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Item 4(c) of the provisional agenda*

HOW TASKS 7, 10 AND 12 COULD BEST CONTRIBUTE TO WORK UNDER THE CONVENTION AND TO THE NAGOYA PROTOCOL

Revised note by the Executive Secretary

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 communities¹ 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.² 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).³ The programme of work sets 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.

* UNEP/CBD/WG8J/8/1.

¹ 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).

² 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 ...”

³ Decision V/16, UNEP/CBD/COP/5/23. ¶

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2. The Conference of the Parties, at its eleventh meeting, (COP-11), in decision XI/14 C on tasks 7, 10 and 12 of the revised Multi-Year Programme of Work, took note of “recent developments” relevant to Article 8(j), including: the adoption, at its tenth meeting, of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization,⁴ the revised Strategic Plan for Biodiversity 2011–2020⁵ and the Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities;⁶ and ongoing work of other relevant international bodies, in particular the World Intellectual Property Organization 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),⁷ the entry into force in 2006 of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (Convention on Intangible Cultural Heritage),⁸ and the entry into force in 2004 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

4. The Conference of the Parties 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 Conference of the Parties 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 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 the three tasks. 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 Conference of the Parties in 2000, the study provides an opportunity to re-examine the tasks and organize the work requested in a more complementary manner.

6. The draft study was made available for an online review during the period from 12 June to 12 July 2013. Comments and suggestions for additions and amendments were received in the first round of submissions, in response to the initial call for submissions by the Executive Secretary (April/May 2013), from Australia, Brazil, China, EU and its Member States, indigenous and local community organizations and non-governmental organizations (UNEP/CBBD/WG8J/8/INF/6). In the second round of submissions received in response to the draft report in July 2013, views were received from the Governments of Bangladesh, Brazil, India, Lithuanian (supported by EU Member States), as well as the World Intellectual Property Organization (WIPO) and the Assembly of First Nations Canada (UNEP/CBBD/WG8J/8/INF/6/Add.1). These comments are incorporated into the final draft of the expert study which is made available as UNEP/CBD/WG8J/8/INF/5.

7. 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

⁴ Decision X/1, annex.

⁵ Decision X/2, annex.

⁶ Decision X/42, annex.

⁷ 13 September, 2007.

⁸ 2003 refer <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00006>

Related Provisions. Task 12 broadly calls for the Working Group on Article 8(j) and Related Provisions to develop guidelines to assist Parties and Governments in the development of legislation and other mechanisms (such as national action plans) to implement Article 8(j) and related provisions.⁹ Task 12 specifically states that these mechanisms could include *sui generis* systems.

8. Tasks 7 and 10 both call for specific actions that may 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 that (a) 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; and (b) institutions interested in such knowledge obtain “prior informed approval”¹⁰ of indigenous and local communities,¹¹ amongst other matters. Task 10 directs the Working Group to develop standards for reporting and prevention of unlawful appropriation of traditional knowledge and related genetic resources.¹² Logic would indicate that work requested under tasks 7 and 10 could be sub-tasks which will need to be explored in developing task 12, on guidance for national mechanisms to implement Article 8(j) and related provisions.

9. Viewing the tasks in this light demonstrates that work under their mandate may fall 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 in relation to obtaining their prior and informed consent or approval in relation to 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 utilization and application of their traditional knowledge, innovations and practices.¹³

10. 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 towards meeting some of

⁹ 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.”

¹⁰ The following COP decisions, among others, have interpreted the original provision in the programme of work for Article 8(j) and related provisions (decision V/16, annex), that access to traditional knowledge “should be subject to prior informed consent or prior informed approval”, as “prior informed consent” – (Decisions VI/10; VII/16, including in the Akwe:Kon Guidelines; VIII/5; and IX/13.)

¹¹ 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.”

¹² 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.”

¹³ 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).

the objectives of the Strategic Plan for Biodiversity 2011-2020, specifically Aichi Target 18 on traditional knowledge and Aichi Target 16 on the Nagoya Protocol.

11. The expert study focusses on the three goals discussed above, taking into account related work and work that has been done so far in each area and attempts to offer recommendations to assist the Working Group in finding a procedural and complementary way forward. The report proposes a way forward with remaining sub-tasks, including advancement of obligations of countries of origin (of traditional knowledge) as well Parties and Governments where such knowledge is used (under task 7) and key terms and concepts (under task 12). Each of these three tasks may fall within the framework of *sui generis* systems and hence *sui generis* approaches for the protection, preservation and promotion of traditional knowledge are considered in the context of each of these categories rather than as a separate issue in itself. This approach may also assist in harmonizing the ongoing work of the Working Group on Article 8(j) and Related Provisions in relation to *sui generis* systems for the protection, preservation and promotion of traditional knowledge.

