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LEGAL AND OTHER APPROPRIATE FORMS OF PROTECTION FOR THE KNOWLEDGE, INNOVATIONS AND PRACTICES OF INDIGENOUS AND LOCAL COMMUNITIES EMBODYING TRADITIONAL LIFESTYLES RELEVANT FOR THE CONSERVATION AND SUSTAINABLE USE OF BIOLOGICAL DIVERSITY

Note by the Executive Secretary

EXECUTIVE SUMMARY

The Executive Secretary has prepared the present note to assist the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity in preparing the advice on the application and development of legal and other forms of protection for the knowledge, innovations and practices of indigenous and local communities requested by the Conference of the Parties in paragraph 1 (a) of its decision IV/9. Existing legal forms of protection include conventional intellectual property rights (IPRs) regimes, sui generis systems, national access and benefit-sharing legislation embodying the prior informed consent principle, contractual agreements, and customary and common-law regimes. Currently, the main non-legally binding forms of protection of indigenous and local community knowledge, innovations and practices include voluntary guidelines and codes of conduct, and traditional resource rights. Incentive measures and capacity-building are required to ensure the success of any protective measures.

The note highlights gaps in the above legal and non-legal techniques and mechanisms with regard to the protection of knowledge, innovations and practices of indigenous and local communities. It points out, in particular, that while considerable effort is now focused on evaluating the potential of existing IPR regimes to provide protection for traditional biodiversity-related knowledge, there are indications that other forms of protection, such as sui generis systems, integrating the customary laws, values and world-view of indigenous and local communities are required to ensure respect and preservation of their knowledge, innovations and practices, and to encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. There are therefore indications that a combination of legal and non-legal forms, existing and novel techniques and mechanisms should be considered for the protection of the knowledge, innovations and practices of indigenous and local communities. In recognition of the fact that a number of intergovernmental organizations and agencies are addressing issues relating to the protection of the knowledge, innovations and practices of indigenous and local communities, the note further points out that there is a need to avoid unnecessary duplication of effort and to promote synergy and harmony among ongoing processes.

* UNEP/CBD/WG8J/1/1.

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SUGGESTED RECOMMENDATIONS

The Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity may wish to recommend that the Conference of the Parties:

1. Emphasizes further the need for case-studies requested in paragraphs 10 (b) and 15 of its decision IV/9, to enable a meaningful assessment of the effectiveness of existing legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities;

2. Requests the Executive Secretary to review activities relating to the knowledge, innovations and practices of indigenous and local communities being undertaken by United Nations organizations and agencies and other intergovernmental bodies with a view to identifying areas of complementarity and synergy and promoting coordination and mutual supportiveness of activities aiming at implementing Article 8(j) of the Convention;

3. Requests the Executive Secretary to establish, in consultation with other United Nations organizations and agencies, a task force to coordinate and harmonize all activities relating to the implementation of Article 8(j) and related provisions of the Convention;

4. Invites Parties and Governments to develop national legislation, including sui generis systems, for the protection of the knowledge, innovations and practices of indigenous and local communities incorporating the elements recommended by the Panel of Experts on Access and Benefit-sharing.

CONTENTS

I. INTRODUCTION

1. By paragraph 1 (a) of decision IV/9 of the Conference of the Parties, the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity was mandated "to provide advice as a priority on the application and development of legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity".

2. The Executive Secretary has prepared the present note, with inputs from a liaison group that met in Montreal on 25-26 November 1999, to provide the Working Group with background information regarding the status and trends of the application and development of legal and other appropriate forms of protection of the knowledge, innovations and practices of indigenous and local communities.* The note also draws on the report of the Panel of Experts on Access and Benefit-sharing (UNEP/CBD/COP/5/8), which met in San José, Costa Rica, in October 1999. Although the scope of the work of the Panel of Experts is different from that of the Ad Hoc Working Group, many of the principles regarding the equitable sharing of benefits among Parties to the Convention may be of relevance to the implementation of Article 8(j) at the national level.

3. In the present note, "traditional biodiversity-related knowledge" refers to the "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity". The traditional knowledge, innovations and practices referred to in Article 8(j) are generally communal in character and passed on from one generation to the next as part of a community's oral tradition. Within any one traditional community, in accordance with its customary law, there are usually rights and obligations regarding such knowledge, innovations and practices and protocols for their use.

4. The note first addresses legal forms of protection of traditional biodiversity-related knowledge; secondly, other appropriate forms of protection; and, finally, relevant ongoing work in United Nations organizations and agencies.

II. LEGAL FORMS OF PROTECTION FOR TRADITIONAL BIODIVERSITY-RELATED KNOWLEDGE

A. Intellectual-property-rights regimes

5. Conventional intellectual-property-rights (IPR) systems, which are based on concepts of individual ownership and private property rights, were designed essentially to act as an incentive for inventions and to facilitate technology transfer and access. These systems, which long pre-date the Convention on Biological Diversity, were not designed to anticipate or address the concerns it raises with regard to such matters as access to genetic resources, equitable benefit-sharing and the protection of the traditional biodiversity-related knowledge of indigenous and local communities.

