6/2/Add.3 "[d]atabases and other documenting projects are most useful when they are part of a larger framework for the protection of traditional knowledge."[54] Documenting and recording schemes should not stand alone in a legal vacuum. Instead,

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[49] Ruiz, Manuel, The international debate on traditional knowledge as prior art in the patent system: Issue and options for developing countries, www.ciel.org/Publications/**PriorArt_ManuelRuiz**_Oct02.pdf.

[50] Refer UNEP/CBD/WG8J/4/INF/9, Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities: The advantages and limitations of registers at http://www.cbd.int/doc/meetings/tk/wg8j-04/information/wg8j-04-inf-09-en.pdf.

[51] Hardison Report ¶56.

[52] UNEP/CBD/WG8J/6/2/Add.3 ¶34.

[53] http://www.localcontexts.org. This project receives technical and financial assistance from WIPO. WIPO also conducts a Training Program to help Indigenous Peoples and local communities manage their IP interests when they document their rich cultural heritage. Further information may be found at: http://www.wipo.int/tk/en/resources/training.html.

[54] UNEP/CBD/WG8J/6/2/Add.3 ¶22.

projects to document traditional knowledge should consider the national IP framework to ensure it does not frustrate the purpose of the project. Furthermore, "[i]t 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."[55] The documentation of traditional knowledge of indigenous and local communities should be optional, and should not be a prerequisite for national or international legal protection of traditional knowledge.[56]

46. WIPO is currently in the process of finalizing a toolkit on documenting traditional knowledge, the WIPO Traditional Knowledge Documentation ToolKit (WIPO Toolkit).[57] The Secretariat of the Convention has provided technical advice on drafts received. The Working Group, taking into account the Hardison Report, databases developed by Parties, and the WIPO Toolkit, should examine the issue of databases and may wish to provide comments to WIPO on the WIPO Toolkit.

47. In contrast to defensive protection, positive protection involves "the use of existing IP or contractual rights or the development of *sui generis* rights to enable the affirmative protection of traditional knowledge by and for traditional knowledge holders themselves. This would entail a specific right on behalf of the traditional knowledge holders to restrict the way the traditional knowledge is used by others, or to claim compensation for its use."[58]

48. In situations where communities would like to enter into agreements with the commercial and the research sector for the use of their traditional knowledge in exchange for benefits, the discourse of traditional knowledge protection closely mirrors IPRs, by emphasizing clear access rules, with the intent to reduce "transaction costs" and to ensure legal certainty for non-community users of traditional knowledge.

49. The emphasis in the Bonn Guidelines and the Nagoya Protocol on establishing "mutually agreed terms" and the development of model contractual clauses indicates a market compatible aspiration of traditional knowledge protection that brings with it criteria for good commercial agreements.[59] For example, paragraph 44 of the Bonn Guidelines sets forth an indicative list of typical mutually agreed terms, which includes "[w]hether the knowledge, innovations and practices of indigenous and local communities have been respected, preserved and maintained, and whether the customary use of biological resources in accordance with traditional practices has been protected and encouraged". Similarly, Article 5(2) of the Nagoya Protocol requires the fair and equitable sharing of benefits with indigenous and local communities to be based on mutually agreed terms.

50. Protection of traditional knowledge in this case implies establishing "good title" that would enable the rightful community holders of traditional knowledge to legitimately enter into contracts with external stakeholders for the use of their traditional knowledge. As set forth in Article 12(3) of the Nagoya Protocol, Parties shall endeavour to support indigenous and local communities to develop minimum requirements for mutually agreed terms to secure the sharing of benefits and model contractual clauses for benefit-sharing arising from the use of traditional knowledge. And Article 22(4) encourages Parties to build the capacity of indigenous and local communities to negotiate mutually agreed terms.

[55] UNEP/CBD/WG8J/6/2/Add.3 ¶22.

[56] Composite Report on Traditional Knowledge ¶34.

[57] Available at http://www.wipo.int/export/sites/www/tk/en/resources/pdf/tk_toolkit_draft.pdf.