12. Drawing on the revised expert study and views and submissions received during the peer-review process, this document, in section I, provides an overview of traditional knowledge and *sui generis* protection to assist in contextualizing the work requested under tasks 7, 10 and 12. Section II suggests possible goals for the Working Group to focus on, in order to make progress on tasks 7, 10 and 12, including in section II, subsection D on remaining actions (required) under tasks 7 and 12.¹⁴ Section III provides some conclusions and section IV provides some possible draft recommendations for the consideration of the Working Group. Parties may wish to use the draft recommendations as a framework and to import other elements from the expert study as needed and appropriate.

I. TRADITIONAL KNOWLEDGE AND *SUI GENERIS* SYSTEMS

Sui generis systems and tasks 7, 10 and 12

13. The term '*sui generis*' is a Latin expression that means '*of its own kind*' and 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.

14. As stated in the note by the Executive Secretary on tasks 7, 10 and 12 of the revised Multi-Year Programme of Work (UNEP/CBD/WG8J/7/4),¹⁵ *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 the knowledge and related resources of indigenous and local communities 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 may 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);

¹⁴ 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.

¹⁵ UNEP/CBD/WG8J/7/4, para.11.

(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 utilization and 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 inter-generational 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).¹⁶

15. Another approach to protecting 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 States¹⁷ have reformed copyright and patents acts 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.

16. However, 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, such as those governing copyrights, patents, trademarks and designs.¹⁸ The conventional IP system is based on a four key assumptions:

(a) It is possible to clearly identify the owners or progenitors of knowledge;

(b) It is possible to clearly distinguish 'new' from 'old' knowledge;

(c) 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

(d) 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 system¹⁹ because:

(a) Traditional knowledge is collectively held by communities and in many cases widely shared, thereby making it difficult to identify exclusive owners;²⁰

¹⁶ 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.

¹⁷ Such as Australia and New Zealand.

¹⁸ 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).

¹⁹ "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.

(b) 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;²¹

(c) Traditional knowledge in many instances is holistic²² and develops organically thereby making it difficult to distinguish between ‘new’ and ‘old’ knowledge;

(d) 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

(e) 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.’

(f) Indigenous and local communities regard their rights to their knowledge as inalienable and held in perpetuity for future generations.

(g) 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. Hence the difficulty of ensuring the protection of traditional knowledge under intellectual property (IP) rights law stems mainly from the fact that traditional knowledge often does not meet the requirements for protection under existing intellectual property law. For example, intellectual property must be new, original, innovative or distinctive to qualify for protection. These requirements make it difficult for traditional knowledge which is generally collectively held, handed down from generation to generation, (maybe) publically available or considered in the public domain, to obtain IP protection. The limitations of conventional IPRs are often not revealed until 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.

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

²⁰ The Tkarihwaí: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.

²¹ 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.” 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) (UNEP/CBD/WG8J/4/INF/9).

²² 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), (UNEP/CBD/WG8J/4/INF/9).

knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc.²³

20. A report of the Executive Secretary (UNEP/CBD/WG8J/5/6)²⁴ 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 adaptation 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 patrimony²⁵ 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 collectively held even in instances where there are individuals within a community who are its custodians.

22. The difference between traditional knowledge and other kinds of knowledge is most evident when it comes to its non-fungible nature.²⁶ Traditional knowledge is embedded within the community and in many ways the very identity of the community is tied to it.²⁷ 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.²⁸ 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.²⁹ 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.³⁰ 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

²³ 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.

²⁴ Development of elements of *sui generis* systems for the protection of traditional knowledge, innovations and practices to identify priority elements (UNEP/CBD/WG8J/5/6), p.4. Available at: [http://www.cbd.int/doc/meetings/tk/wg8\(j\)-05/official/wg8\(j\)-05-06-en.pdf](http://www.cbd.int/doc/meetings/tk/wg8(j)-05/official/wg8(j)-05-06-en.pdf).

²⁵ Brazil: Item II, para. 15: "TK as cultural patrimony" - 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.

²⁶ Radin, Margaret Jane (1987) "Market inalienability", *Harvard Law Review* 100 (8): 1849-1937 - **Fungibility** is the property of a good or a commodity whose individual units are capable of mutual substitution, such as crude oil, shares in a company, bonds, precious metals, or currencies.

²⁷ For instance, the Nagoya Protocol recognises the inseparability of traditional knowledge and genetic resources in its preambular paragraphs.