6. The principal forms of intellectual property rights of relevance to the protection of traditional biodiversity-related knowledge in terms of fulfilling the relevant provisions of the Convention on Biological Diversity are: patents, plant breeders' rights (PBRs), copyrights, trademarks, geographic indications/appellations of origin, and trade secrets. Of these, patents, plant breeders' rights , copyrights

* For the purposes of the present note, the phrase "indigenous and local communities" is used throughout to mean "indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity".

and trade secrets are designed to encourage invention and may be considered as granting "true" intellectual property rights to holders, whereas trademarks and geographic indications assert economic rights. All of the above IPR forms are market-based mechanisms

7. Conventional IPR regimes have been deemed inadequate to protect indigenous knowledge essentially because they are based on the protection of individual property rights while the ownership of traditional knowledge is by and large collective in nature. While these regimes have been widely questioned regarding their ability to provide adequate protection for the communally-based knowledge of indigenous and local communities, there are, nevertheless, "windows of opportunity" presented by the main forms of intellectual property protection of most relevance to the work of the Convention on Biological Diversity and the protection of traditional biodiversity-related knowledge. For example, with regard to patent laws, while traditional biodiversity-related knowledge may be utilized by the biotechnology industry to select plants for laboratory analysis in a way which significantly reduces the cost of developing new commercial products, the knowledge itself may not be patentable, although it can prove to be a significant asset for others to obtain patents for inventions based on that knowledge. In these circumstances, traditional biodiversity-related knowledge can have significant economic value. In an attempt to provide some protection for the intellectual property rights of indigenous and local communities, some Governments have called for the disclosure in patent applications of the origin of genetic resources and the traditional knowledge used to develop a biotechnological or pharmaceutical invention.

8. As noted in the paper prepared for the third meeting of the Conference of the Parties on the relationships and synergies between the Convention on Biological Diversity and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) (UNEP/CBD/COP/23, para. 38 and annex I), a number of commentators have proposed the requirement or encouragement of "disclosure in patent applications of the country and community of origin for genetic resources and informal knowledge used to develop the invention". Some evidence suggests that such disclosures are already common practice in filing patent applications. The disclosure might also include the "certification of prior approval of the use by the source party or community". There have been proposals that the requirement of disclosure might be enforced by making it a condition of approval of an application, and providing for the revocation of a patent where a disclosure was shown to be fraudulent. In some instances, disclosure of the use of traditional biodiversity-related knowledge may provide grounds for not granting a patent. The patenting process normally requires the description of the invention and the background knowledge it was based on. Thus, where traditional biodiversity-related knowledge is used, this should be disclosed, irrespective of whether there is specific reference to traditional biodiversity-related knowledge in the relevant statute. Patent examiners could reject a patent application if it were found that previous knowledge in the area showed the invention was not novel. This practice would prevent others from profiting from the use of the knowledge, but would not necessarily lead to a benefit-sharing arrangement for the knowledge-holders. Another strategy suggested is that indigenous and local communities might form corporations that could then apply for and hold patents as legal entities in much the same way as corporations in developed countries do under the relevant national laws.

9. It has been suggested that Parties could also improve benefit-sharing by creating a positive link between their patent legislation and their legislation governing access to genetic resources. Specific suggestions were listed in the note by the Executive Secretary on knowledge, innovations and practices of indigenous and local communities: implementation of Article 8(j), prepared for the third meeting of the Conference of the Parties (UNEP/CBD/COP/3/19, para. 94)

10. With regard to the other forms of IPR protection most relevant to the Convention on Biological Diversity, some analysts have argued that trademarks, geographical indications and trade secrets can be used to protect communal rights. 1/

11. While there is much positive debate as to how conventional IPRs might provide protection with regard to traditional biodiversity-related knowledge, further case-studies are needed regarding their practical application. It would be useful to know of examples in which indigenous and local communities have taken advantage of, or attempted to use, these "windows of opportunity" to either protect their traditional biodiversity-related knowledge or to further their own interests in the commercial application and utilization of their traditional biodiversity-related knowledge.

12. The Panel of Experts on Access and Benefit-sharing considered intellectual property rights and traditional knowledge related to genetic resources (UNEP/CBD/COP/5/8, paras. 127-138). The Panel developed a list of issues requiring further study for consideration by the Conference of the Parties to facilitate progress in understanding the role of intellectual property rights regimes in the protection of traditional knowledge. In addition, the Panel felt a need to ensure that granting intellectual property rights does not preclude continued customary use of genetic resources and related knowledge (UNEP/CBD/COP/5/8, para. 131 (c)).

B. Sui generis legislative protection for traditional biodiversity-related knowledge

13. Indigenous and local communities have pointed to an urgent need for the development of guidelines for the establishment of legal frameworks that could form the basis of sui generis systems that recognize, safeguard and fully guarantee the protection of their traditional biodiversity-related knowledge and assist Parties to the Convention in their implementation of Article 8(j) and related provisions. However, questions arise about such a framework. Should it, for example, be confined to issues raised by the Convention, or should it be much broader in scope, but incorporating the need to accommodate the Convention? Concern has also been expressed that such a framework may prove inflexible in the face of the different needs and situations of indigenous and local communities around the world, and could dampen innovative attempts between such communities and Governments to arrive at their own solutions.