[58] UNCTAD/DITC/TED/10 (Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions) pages 121-22.

[59] It is important to note that the Bonn Guidelines, while voluntary, were negotiated and adopted by all Parties to the Convention. Over time they have become a minimal standard in customary international law and also of continuing applicability to all Parties, in particular those that have not ratified the Nagoya Protocol.

51. In examining the above issues, the Working Group should take into account the efforts of the WIPO IGC, where some progress is being made towards the development of an international legal instrument or instruments for the effective protection of traditional cultural expressions and traditional knowledge, and to address the intellectual property aspects of access to and benefit-sharing from genetic resources. Many of the current discussions at WIPO have direct bearing to the work of the CBD under Article 8(j). In particular WIPO has developed draft articles for the protection of traditional knowledge ("WIPO Draft Articles").[60]

52. One potential avenue for practical actions for preventing the unlawful appropriation of traditional knowledge is through the use of national biodiversity strategies and action plans (NBSAPs), as called for in Article 6 of the Convention. In developing, implementing and revising NBSAPs, the COP has urged Parties to engage indigenous and local communities and to respect, preserve and maintain the traditional knowledge, innovations and practices of indigenous and local communities consistent with Article 8(j).[61] Some countries have already addressed traditional knowledge in their NBSAPs. For example, Suriname's National Biodiversity Action Plan (NBAP) (2012-2016) contains several objectives, one of which is regulated access to genetic material and associated knowledge, with fair and equitable sharing of benefits. The implementation of Finland's NBSAP will be conducted in a manner respectful of the indigenous Sámi community's traditional knowledge and practices related to biodiversity.[62]

B. Goal 2: Ensure that the right of indigenous and local communities to free, prior and informed consent regarding their traditional knowledge is respected (task 7)

53. Task 7 calls on the Working Group to develop guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure: (i) that indigenous and local communities obtain a fair and equitable share of benefits arising from the use and application of their knowledge, innovations and practices; (ii) that private and public institutions interested in using such knowledge, practices and innovations obtain the prior informed approval of the indigenous and local communities; (iii) advancement of the identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices and the associated genetic resources are used.

54. All three categories in task 7 relate directly to the mandate of task 10, *i.e.* the development of standards and guidelines for the reporting and prevention of unlawful appropriation of traditional knowledge and related genetic resources. If traditional knowledge is unlawfully appropriated, indigenous and local communities will have difficulty obtaining a fair and equitable share of benefits arising from the use of that traditional knowledge. If the prior informed approval of indigenous and local communities is obtained before their traditional knowledge is appropriated, the likelihood of unlawful appropriation of that knowledge is reduced. And the obligations of countries of origin, as well as users, of traditional knowledge, would clearly involve reporting on and preventing the unlawful appropriation of traditional knowledge. However, considering the Nagoya Protocol,[63] it may also give rise to discussions about recognition of foreign laws and jurisdiction, such as has the traditional knowledge in question been accessed in accordance with prior informed consent and that mutually agreed terms have been established,

[60] WIPO/GRTKF/IC/24/FACILITATORS DOCUMENT REV. 2 (The Protection of Traditional Knowledge: Draft Articles), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_24/wipo_grtkf_ic_24_facilitators_document_rev_2.pdf.

[61] UNEP/CBD/COP/DEC/IX/8 (Review of implementation of goals 2 and 3 of the Strategic Plan) ¶8(m, n).

[62] See http://www.cbd.int/nbsap/about/latest/ for more information.

[63] Article 15(1): Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party.

as required by the domestic access and benefit-sharing legislation or regulatory requirements of the provider country.

55. Perhaps central among these three categories is the concept of prior informed consent. It should be noted that the language in task 7 focuses exclusively on the *use* of traditional knowledge and does not refer to *access*. However, one of the General Principles of the Programme of Work is that "[a]ccess to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices."[64] Thus, it is logical to read task 7 regarding prior informed consent as applying to both access and use of traditional knowledge. If prior informed consent of indigenous and local communities is obtained with regard to the access and use of their traditional knowledge, it will facilitate fair and equitable benefit sharing as well as prevention of unlawful appropriation.