²⁸ UNEP/CBD/WG8J/6/2/Add.3 ("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.").

²⁹ UNEP/CBD/WG8J/6/2/Add.3 ("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.").

³⁰ Hyde, Lewis, *The Gift: Imagination and the Erotic Life of Property*, Random House: New York, 1983.

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 Convention on Biological Diversity, prior to undertaking any action regarding traditional knowledge protection is: *How do efforts to protect traditional knowledge affirm the community lifestyle that embodies such traditional knowledge?*

II. POSSIBLE GOALS FOR WORKING GROUP CONCERNING TASKS 7 10 AND 12

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 promote³¹ 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”. Paragraph 5 of Article 5 of the Nagoya Protocol provides that Parties 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.

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, protect, preserve and maintain knowledge, innovations and practices of indigenous and local communities, as well as encourage promotion of such knowledge based on the consent or approval 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 associated with genetic resources are shared fairly and equitably with indigenous and local communities, as well as possibly contribute to monitoring³² the use of traditional knowledge.

26. As an initial matter, task 10 has the potential to create some 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”.³³ 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), while 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, as genetic resources is now addressed under the Nagoya Protocol. Additionally, it should be noted that the term “unlawful appropriation” is not defined in the Convention or the Nagoya Protocol. The World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic

³¹ Promote with the approval and involvement of the knowledge holders.

³² Noting that Article 17 only refers to the monitoring of the utilization of genetic resources..

³³ 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) ¶

Resources, Traditional Knowledge and Folklore (WIPO IGC) is considering the following definition of misappropriation in the context of genetic resources:³⁴

“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]].”³⁵

27. To date, the Working Group has not addressed the definition of “unlawful appropriation” It is recognized that defining this term is controversial³⁶ and could have different ramifications for different Parties and in different national circumstances. 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 alternative 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 decides on a consistent use of terms regarding these tasks, especially in light of task 10 and also considers whether there is a need to develop a common understanding of “unlawful appropriation” or perhaps replace the term with “misappropriation”³⁷ or “unauthorized access” of traditional knowledge, in order to advance the implementation of task 10. However reverting to another term may also require the development of a common understanding of the alternative term.

28. 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 GR 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.”³⁸

29. 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 and/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 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.

30. In regard to preventing the unlawful appropriation of traditional knowledge, the 2010 *Tkarihwaí:ri* Code of Ethical Conduct (document UNEP/CBD/COP/DEC/X/42, annex) is a particularly

³⁴ 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).

³⁵ 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).

³⁶ UNEP/CBD/WGABS/4/INF/6 (Analysis of Claims of ‘Unauthorised Access and Misappropriation of Genetic Resources and Associated Traditional Knowledge’) (hereinafter “IUCN Misappropriation Study”).

³⁷ Noting that WIPO has not yet agreed on a working definition of the term “misappropriation”.

³⁸ IUCN Young Study.

relevant. As stated in the Tkarikwaié: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.”³⁹ This is consistent with Aichi Target 18, which calls for traditional knowledge to be respected at all relevant levels by 2020, and also 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.

31. An important element in ensuring traditional knowledge of indigenous and local communities is respected, protected, preserved and promoted 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.”⁴⁰

32. The Tkarikwaié: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 the fair and equitable sharing of benefits.

33. The Tkarikwaié: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 and associated traditional knowledge may have already taken place on a large scale, and those genetic resources and associated traditional knowledge 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.”⁴¹

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)

34. 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 utilization 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.

³⁹ Tkarikwaié:ri Code of Ethical Conduct.

⁴⁰ UNEP/CBD/WG8J/5/6.

⁴¹ 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.

35. 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 and would be essential elements of task 12. 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 consent or approval of indigenous and local communities is obtained before their traditional knowledge is appropriated, the likelihood of unlawful appropriation of that knowledge is reduced. Hence the obligations of countries of origin, as well as users of traditional knowledge, may involve reporting on and preventing the unlawful appropriation of traditional knowledge.

36. 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.”⁴² 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 assist in preventing unlawful appropriation.

37. Although the Convention text does not specifically mention prior informed consent (PIC)⁴³ 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’”⁴⁴ and is also interpreted over time and reflected in Article 8(j) related decisions V/16, VI/10, and VII/16.

38. Importantly, the Nagoya Protocol provides that in accordance with domestic law, each Party shall take measures, as appropriate, 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, prior and informed consent.”⁴⁵

39. Additionally, the 2004 Akwé:Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments⁴⁶ and the 2010 Tkarihwaí:ri Code of Ethical Conduct⁴⁷ both contain provisions dealing with prior informed consent or approval and involvement. The Tkarihwaí: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

⁴² UNEP/CBD/COP/5/23, annex.