14. Models for sui generis protection of traditional biodiversity-related knowledge that have potential for application include, inter alia:

(a) The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, developed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO);

(b) The Principles and Guidelines for the Protection of the Heritage of Indigenous People, elaborated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1995/26);

1/ See D. Downes, "Using intellectual property as a tool to protect traditional knowledge: recommendations for next steps (discussion draft)" (Discussion paper prepared for the Workshop on Traditional Knowledge and Biological Diversity, held in Madrid in November 1997) (Centre for International Environmental Law (CIEL), Washington D.C., 1997), p. 4.

(c) The Third World Network's proposal for a Rights Regime for the Protection of Indigenous Rights and Biodiversity; 2/

(d) The Intellectual Integrity Framework of the Rural Advancement Foundation International (RAFI); 3/

(e) The Model Biodiversity Related Community Intellectual Rights Act of the Research Foundation for Science, Technology and Ecology; 4/ and

(f) The Draft Legislation on Community Rights and Access to Biological Resources, developed by the Organization of African Unity (OAU). 5/

15. The Panel of Experts on Access and Benefit-sharing noted the initiation of processes for development of sui generis legislation in countries that have adopted access legislation such as in the Andean Community. The Panel also included in its report, for illustrative purposes, some possible elements of sui generis legislation (UNEP/CBD/COP/5/8, annex VI).

16. It has been argued that any model for sui generis national legislation for the protection of traditional biodiversity-related knowledge should have as its basis indigenous and local community cosmovisions and customary laws, and entrench respect, preservation and maintenance of their knowledge, innovations and practices. 6/ It would also be expected that other national laws governing land tenure, natural resources, protected areas, environment protection and intellectual property would need to be amended, as appropriate, to accommodate such a sui generis system.

17. Past discussions on the matter suggest that it is essential that sui generis systems:

(a) Be not only consistent with but supportive of the provisions of the Convention on indigenous and local communities, and conservation and sustainable use of biodiversity;

(b) Be based on an integrated-rights approach guided by human-rights principles and concern for the environment;

(c) Have among their basic objectives:

(i) The encouragement of conservation and sustainable use of biodiversity;

(ii) The promotion of social justice and equity;

(iii) The effective protection of traditional biodiversity-related knowledge and resources against unauthorized collection, use, documentation and exploitation – in part this would require a provision on prior informed consent; and

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2/ G.S. Nijar, A Conceptual Framework and Essential Elements of a Rights Regime for the Protection of Indigenous Rights and Biodiversity (Third World Network, Penang, Malaysia, 1994).

3/ Rural Advancement Foundation International (RAFI), Conserving Indigenous Knowledge: Integrating Two Systems of Innovation (an independent study commissioned by the United Nations Development Programme (UNDP)) (RAFI, Ottawa, 1994).

4/ V. Shiva, A.H. Jafri, G. Bedi and R. Holla-Bhar, The Enclosure and Recovery of the Commons: Biodiversity, Indigenous Knowledge and Intellectual Property Rights (Research Foundation for Science, Technology and Ecology, New Delhi, 1997).

5/ Organization of African Unity/Scientific, Technical and Research Commission, "Draft Legislation on Community Rights and Access to Biological Resources" (Addis Ababa. 1998).

6/ Indigenous Peoples' Biodiversity Network, Indigenous Peoples' Perspectives on Intellectual Property Rights and Indigenous Peoples' Knowledge Systems: Reports from the Regional Meetings of Indigenous Peoples' Representatives on the Conservation and Protection of Indigenous Peoples' Knowledge Systems (Discussion Paper No. 1) (Cultural Survival Canada, Ottawa, 1996).

(iv) The recognition and reinforcement of customary laws and practices, and traditional resource- management systems that are effective in conserving biological diversity;

(d) Be developed in close collaboration with indigenous and local communities through a broad-based consultative process that reflects a country's cultural diversity. 7/

C. The principle of prior informed consent in national legislation

18. Article 15, paragraph 5, of the Convention on Biological Diversity requires that:

> "Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party".

The principle of prior informed consent (PIC) is also embedded 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".

19. The Panel of Experts on Access and Benefit-sharing reviewed the PIC concept and the procedures for its application in the context of access to genetic resources (UNEP/CBD/COP/5/8, paras. 156-161). The Panel concluded that the prior informed consent of indigenous and local communities depends on clear recognition and protection of their rights, knowledge, innovations and practices; and that for this reason the development of sui generis legislation may need to be considered.

20. However, PIC and sui generis regimes are relatively new, and formal reviews of their operation and efficacy are needed before a meaningful assessment of their value can be made. Favourable reviews may prompt other Parties to pursue similar legislative means for the protection of traditional biodiversity-related knowledge. In addition, while education and capacity-building are required for application of PIC by local and indigenous communities, it may be useful to establish adequate mechanisms for monitoring PIC and encourage international cooperation.

D. Other forms of legal protection – contractual agreements

21. In the absence or in addition to intellectual property rights protection for traditional biodiversity-related knowledge, protection of the rights and interests of indigenous and local communities may be secured through the application of other legal techniques and mechanisms. Such techniques and mechanisms , under the umbrella term "contractual agreements" encompass both legally binding and non-binding agreements, while the latter can involve letters of intent (LOI), memoranda of understanding (MOU) and covenants.