56. Although the Convention's text does not specifically mention prior informed consent (PIC)[65] in the context of indigenous and local communities, the principle may be implied in the wording of Article 8(j), whereby, "subject to national legislation, the wider application of the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity should only occur 'with the approval and involvement of the holders of such knowledge, innovations and practices'"[66] and is also interpreted over time and reflected in 8(j) related decisions from V/16, VI/10, and VII/16.

57. Importantly, the Nagoya Protocol requires parties to take measure to ensure that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities (Article 7). It can thus be argued that the Convention, and the Nagoya Protocol among other instruments, "provide[s] a normative basis for free, prior and informed consent."[67]

58. Additionally, the 2004 Akwé:Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments[68] and the 2010 Tkarihwaié:ri Code of Ethical Conduct[69] both contain provisions dealing with PIC or approval and involvement. The Tkarihwaié:ri Code of Ethical Conduct, for example, states that:

> Any activities/interactions related to traditional knowledge associated with the conservation and sustainable use of biological diversity, occurring on or likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities and impacting upon specific groups, should be carried out with the prior informed consent and/or approval and involvement of indigenous and local communities. Such consent or approval should not be coerced, forced or manipulated.[70]

[64] UNEP/CBD/COP/5/23 Annex.

[65] Convention documents have tended to use the term "prior informed consent" as opposed to "free, prior and informed consent." However, the Tkarihwaié:ri Code of Ethical Conduct in paragraph 11 makes clear that "prior informed consent" should not be "coerced, forced or manipulated." Thus, the term "prior informed consent" as used in CBD documents, as well as this report, should be understood to include the criteria that it was freely obtained.

[66] WG8(j)/1/2 paragraph 18. The Working Group's statement makes clear that the principle of free, prior and informed consent is expressed in various formulations. Article 8(j) refers to "approval and involvement,"

[67] E/C.19/2005/3 at ¶40.

[68] Decision VII/16 F.

[69] Decision X/42 Annex.

[70] Tkarihwaié:ri Code of Ethical Conduct ¶11.

59. The Working Group has considered "prior informed consent" as: "the procedure through which national governments or the Indigenous or local communities, as the case may be, properly supplied with all the required information, allow or refuse access to their biological resources and traditional knowledge innovation and practices, under mutually agreed conditions of equality, respect and fair compensation."[71] This definition makes reference to the Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples facilitated by the United Nations Permanent Forum on Indigenous Issues[72] (International Workshop on FPIC Report). The reference set forth above by the Working Group echoes the essential components of free, prior and informed consent set forth in the International Workshop on FPIC Report, which sets forth the elements of free, prior and informed consent as follows:

- *Free* should imply no coercion, intimidation or manipulation.
- *Prior* should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.
- *Informed* should imply that information is provided that covers (at least) the following aspects:
    - The nature, size, pace, reversibility and scope of any proposed project or activity;
    - The reason(s) for or purpose(s) of the project and/or activity;
    - The duration of the above;
    - The locality of areas that will be affected;
    - A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;
    - Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);
    - Procedures that the project may entail.
- *Consent*.[73]

60. It is important to bear in mind that given the cultural, legal and political diversity of indigenous peoples, local communities and States, there is no one size fits all answer to the question of securing PIC. Instead, communities, or States on behalf of communities, are increasingly using a coordinated menu of diverse options to protect traditional knowledge, which includes using existing IP laws of patents, trademarks, geographical indications, industrial designs and trade secrets to challenge misuse and misappropriation of their traditional knowledge.

61. At the same time, States, along with communities, have also begun to make *sui generis* adaptations to existing IP laws and design novel *sui generis* systems to protect their traditional knowledge. However, the fact remains that no one form of legal protection can replace the complex customary law and social systems that protect traditional knowledge at the community level.

62. Prior informed consent is relevant to both defensive and positive protection of traditional knowledge, discussed above. WIPO has stated that protection through "the free, prior and informed

[71] UNEP/CBD/WG8(j)/4/7 Annex II.

[72] E/C.19/2005/3.