⁴³ Convention documents have tended to use the term “prior informed consent” as opposed to “free, prior and informed consent.” However, the Tkarihwaí: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, may be understood to include the criteria that it was freely obtained. For reasons discussed herein, it is suggested that the Working Group may consider the phrases interchangeable.

⁴⁴ 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,”

⁴⁵ E/C.19/2005/3.

⁴⁶ Decision VII/16 F.

⁴⁷ Decision X/42, annex.

*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.*⁴⁸

40. 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.”⁴⁹ 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 Issues⁵⁰ (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*.⁵¹

41. 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, as well as encouraging communities to develop community protocols.

⁴⁸ Tkarihwaïé:ri Code of Ethical Conduct.

⁴⁹ UNEP/CBD/WG8J/4/7, annex II.

⁵⁰ E/C.19/2005/3.

⁵¹ The International Workshop on FPIC Report 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.

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

43. 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 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.”⁵² 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.”⁵³ 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.⁵⁴ Determining how to properly obtain prior informed consent from specific indigenous and local communities will depend upon the customary practices of each particular community.

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

44. 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 of the Convention 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.”

45. . Some Parties and governments have considered how to address traditional knowledge in their national laws.⁵⁵ 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.

46. Under Costa Rica’s ABS law,⁵⁶ 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.”⁵⁷ In South Africa, on the other hand, the Council for Scientific and Industrial Research 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.”⁵⁸

⁵² E/C.19/2005/3.

⁵³ E/C.19/2005/3.

⁵⁴ E/C.19/2005/3.

⁵⁵ Such as the Peruvian *sui generis* law to protect traditional knowledge

⁵⁶ Regulation for the Access to Genetic and Biochemical Resources and Elements of Biodiversity (Executive Decree No. 31514-MINAE).

⁵⁷ International Plant Genetic Resources Institute, Case Studies on Access and Benefit-sharing (2006), at 12 (emphasis added).

⁵⁸ International Plant Genetic Resources Institute, Case Studies on Access and Benefit-sharing (2006).

47. 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:*⁵⁹

(a) 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;

(b) 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;

(c) Must not interfere with existing forms of fair and equitable benefit-sharing, including customary benefit-sharing mechanisms;

(d) Must respect basic human rights;

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

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

(g) 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);

(h) Must not unnecessarily restrict access to non-rival goods and resources;

(i) 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 preceded by effective prior informed consent (PIC);

(j) Must, if contractual relations are involved, provide for identification of the origin of genetic resources and related knowledge;⁶⁰

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

D. Remaining Actions under tasks 7 and 12⁶¹

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

⁵⁹ “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

⁶⁰ “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.

⁶¹ 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.

48. Regarding traditional knowledge, sub-task (iii) of task 7, requests 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. In this regard, in advancing task 7(iii), it is essential to take note of the provisions of the Nagoya Protocol, in particular Article 16 entitled *Compliance with Domestic Legislation or Regulatory Requirements on Access and Benefit-sharing for Traditional Knowledge Associated with Genetic Resources* which provides that:

1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.
2. Each Party 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

49. With this in mind, it is recommended that consideration of guidelines under task 7 (iii), take into account the provisions of the Nagoya Protocol and build on advances made in priority tasks 10 and 12.

Definitions of relevant key terms and concepts in Article 8(j) and Related Provisions

50. 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 this it is necessary to consider the background of this issue. In decision VII/16 H, paragraph 4, the Conference of the Parties 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 Working Group on Article 8(j) and Related Provisions. In paragraph 10 of decision XI/14 E, the Conference of the Parties 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.⁶²

51. Document UNEP/CBD/WG8J/7/INF/1/Add.1⁶³ 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 knowledge", amongst other terms. Document UNEP/CBD/WG8J/7/3⁶⁴ 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.

⁶² Article 8(j) and Related Provisions (UNEP/CBD/COP/DEC/XI/14).

⁶³ 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).

⁶⁴ Elements of *Sui Generis* Systems for the Protection of Traditional Knowledge, Innovations and Practices (UNEP/CBD/WG8J/7/3, annex).

52. Additionally, some relevant definitions have already been developed in the context of other decisions and Convention processes. For example, section II of the Akwe: Kon Guidelines entitled “Use of Terms” sets forth definitions of “customary law” and “traditional knowledge,” among others.

53. 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 WIPO IGC, which has developed a Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge.⁶⁵ 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.