22. Legally binding contracts have become the standard modus operandi of a number of corporations that have been accessing biological resources within indigenous and local community territories and their traditional biodiversity-related knowledge for a decade or more. Many of these agreements are, however, not required or guided by legislation. They are established on mutual trust arising from a long and close contact between the communities and the researchers/collectors. 8/ Reliance upon such contractual methods to capture benefit for indigenous and local communities is widely thought of as the most practical approach to ensure equitable sharing of benefits referred to in Article 8(j) and to protect a community's

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7/ G. Dutfield, Can the TRIPs Agreement Protect Biological and Cultural Diversity? (Biopolicy International Series No. 19, ACTS Press, Nairobi, 1997).

8/ See UNEP/CBD/COP/3/19.

intellectual property rights. The contractual concept is considered attractive because most societies are familiar with it and because it is a relatively private bargain involving minimal governmental intervention.

23. The contractual approach, however, presents some limitations, such as the non-binding nature of contracts on third parties, the high transaction costs for the parties, the lack of resources to hire the best legal expertise, and the problems that arise in dealing with research and development institutions and corporations located outside the providing country. In addition, the unfamiliarity of indigenous and local communities with formal national legal systems, and the disparity in bargaining power, limit significantly the extent to which this approach can be used by indigenous and local communities to obtain protection and to capture the true value or benefit of the use of their traditional biodiversity-related knowledge. 8/

24. Agreements may require limited legal assistance and may be useful mechanisms for indigenous and local communities to ensure that any transfer of knowledge and resources is fairly compensated. Contractual agreements could provide for monetary and non-monetary benefits including for example: up-front payments, training, licences, technology transfer, royalties, and establishment of trust funds. Regional environmental agreements can create adequate frameworks to harmonize and standardize the types of contract while taking care of transboundary issues at the same time.

25. The Panel of Experts on Access and Benefit-sharing reviewed contractual agreements and mutually agreed terms for access to genetic resources and benefit-sharing (UNEP/CBD/COP/5/8, paras. 50-73). It identified a number of common aspects that could serve as a basis for the development of guidelines for such terms and arrangements. These aspects include the need for national focal points and/or competent national authorities; the issues of transaction costs and confidentiality; the role of non-end users; access to information; and capacity needs for negotiation. Elements of mutually agreed terms specific to the needs of indigenous and local communities could include, in particular:

(a) Terms governing access to indigenous and local community lands and territories (no-go areas with regard to sacred sites, ecologically sensitive areas, seasonal breeding grounds, etc.);

(b) Non-disclosure clauses to protect confidentiality of sources and information;

(c) Right to review research and authorize texts of research before release/publication;

(d) Right to receive copies of research in a form or format intelligible to the community (for example, audio/video tape rather than written format);

(e) Repatriation of information relevant to the research;

(f) Community ownership or joint ownership of copyright over any publications resulting from research;

(g) Joint patents between holders of traditional biodiversity-related knowledge and researchers/collectors.

26. Because of the range of rights and responsibilities affirmed by the Convention on Biological Diversity, Governments are likely to be increasingly involved in some way with any arrangements between indigenous and local communities and private-sector interests, particularly if the private-sector partners are from outside the country. A number of countries have, or are in the process of, formulating standard-form contracts underpinned by national legislation. Concerns that may arise over such arrangements include: whether national authorities have the administrative capacity to establish mechanisms that can ensure compliance, and the possibility that an overly expensive system would result in the benefits being consumed by the maintenance of the arrangements and not reaching communities. 9/

9/ See B. Tobin, Protecting Collective Property Rights in Peru: the Search for an Interim Solution (Asociacion para la Defensa de los Derechos Naturales (ADN), Lima, 1997).

27. Contractual agreements are often developed between a collector/researcher and an indigenous or local community (or communities). Experience suggests that a number of principles / elements, however, should guide such agreements and any other agreements in order to protect indigenous and local community collective traditional biodiversity-related knowledge. These elements include that:

(a) The collective nature of the knowledge, both within and among generations of indigenous and local communities, should be recognized;

(b) Control of the use of knowledge should remain firmly in the hands of the indigenous and local communities of origin, even where such information is found within the "public domain";

(c) The exercise of rights by any community, or group of communities, should not infringe the rights of other communities to use, dispose of, or otherwise control the use of, their resources;

(d) The creation of monopolistic rights over knowledge should be avoided, and the possibility of acquiring monopolistic rights over knowledge or the associated biological resources prevented;

(e) Equitable benefit-sharing within and among communities should be ensured;

(f) Assistance in the re-evaluation of traditional and biodiversity-related knowledge should be provided, its use promoted and adverse impacts on resources and cultures minimized; and

(g) A presumption should be established that use of resources over which there exists knowledge, in particular regarding medicinal plants, implies use of that knowledge. 9/

28. At all stages, there must be the widest consultations with the relevant indigenous and local communities, and any developmental, resource-use and conservation measures must be compatible with and build upon their cultures.

29. While agreements of this nature are often subject to confidentiality clauses, it would be useful to know, in circumstances in which the information is legally available, about the experiences of those who have been or are involved with contractual agreements. Such experience would be suitable subject matter for case-studies.