[73] The International Workshop on FPIC Report (E/C.19/2005/3.) at page 9 elaborated on the concept of consent as follows: "Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of Indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent." Thus it is important to differentiate this nuanced concept of consent, which is based on inclusive dialogue at the earliest stages, from the more simplified and polarizing concept of "veto" power.

consent principle in the context of intellectual property can mean defensive protection in which any use of traditional knowledge, and in particular acquisition of intellectual property rights over traditional knowledge and derivatives thereof, without the prior consent of the community, can be prevented."[74] It "can also support positive forms of protection, in which, for example, a community would have the right to authorize any use or commercialization of its knowledge, either by itself or by a third party, that would be to the community's financial and other advantage."[75] These forms of protection are not necessarily mutually exclusive and decisions regarding whether to seek defensive or positive protection, or some combination of the two, should be made entirely by relevant communities.[76]

63. Determining how to properly obtain prior informed consent from specific indigenous and local communities will depend upon the customary practices of each particular community. To assist Parties in developing methods of obtaining prior informed consent, meetings, such as the Ad Hoc Expert Group Meeting of Local Community Representatives held in July 2011 (Meeting of Local Community Representatives) should continue to be held.[77] Although prior informed consent was not a central theme of the Meeting of Local Community Representatives, one of the recommendations was to "Encourage Parties to recognize and respect the right of free, prior and informed consent of the local communities with regard to decisions related to biodiversity".[78]

C. Goal 3: Ensure that indigenous and local communities equitably share in benefits derived from their traditional knowledge (task 7)

64. One of the three stated objectives of the Convention, as set forth in Article 1, is the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Article 15 provides that such sharing is to take place upon mutually agreed terms. The Nagoya Protocol provides in Article 5(5) that "Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms."

65. There has been a considerable thinking within the CBD related processes on what would constitute fair and equitable sharing of benefits arising from the utilization of traditional knowledge. Some parties and governments have considered this in national laws.[79] Additionally, countries have taken different approaches regarding access and benefit sharing (ABS) regimes. In general, these approaches fall into two categories: direct payments to indigenous and local communities or payments to trust funds kept on behalf of indigenous and local communities.

66. Under Costa Rica's ABS law,[80] for example, applicants seeking to conduct basic research or bio-prospecting must commit "to share up to 50% of the royalties in favour of the National System of Conservation Areas, *communities*, owners of the land or ex situ facilities, depending on where resources were effectively accessed."[81] In South Africa, on the other hand, the Council for Scientific and Industrial

[74] E/C.19/2005/3 at ¶30.

[75] E/C.19/2005/3 at ¶30.

[76] E/C.19/2005/3 at ¶30.

[77] See UNEP/CBD/WG8J/7/8/Add.1 (Report of the Expert Group Meeting of Local Community Representatives Within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity).

[78] UNEP/CBD/WG8J/7/8/Add.1 III.q.

[79] Such as the Peruvian *sui generis* law to protect traditional knowledge.

[80] Regulation for the Access to Genetic and Biochemical Resources and Elements of Biodiversity (Executive Decree No. 31514-MINAE).

[81] International Plant Genetic Resources Institute, Case Studies on Access and Benefit-sharing (2006), at 12 (emphasis added).

Research (CSIR) reached an agreement with the South African San Council in 2003 for royalty payments based on the sale of a compound derived from the hoodia plant, commonly used by the San people to assuage hunger. "Money will be paid into a Trust set up by CSIR and the South African San Council to uplift the standard of living and well-being of the San peoples of Southern Africa."[82]

67. The elements of good process, regarding contracts for fair and equitable benefit-sharing with communities, for the use of their traditional knowledge and genetic resources, was listed in a standard setting report in 1999 by the Swedish Scientific Council. The report stated that the definition of "fair and equitable benefit sharing" is non-exhaustive and inclusive but it must however encompass the following minimum conditions.