54. In considering terms and definitions, the Working Group should keep in mind the purpose behind definitions, which is consistency and clarity. Definitions should be within the mandate of the Convention and must be relevant to tasks 7, 10 and 12. They must be contingent, rather than absolute, and recognize the dynamic nature of the knowledge and customs of indigenous and local communities. Definitions may be different in different countries and context. In some cases, lists of common characteristics or working definitions may suffice. Ultimately, the definitions should uphold the rights of indigenous and local communities to 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 misappropriated. Ultimately 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 whether it might be better identified as a Glossary (within the context of article 8(j) and related provisions).

III. CONCLUSION

55. As noted above and as recognized in decision XI/14 C, several significant developments have occurred since the programme of work was first adopted that warrant a re-examination of tasks 7, 10 and 12. These include the adoption of the Nagoya Protocol, the Tkarihwaïé:ri Code of Ethical Conduct 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 Aichi Targets including Target 18 on traditional knowledge and customary sustainable use..

56. 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 Draft WIPO TK Documentation Toolkit,⁶⁶ the United Nations Permanent Forum on Indigenous Issues’ guidelines on prior informed consent, and UNESCO’s Chengdu Recommendations.

57. 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.”⁶⁷ 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

⁶⁵ WIPO Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge, 2011 (WIPO/GRTKF/IWG/2/INF/2).

⁶⁶ Refer <http://www.wipo.int/tk/en/resources/tkdocumentation.html>

⁶⁷ See Nagoya Protocol Article 7.

obtained for access to genetic resources where they have the established right to grant access to such resources”.

58. 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.

59. 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.

60. 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 Conference of the Parties..

61. 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.

IV. RECOMMENDATIONS

62. The following draft recommendations are prepared as a framework for Parties and offer a procedural way forward, which takes into account exiting and ongoing work and avoids overlap and duplication.

63. Parties are invited to use this framework, taking into consideration the Expert 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 (UNEP/CBD/WG8J/8/INF/5), as a basis of work to decide how best to take forward the bundle of work requested in tasks 7, 10 and 12.

64. The Ad Hoc Open-ended Working Group on Article 8(j) and Related provisions may wish to recommend that the Conference of the Parties adopt a decision along the following lines:

The Conference of the Parties,

Taking note of the Expert Study on how the implementation of tasks 7, 10 and 12 could best contribute to the work under the Convention and the Nagoya Protocol,

Noting the desirability for consistent terminology throughout the programme of work on Article 8(j) and related provisions, and within the Convention,

Recalling decision IX/13 C on considerations for guidelines for documenting traditional knowledge,

Also noting that at this time there is no centralized mechanism for indigenous and local communities to report unlawful appropriation, misappropriation or unauthorized access of their traditional knowledge,

1. *Decides* to implement tasks 7, 10 and 12 in an integrated manner through the development of Guidelines that will assist Parties and Governments in the development of legislation or other mechanisms, including national action plans, as appropriate, for an effective implementation of Article 8(j) and its related provisions, that recognize, safeguard and fully guarantee the rights of indigenous and local communities over their knowledge, innovations and practices, within the context of the Convention.

2. *Decides* to include the following sub-tasks in priority order:

Phase I

Priority work for tasks 7, 10 and 12.

The Working Group is to develop guidelines:

- (i) To ensure that private and public institutions interested in using such knowledge, practices and innovations obtain the prior informed consent of the relevant indigenous and local communities; and
- (ii) To ensure 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;
- (iii) To establish standards for the prevention and reporting of unlawful appropriation or unauthorized access of the knowledge, innovations and practices of indigenous and local communities.

Phase II

The Working Group may consider further work on the following sub-tasks, in light of advancements made in prioritizes (i), (ii), and (iii) above, including:

- (iv) Advancement of the identification of the obligations of countries of origin, as well as Parties and Governments where such knowledge, innovations and practices are used;
- (v) The development and adoption of a Glossary of relevant key terms and concepts to be used within the context of Article 8(j) and related provisions.

3. To ensure that advances made can contribute in a timely fashion to the effective implementation of the Convention, the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets, as well as the Nagoya Protocol, *decides* to address and adopt the guidance developed under each sub-task as a standalone but complementary element of the overarching task;

4. *Invites* Parties, Governments, relevant international organizations and indigenous and local communities to submit their views on the sub-tasks (i), (ii) and (iii) to the Secretariat;

5. *Requests* the Executive Secretary to compile and analyse these views taking into account relevant work in related international processes and to draft guidelines for sub-tasks (i), (ii) and (iii) and to make them available to the ninth meeting of the Working Group on Article 8(j) and Related Provisions for its consideration.