E. Accommodation of indigenous and local community customary-law systems within national legal systems

30. The issue of the recognition of customary law as a mechanism for the protection of traditional knowledge, innovation and practices is considered an important rights issue dealt with in many indigenous and local community declarations, statements and charters that they have generated as standard-setting documents, such as the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, the Julayinbul Statement, 10/ and the "Heart of the Peoples Declaration". 11/ The draft American Declaration of the Rights of the Indigenous Peoples, approved by the Inter-American Commission on Human Rights at its 95th regular session on 26 February 1997, provides, in its Article XVI, for the recognition of indigenous law. 12/ Likewise, Article 8 of the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries also provides impetus for the recognition of customary-law systems.

10/ The Julayinbul Statement on Indigenous Intellectual Property Rights and Declaration Reaffirming the Self-Determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area, Jingarrba/Daintree, Australia, 27 November 1993.

11/ Made at the North American Indigenous Peoples Summit on Biological Diversity and Biological Ethics, 7 August 1997, Gros Ventre and Assinboine Nations' Territories, Fort Belknap Reservation, Montana, United States of America.

12/ Document OEA/Ser/L/V/11.95. Doc. 6 (1997).

31. Therefore, in addition to attempting to use or modify existing IPR regimes as a means of regulating access to and control over knowledge, the international community might consider that traditional knowledge should be acquired and used in conformity with the customary laws of the indigenous and local communities concerned. 13/ However, there would be a need to accommodate customary-law systems, or at least those elements of them relevant to the Convention on Biological Diversity, within national statutory and common-law legal systems, in those countries where this is not already the case.

32. In order to deal with the issue of legal protection for traditional biodiversity-related knowledge, the following are among those matters which will need to be addressed: the area and nature of respective national and indigenous and local community jurisdictions regarding intellectual property; policing; rules of evidence and procedure (particularly where the disclosure of secret/sacred knowledge might be at issue); locus standi; the nature and composition of the judicial authority assigned to deal with customary intellectual property; the role of local community justice mechanisms; and the appropriateness, nature and enforcement of any penalties imposed for infringements against customary laws governing access to and use of traditional biodiversity-related knowledge.

33. While this will be a challenge for national Governments and indigenous and local communities alike, it is a worthy one that would not only honour commitments to indigenous and local community self-determination in the recognition and administration of customary law, but also assist in the protection of an important element of the world's cultural diversity, namely its legal systems.

34. There are now examples of attempts to accommodate indigenous and local community customary laws within the context of biodiversity conservation and management. For example, the Philippines Access Regime (Philippines Executive Order No. 247 (1995)) provides that prospecting for genetic resources shall be allowed "within the ancestral lands and domains of indigenous cultural communities only with the prior informed consent of such communities, obtained in accordance with the customary laws of the community concerned". However, further studies are needed on this issue.

F. Application of common-law principles

35. The common law, in those countries where it applies, may also provide a source of protection for traditional biodiversity-related knowledge. While there are a number of common-law principles that could be applied (such as those governing unconscionable behaviour and unjust enrichment), actions brought by indigenous and local communities for breach of confidentiality, passing off and unfair competition have brought relief in some countries. However, these actions, to date, have been in the domain of the arts. The application of such principles could be extended to the protection of traditional biodiversity-related knowledge in certain instances.

36. It may be argued that some elements of traditional biodiversity-related knowledge, such as the herbal remedies used by traditional healers for centuries, can be protected as confidential information. Such knowledge, under standard patent law, would be regarded as unpatentable since it lacks the requisite novel character for the granting of a patent.

37. The provisions of Article 10 bis of the Paris Convention for the Protection of Industrial Property which obliges parties to ensure that people are protected from unfair competition could also be relevant to indigenous and local communities seeking to control the imitation or unauthorized commercial sale of their products.

13/ See UNEP/CBD/COP/3/19 (referred to in note 8 on page 8 above), para. 79.

38. There is a need for case-studies which detail the success (or otherwise) of indigenous and local community attempts to use common-law remedies to protect their traditional biodiversity-related knowledge. Such studies may lead to the establishment of a database of case-law to which common-law countries can refer.

G. Other national non-IPR laws that can assist in the protection of traditional biodiversity-related knowledge

39. Most Parties have a range of legislation dealing with the conservation and sustainable use of their natural resources, usually on a sectoral basis. Thus, laws governing forests, fisheries, agriculture, as well as those specific to nature conservation and protected areas, all provide opportunities for the protection of traditional biodiversity-related knowledge. Provisions governing access to and use of natural resources frequently control such access and use through permit and licensing regimes permit/licence usually details conditions of access, purpose, duration, quantities of the resource to be removed, etc. If such resources exist on territories occupied or traditionally used by indigenous and local communities, then it is possible to provide for the permission of the affected community in the law and/or its regulations with respect to access to both specific genetic resources and any associated traditional biodiversity-related knowledge.

40. Provisions to protect traditional biodiversity-related knowledge in relevant circumstances could also be included as part of statutory plans, management partnerships and regional agreements where these involve the management of biological resources. In some countries, these arrangements arise out of treaty and constitutional obligations of the State towards indigenous and local communities over whom they exercise jurisdiction.