Fair and equitable benefit sharing:[83]

(i) Should contribute to strengthening the situation of the less powerful party/parties at all levels in the sharing relation, including by enabling:- Equal access to information,- Effective participation by all relevant stakeholders,- Capacity building,- Privileged access to new technology and products;

(ii) Should contribute toward, or as a minimum not counteract, the two other objectives of the Convention: conservation of biological diversity and the sustainable use of its components.

(iii) Must not interfere with existing forms of fair and equitable benefit sharing, including customary benefit sharing mechanisms.

(iv) Must respect basic human rights.

(v) Must respect value and legal systems across cultural borders, including customary law and indigenous intellectual property systems.

(vi) Must allow democratic and meaningful participation in policy decisions and contract negotiation by all stakeholders, including stakeholders at the local level.

(i) Must be transparent enough that all parties understand the process equally well, especially local and indigenous communities, and have time and opportunity to make informed decisions (effective Prior Informed Consent, PIC).

(vii) Must not unnecessarily restrict access to non-rival goods and resources.

(viii) Must, if contractual relations are involved, include provisions for independent third party review to ensure that all transactions are on mutually agreed terms (MAT) and proceeded by effective prior informed consent (PIC).

(ix) Must, if contractual relations are involved, provide for identification of the origin of genetic resources and related knowledge.[84]

(x) Must, if contractual relations are involved, make information about agreed terms publicly available.

[82] International Plant Genetic Resources Institute, Case Studies on Access and Benefit-sharing (2006), at 144.

[83] "Fair and Equitable - Sharing the benefits from use of genetic resources and traditional knowledge" report by the Swedish Scientific Council on Biological Diversity, September 1999 by Marie Byström et al.

[84] "The Norwegian Patent Act 2004 also requires an obligation for applications regarding both disclosure of origin of biological materials and also prior and informed consent if required in the country of origin. The disclosure obligations were extended to traditional knowledge in 2009.

D. Remaining actions under tasks 7 and 12[85]

Identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices and the associated genetic resources are used

68. The extensive six year negotiation of the Nagoya Protocol arrived at a way forward with this issue of foreign jurisdiction in its Article 15, **Compliance with domestic legislation or regulatory requirements on access and benefit-sharing:**

> *1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party.*
>
> *2. Parties shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above.*
>
> *3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above.*

However, Article 15 of the Nagoya Protocol restricts this requirement to genetic resources only. The Working Group on Article 8(j) may wish to consider whether a similar principle could be recommended to COP along with other guidance on tasks 7, 10, and 12 regarding traditional knowledge. Such a way forward may presuppose that provider Parties may developed national laws to protect traditional knowledge, however should Parties may need maximum flexibility or pursue these actions through such practical means as national action plans (within NBSAPs).

It is recommended that prioritized work within tasks 7, 10 and 12 be advanced before this issue is considered to provide a context for the discussions.

Definitions of relevant key terms and concepts in Article 8(j) and related provisions

69. Task 12 refers to the development of definitions of relevant key terms and concepts in Article 8(j) and related provisions. In order to progress and avoid overlap it is necessary to consider the background of this issue. In decision VII/16 H, paragraph 4, the COP requested the Executive Secretary to develop a glossary of terms relevant to Article 8(j) and related provisions for the consideration by the fourth meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention. In decision XI/14 E, paragraph 10, the COP adopted the Working Group's recommendation to invite Parties to consider the terms and definitions developed in response to decision VII/16 H, paragraph 4, and to request the Executive Secretary to revise the terms and definitions, to include additional terms and definitions proposed, and to propose a draft glossary of terms for consideration by the eighth meeting of the Working Group on Article 8(j) and Related Provisions.[86]

70. Document UNEP/CBD/WG8J/7/INF/1/Add.1[87] for the Working Group's Seventh Meeting covers the evolution of the issue of definitions within the *sui generis* agenda item, from 2004 to the July 2011. The document contains definitions of "customary law," "prior informed consent," and "traditional

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[85] *The Working Group to develop guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure advancement of the identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices and the associated genetic resources are used* and *Definitions of relevant key terms and concepts in Article 8(j) and Related Provisions*

[86] Article 8(j) and Related Provisions (UNEP/CBD/COP/DEC/XI/14).