41. Similarly, some Parties with jurisdiction over indigenous and local communities have passed laws granting or securing tenure for such communities over their traditional territories, or parts of them. These laws may also provide for a level of community self-governance to the extent that they are able to enact local laws or by-laws. Such laws also frequently enable such communities to control access to their territories. Access is usually granted through a permit system by which indigenous and local communities are able to control activities by outsiders within their territories. Such activities may entail conditions regarding access to and use of genetic resources and traditional biodiversity-related knowledge.

42. Finally, national and subnational laws may also provide for a level of cultural heritage protection that recognizes the need to protect sacred sites or areas of particular significance to indigenous and local communities. Such sites may include, for example, sacred groves where particular medicinal plants are found, or the breeding site of an important (or totemic) species. These laws may restrict general access, and may contain provisions to protect any associated traditional knowledge subject to the approval and consent of the knowledge-holders.

43. Case-studies in this area could identify the range of relevant laws, the kinds of mechanisms which they provide and the extent to which they have been used, if at all, by indigenous and local communities to protect their traditional biodiversity-related knowledge.

III. OTHER APPROPRIATE FORMS OF PROTECTION FOR TRADITIONAL BIODIVERSITY-RELATED KNOWLEDGE

A. Guidelines, principles and codes of ethics/conduct

44. Indigenous and local communities have had to deal with issues related to research and the protection of their traditional knowledge long before the Convention on Biological Diversity. From the early 1980s, indigenous and local community groups established codes of conduct, ethical guidelines and principles of cultural ownership. While the concept of and issues related to the protection of intellectual

property rights generally were not explicitly mentioned, they were subsumed within the debate over the protection of secret/sacred knowledge and more broadly within the concept of the protection of cultural heritage. The principles and codes of ethics of indigenous and local communities generally assert ownership of cultural heritage and associated knowledge, rights to privacy, ground-rules for consultation and obtaining permission, and rules for the publication/disclosure of information (which usually include that any publication is subject to prior approval of those concerned). The enforcement of such codes may also depend, however, on the range of powers that indigenous and local communities can exercise under national and subnational laws, for example, in relation to ownership of lands and natural resources, right to control entry on to those lands, laws governing contracts, etc., or on how various institutions and corporations are willing to respect them.

45. Many institutions, likewise, responded by introducing codes/guidelines for conduct regarding working with indigenous and local communities and respecting their rights to privacy, the protection of their traditional knowledge and to fair dealings. More recently, international agencies and non-governmental organizations have also weighed in with their contributions, with the result that there now exists a considerable body of guidelines/codes/principles intended to guide researchers towards the right conduct in their dealings with indigenous and local communities or to further refine their conduct within the basic, but sometimes insufficient, parameters set by the law. Examples of these include the Manila Declaration Concerning the Ethical Utilization of Asian Biological Resources (which includes a Code of Ethics for Collectors); 14/ the Covenant on Intellectual, Cultural and Scientific Resources: a basic code of ethics and conduct for equitable partnerships between responsible corporations, scientists or institutions, and indigenous groups, developed by the Coalition for Bio-Cultural Diversity, Oxford University, United Kingdom; the "Professional Ethics in Economic Botany: Preliminary Draft Guidelines" of the Society for Economic Botany; 15/ the "Biodiversity Research Protocols" developed by the Pew Conservation Fellows; 16/ the "Guidelines for Equitable Partnerships in New Natural Products Development: Recommendations for a Code of Practice"; 17/ the "Code of Conduct and Standards of Practice" developed by the International Society of Ethnobiology; 18/ and the conclusions of the Workshop on Drug Development, Biological Diversity and Economic Growth organized in 1991 by the National Cancer Institute of the United States National Institutes of Health. Matters dealt with under these and other such codes/guidelines include: the role and procedures of national licensing authorities, applications for and granting of licences, collecting responsibilities and procedures during and after collection, responsibilities of sponsoring organizations, respecting and assigning intellectual property rights, reporting requirements for collectors and sponsoring organizations, and national and international monitoring of the codes of practice.

46. However, in spite of the good intentions behind such codes of ethics, they are not immune from breach. The effectiveness of institutional codes of ethics/conduct will depend partly on how willing the administering bodies are to investigate alleged infringements and take action against guilty members. In addition, while many bodies, such as universities, public research institutions and large corporations, may have ethical codes, there are also many individual researchers/collectors and small companies - perhaps acting under contractual arrangements with larger bodies - who are not members of professional bodies and

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14/ Adopted at the Seventh Asian Symposium on Medicinal Plants, Spices, and other Natural Products (ASOMPS VII), held in Manila in February 1992.

15/ Prepared in 1996 by C. Padoch and B.M. Boom, Co-Chairs, Society for Economic Botany, Ethics Committee, New York Botanical Garden, Bronx, New York City.

16/ Developed by the Biodiversity and Ethics Working Group of Pew Conservation Fellows, Department of Geography, University of California and Environmental Energy Technologies Division, Ernest Orlando Lawrence Berkeley National Laboratory, Berkeley, California (1997).

17/ A.B. Cunningham, Ethics, Ethnobiological Research and Biodiversity (WWF International, Gland, Switzerland, 1993).