[87] Extracts Covering the Evolution of the Issue of Definitions Within the *Sui generis* Agenda Item from the Working Group on Article 8(j) and Related Provisions (UNEP/CBD/WG8J/7/INF/1/Add.1 Annex).

knowledge." Document UNEP/CBD/WG8J/7/3[88] contains a set of relevant definitions/glossary of terms for Article 8(j) and related provisions collated from various sources including the UNPFII and WIPO. As the document is yet to be negotiated there remains some overlap in the definitions contained in these two documents.

71. Additionally, some relevant definitions have already been developed in the context of other decisions. For example, Section II of the Akwe: Kon Guidelines entitled "Use of Terms" sets forth definitions of "customary law" and "traditional knowledge," among others.

72. At this stage, the Working Group could significantly advance this aspect of task 12 by considering terms already adopted under the Convention and reviewing the work that has been done thus far under the Working Group regarding definitions and compiling it into a single document. The document could then, in order to ensure complementarity, be compared with the work of the WIPO IGC, which has developed a Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge.[89] Taking into account the work of WIPO, the Convention's work on terms and definitions should not run contrary to and should strive to be in harmony with, similar work under WIPO, whilst acknowledging the different mandates and context of the two bodies.

73. In considering terms and definitions, the Working Group should keep in mind the purpose behind definitions. Definitions should be within the mandate of the Convention, developed with the participation of indigenous and local communities, and recognize the dynamic nature of the knowledge and customs of indigenous and local communities. Ultimately, the definitions should uphold the rights of indigenous and local communities over their traditional knowledge by ensuring prior informed consent, the fair and equitable sharing of benefits, and that the traditional knowledge of indigenous and local communities is not unlawfully appropriated or misappropriated. Indigenous and local communities should agree with the terms and definitions finally adopted. Parties may wish to consider the nature of such a list and would it be better identified as a glossary (within the context of Article 8(j) and related provisions.[90]

IV. CONCLUSION

74. As noted above and as recognized in decision XI/14 C, several significant developments have occurred since the Programme of Work was first implemented that warrant a re-examination of tasks 7, 10 and 12. These include the adoption of the Nagoya Protocol and the United Nations Declaration on the Rights of Indigenous Peoples, the entry into force of the UNESCO Convention on Intangible Cultural Heritage, as well as the issuance of COP decisions setting forth the revised Strategic Plan for Biodiversity 2011–2020, and the Tkarihwaié:ri Code of Ethical Conduct.

75. Additionally, ongoing work of other relevant international bodies, such as the WIPO IGC, the United Nations Permanent Forum on Indigenous Issues and UNESCO, has resulted in valuable contributions to the efforts to respect, preserve and maintain traditional knowledge. These include WIPO's Draft Articles on the Protection of Traditional Knowledge and its Glossary of Key Terms, the United Nations Permanent Forum on Indigenous Issues' guidelines on prior informed consent, and UNESCO's Chengdu Recommendations.

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[88] Elements of *Sui Generis* Systems for the Protection of Traditional Knowledge, Innovations and Practices (UNEP/CBD/WG8J/7/3 Annex).

[89] WIPO Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge, 2011 (WIPO/GRTKF/IWG/2/INF/2).

[90] Brazil commented that "With regard to the proposed definitions and the glossary of terms, it is paramount to clarify that the glossary elaborated by the WIPO Secretariat was not endorsed nor thoroughly discussed by the Members of that organization and remain as an information document. Therefore, the glossary of terms to be developed and approved under the CBD should not have its scope restricted by the terms suggested in that document."

76. As international negotiations have advanced, Parties are increasingly recognizing the rights of indigenous and local communities over their traditional knowledge. For example, the qualifying language in Article 8(j) that makes that article "subject to (a Party's) national legislation" was nuanced in the Nagoya Protocol to "in accordance with domestic law."[91] The Protocol provides in Article 6 that "In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources."