18/ Sixth International Congress of Ethnobiology, Aotearoa, New Zealand, 1998.

neither have nor subscribe to such codes. In such cases, codes of ethics are largely irrelevant, unless such researchers/collectors are required either by contract or statute to adhere to an appropriate code before they can carry out their activities.

47. A number of international agencies such as the World Bank (operational directive 4.20, on indigenous peoples), the Inter-American Development Bank, the Asian Development Bank and the United Nations Environment Programme (UNEP), and non-governmental organizations, such as the World Wide Fund for Nature (WWF), have drawn up or are in the process of drawing up strategies and guidelines with regard to assisting and supporting indigenous and local community-driven development projects. While these strategies and guidelines are not specifically directed at the legal protection of traditional biodiversity-related knowledge, they nevertheless pay deference to the role of such knowledge in community maintenance and development, and the need to protect it.

B. Traditional resource rights

48. The term "traditional resource rights" can be defined as "a rights concept that seeks to integrate an array of existing universally recognized human rights (such as the right to development, the right of self-determination) with implied environmental rights (such as the right to an ecologically sustainable environment), and the emerging rights of indigenous peoples as expressed in the draft United Nations Declaration on the Rights of Indigenous Peoples into a "bundle of overlapping and synergistic rights". 19/

49. Part of the rationale for this new conceptual approach lies in the inappropriate application of the term "property" to the traditional resources of indigenous and local communities. The concept of ownership and the ability to transfer ownership, which are fundamental to common-law notions of property, are "not only foreign but incomprehensible or even unthinkable" to many such communities. 19/

50. The concept of traditional resource rights has emerged as a unifying concept that more accurately reflects the views and concerns of indigenous and local communities and yet is entirely compatible with the requirements of the Convention on Biological Diversity, the International Undertaking on Plant Genetic Resources and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. Consequently, an integrated rights approach allows States not only to implement their international obligations on trade, environment and development, but also to put into effect commitments on human rights that they have agreed to undertake by signing human rights treaties. Traditional resource rights is therefore more than a system: it is a framework of principles that can serve as a foundation for the diverse and flexible systems that indigenous and local communities are seeking, and which is capable of generating a whole range of alternative (sui generis) systems. 20/ Traditional resource rights can also be considered more as a process than a product. The concept can grow as additional rights accrue and are adapted through the development of national and international legislation. Despite the considerable number of instruments referred to, however, traditional resource rights cannot be considered self-executing rights and therefore require implementation by national law-making bodies. In this respect, traditional resource rights may also be used to provide framework of criteria for the evaluation of existing or planned laws intended to provide protection for traditional biodiversity-related knowledge and associated rights.

51. While recognition of a bundle of rights seeks to ensure the most comprehensive respect for, and protection of, indigenous and local community interests, it does not presume to provide the format for a system of protection but rather to identify existing regimes each of which, when treated collectively, provide for recognition of and protection for indigenous and local community rights.

19/ D.A. Posey and G. Dutfield, Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities (International Development Research Centre, Ottawa, 1996).

20/ See UNEP/CBD/COP/3/19, paras. 90 and 91.

C. Incentive measures

52. Appropriately targeted incentive measures formulated in conjunction with the indigenous and local communities concerned may also provide an effective avenue by which traditional biodiversity-related knowledge could be protected. The key to the success of such measures is, however, the need to communicate in unambiguous terms that the traditional biodiversity-related knowledge of indigenous and local communities is valued for its own sake and must be preserved and protected for the benefit of the present and future generations of the community of origin as well as for the benefit of all humanity. In this regard a range of measures might be considered: security of tenure over land and natural resources as well as co-management of natural resources and effective legislative protection for traditional biodiversity-related knowledge might be considered as core incentive measures, to which might be added a range of monetary and non-monetary measures especially tailored to meet specific circumstances. Such incentive measures might apply to particularly knowledgeable or skilled individuals, or potential apprentices, or to the conservation of a particular culturally relevant species or habitat. In other instances, it might involve a range of capacity-building measures involving provision of community infrastructure, resources and training.

53. While the implementation of legislative measures that might act as incentives to respect, maintain and preserve traditional biodiversity-related knowledge is the responsibility of Governments, many other incentive measures may be provided by, for example, private research and collecting bodies through contractual obligations based on mutually agreed terms and which specify equitable benefit-sharing arrangements. 21/

54. In addition, efforts should be made to identify perverse incentives and mitigate or remove their negative effects on the use and preservation of traditional biodiversity-related knowledge. The Conference of the Parties will consider this issue at its fifth meeting in the wider context of conservation of biological diversity, sustainable use of its components and benefit-sharing. 22/

D. Capacity-building measures

55. The strengthening and further development of capacities within the indigenous and local communities are required for the implementation of Article 8(j) and related provisions of the Convention, in particular for the implementation of the programme of the work on Article 8(j) (described in document UNEP/CBD/WG8J/1/4). The needs include essentially:

(a) Capacities for making use of genetic resources, including through the establishment and strengthening of indigenous universities (see also decision IV/10 B, on public education and awareness);

(b) Expertise in a range of scientific and technological fields, including, inter alia, in communication technology;

(c) For the acquisition, management, modification and development of technologies 23/ and for drafting legislation and developing sui generis systems for the protection of traditional knowledge; 24/ and

(d) Expertise and skills for negotiating access and benefit-sharing and other agreements.