77. Traditional knowledge is difficult to fit into the existing system of intellectual property rights (IPRs) because it does not lend itself to nor satisfy the protection requirements of conventional intellectual property systems. The non-fungible aspect of traditional knowledge, the fact that it is often collectively held and not necessarily "owned" in the typical IP sense, and the practical difficulties involved in providing monetary compensation for its use, are considerations for the Working Group to bear in mind as it addresses tasks 7, 10 and 12 and the implementation of Article 8(j) and related provisions and the Nagoya Protocol.

78. Based on the broad language set forth in task 12 and the more specific terms used in tasks 7 and 10, the Working Group may wish to consider focusing on three major categories: (a) Preventing the unlawful appropriation/misappropriation or unauthorized access of traditional knowledge; (b) Ensuring that the right of indigenous and local communities in relation to obtaining their prior and informed consent or approval in relation to their traditional knowledge, innovations and practices is respected; and (c) Ensuring that indigenous and local communities obtain a fair and equitable share of benefits arising from the utilization and application of their traditional knowledge, innovations and practices.

79. To facilitate more efficient implementation of tasks 7, 10 and 12, it is important to harmonize the terminology used in the tasks with that used in the Convention, the Nagoya Protocol, and decisions of the COP. Additionally, as Parties begin drafting legislation to implement the Nagoya Protocol, they will have to decide on the temporal scope of such legislation. In order to ensure that the intent of the Nagoya Protocol is fulfilled, such legislation should apply to new uses of genetic resources and associated traditional knowledge rather than only to new access of such resources and knowledge.

80. Finally, against the backdrop of the international framework of rights of indigenous and local communities over their traditional knowledge, it is fundamentally important that further developments in law and policy relevant to traditional knowledge should proceed with the effective participation of indigenous and local communities and incorporate a collective rights based approach that respects their customary laws.

V. RECOMMENDATIONS

81. Taking into account that tasks 7, 10 and 12 of the programme of work for Article 8(j) and related provisions was drafted and adopted at COP 5, some thirteen years ago, and therefore does not take into account developments relevant to Article 8(j) or access and benefit sharing, and other related work advanced since that time,

[91] See Nagoya Protocol Article 7.

The Parties may wish to:

(a) *Consider using* task 12[92] as an overarching structure, and prioritize elements of work within each task, that could best contribute to the effective implementation of the Convention and the Nagoya Protocol, as follows:

(i) Guidelines for prior informed consent and fair and equitable sharing of benefits concerning traditional knowledge; as well as

(ii) Standards and guidelines for reporting and prevention of unlawful appropriation/ misappropriation/ unauthorized access of traditional knowledge;

(b) *Consider revising* tasks 7, 10 and 12 to ensure consistency in language and complementarity with related work of other bodies such as the WIPO;

I *Consider* whether key terms such as "unlawful" (task 10) need to be either defined or contextualized or replaced with a more appropriate term such as "misappropriation" or "unauthorized access";

(d) *Consider*, in light of the Nagoya Protocol, whether references in tasks 7 and 10 to "associated genetic resources" and "related genetic resources", respectively, could either be deleted or consistent language (in line with the Nagoya Protocol) be used throughout the tasks;

(e) *Consider* other sub-tasks[93] and next steps forward in the light of advances made on these priority elements;

(f) In light of the revised Strategic Plan, the Aichi Targets and the Nagoya Protocol, and noting that Parties have shown a desire for practical outcomes towards 2020, *consider* that guidelines for the development of mechanisms, legislation or other appropriate mechanisms, called for under tasks 7, 10 and 12, may take the form of national actions plans,[94] and *decide* to focus on national action plans for traditional knowledge (and customary sustainable use) as appropriate mechanisms for national and local level action relevant for the conservation and sustainable use of biological diversity, and *further consider* including such action plans in the revision of NBSAPs;

(g) *Taking into account* initial work under the Working Group on Article 8(j) on possible terms and definitions, as well as relevant terms and definitions already adopted by the Convention and its Protocols, as well as work in related bodies such as WIPO, *consider* the usefulness of developing and adopting a glossary to be used within the context of Article 8(j);

(h) *Promote* guidelines developed by WIPO (in consultation with the Secretariat of the Convention) regarding the creation of traditional knowledge databases as well as follow the advice on registers in UNEP/CBD/WG8J/4/INF/9, Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities: The advantages and limitations of registers;

[92] Task 12 states: "The Working Group to develop guidelines that will assist Parties and Governments in the development of legislation or other mechanisms, as appropriate, to implement Article 8(j) and its related provisions (which could include *sui generis* systems), and definitions of relevant key terms and concepts in Article 8(j) and related provisions at international, regional and national levels, that recognize, safeguard and fully guarantee the rights of indigenous and local communities over their traditional knowledge, innovations and practices, within the context of the Convention."

[93] Includes terms and definitions, as well as identification of obligations of traditional knowledge countries of origin and countries where traditional knowledge is used.

[94] National action plans could be developed for both traditional knowledge and customary sustainable use (taking into account the related work on Article 10(c)).

(i) *Recall, build on* and *recommit* to decision IX/13 C;[95]

(j) Where the State plays a fiduciary role regarding traditional knowledge, it should *strive for* transparency, involve public consultation, and ensure the effective participation of the relevant indigenous and local communities;

(k) Where bilateral approaches are utilized, Parties should *provide information to communities* so that they are aware that there may be other communities with whom they share traditional knowledge;

(l) *Promote and support* community protocols or other procedures for access and use of traditional knowledge, to assist in certainty for users and providers;

(m) *Explore* a "commons" approach, which has been shown to be effective in instances of shared knowledge; States may wish to explore the possibility of allowing indigenous and local communities to develop their own commons, where the State plays the role of a fiduciary, rather than participatory role;

(n) *Develop* ways of benefit-sharing that will allow multiple indigenous and local communities that have rights to benefit from the same traditional knowledge to do so equitably, such as through trust funds in which indigenous and local communities effectively participate and that identify the relevant indigenous and local communities and knowledge holders and give them a say in how benefits are distributed;

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[95] Decision IX/13 C:

C. Considerations for guidelines for documenting traditional knowledge

The Conference of the Parties,

Recalling decision VIII/5 B, paragraph 5, in which it 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,

Affirming the central role of traditional knowledge in the cultures of indigenous and local communities and rights of indigenous and local communities to their knowledge, innovations and practices,

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,

1. *Urges* 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 including through:

(a) The repatriation of traditional knowledge, innovations and practices, in databases, as appropriate; and

(b) Supporting capacity-building and the development of necessary infrastructure and resources;

With the aim of ensuring that:

(c) Documentation of traditional knowledge, innovations and practices, is subject to the prior informed consent of indigenous and local communities; and

(d) Indigenous and local communities can make informed decisions regarding the documentation of their traditional knowledge, innovations and practices;

[...]

(o) *Consider* that as national ABS regulations are developed, governments will need to determine the scope of those regulations, taking into consideration, inter alia, whether the regulations will apply to new uses of genetic resources and/or associated traditional knowledge that have been accessed prior to the entry into force of those regulations;[96]

The Working Group may wish to

(p) Take this last issue into consideration and develop advice for the consideration of the Nagoya Protocol process concerning national ABS regulations[97] and *consider recommending* that Parties should aim to bring all utilization and commercialization of genetic resources and traditional knowledge under a broad benefit-sharing system irrespective of the date of access;[98] and

(q) *Noting* that at present, there is no centralized mechanism for indigenous and local communities to report unlawful appropriation, misappropriation or unauthorized access of their traditional knowledge, *consider* both national and international mechanisms that would allow indigenous and local communities to report unlawful appropriation, misappropriation or authorized access and/or use of their traditional knowledge.

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[96] This is an issue currently being decided by the European Union. For a detailed discussion of this issue, *see* Johanna von Braun, et al., *Access or utilisation – Who will pull the ABS trigger?*, Bridges Trade BioRes Review, Volume 7, Number 3 (July 2013), available at http://ictsd.org/i/news/bioresreview/173367/.

[97] *See* Background and Analysis of Nagoya Protocol, at 115.

[98] Background and Analysis of Nagoya Protocol, at 116.