21/ See also the report of the first meeting of the Panel of Experts on Access and Beneit-sharing (UNEP/CBD/COP/5/8) and decision IV/10 A of the Conference of the Parties to the Convention on Biological Diversity.

22/ See the note by the Executive Secretary on further analysis and design of incentive measures prepared for the fifth meeting of the Conference of the Parties to the Convention (UNEP/CBD/COP/5/15).

23/ Information on the role of the clearing-house mechanism is contained in the note by the Executive Secretary on the pilot phase of the clearing-house mechanism prepared for the fifth meeting of SBSTTA (UNEP/CBD/SBSTTA/5/3).

24/ See also paragraphs 170-173 of the report of the first meeting of the Panel of Experts on Access and Benefit-sharing (UNEP/CBD/COP/5/8).

IV. RELEVANT WORK BEING CARRIED OUT BY OTHER UNITED NATIONS ORGANIZATIONS AND AGENCIES WITH REGARD TO THE PROTECTION OF TRADITIONAL BIODIVERSITY-RELATED KNOWLEDGE

56. Activities relating to indigenous and local communities of United Nations organizations and agencies, including the United Nations Commission on Human Rights, the Commission on Sustainable Development, the International Tropical Timber Organization (ITTO), the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), the International Labour Organization (ILO), the World Intellectual Property Organization (WIPO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Bank, the Inter-American Development Bank (IDB), the African Development Bank, the Asian Development Bank and the European Bank for Reconstruction and Development, were briefly reviewed in paragraphs 114-152 of the background document prepared for the Workshop on Traditional Knowledge and Biological Diversity, held in Madrid in November 1997 (UNEP/CBD/TKBD/1/2). That review highlights, inter alia, opportunities for cooperation and synergy with the processes under the Convention on Biological Diversity. Additional information on the role of United Nations organizations and agencies is provided below, without any pretension to covering them all and all their relevant activities.

A. Food and Agriculture Organization of the United Nations

57. The FAO Commission on Genetic Resources for Food and Agriculture is concluding its negotiations on the revision of the International Undertaking on Plant Genetic Resources for Food and Agriculture and its final submission is to be presented to the Conference of the Parties to the Convention on Biological Diversity at its fifth meeting. The International Undertaking is currently being revised through negotiations between countries in the FAO Commission in order to harmonize it with the Convention, and for consideration of the issues of access to plant genetic resources for food and agriculture and the realization of farmers' rights. The farmers referred to with regard to the International Undertaking are those predominantly belonging to indigenous and local communities and practising traditional forms of agriculture as distinct from the industrialized systems of agriculture predominantly found in developed countries.

B. United Nations Educational, Scientific and Cultural Organization

58. In 1992, the World Commission on Culture and Development (WCCD) was established by UNESCO and entrusted with preparing the first action-oriented world report focusing on the ties between culture and development. At the conclusion of its three-year work, the WCCD presented its report, Our Creative Diversity, with the main objective to shape future national cultural and development strategies.

59. The UNESCO Intergovernmental Conference on Cultural Policies for Development was held in Stockholm from 30 March to 2 April 1998 to specifically discuss the WCCD report. A key objective of the Conference was to formulate recommendations, through the adoption of an action plan on cultural policies for development, to guide future policy-making decisions regarding cultural and development issues. A draft Action Plan on Cultural Policies for Development, prepared beforehand, was the main conference document under discussion and was adopted by the Conference as the Stockholm Action Plan.

C. World Intellectual Property Organization

60. The Conference of the Parties, in the ninth preambular paragraph to decision IV/9, recognized "the importance of making intellectual property-related provisions of Article 8(j) and related provisions of the Convention on Biological Diversity and provisions of international agreements relating to intellectual property mutually supportive, and the desirability of undertaking further cooperation and consultation with the World Intellectual Property Organization." In 1998, WIPO initiated fact-finding missions to "identify

and explore the intellectual property needs, rights and expectations of holders of traditional knowledge in order to promote the contribution of the intellectual property system to their social, cultural and economic development". The expected outputs of the fact-finding missions will include the identification of the needs of the holders of traditional knowledge for intellectual property protection; the provision of input to other main programmes of WIPO, enabling them to expand their activities related to traditional knowledge; and informed and enhanced international cooperation to promote the protection of intellectual property in relation to such groups.

D. World Trade Organization

61. In paragraph 9 of decision IV/15, the Conference of the Parties stressed the need to "ensure consistency in implementing the Convention on Biological Diversity and the World Trade Organization agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights, with a view to promoting increased mutual supportiveness and integration of biological diversity concerns and the protection of intellectual property rights". The Conference of the Parties invited "the World Trade Organization to consider how to achieve these objectives in the light of Article 16, paragraph 5, of the Convention, taking into account the planned review of Article 27, paragraph 3 (b), of the Agreement on Trade-Related Aspects of Intellectual Property Rights in 1999". 25/ While a review of Article 27, paragraph 3 (b), of the TRIPs Agreement took place in 1999, it may be noted that a review of the full Agreement is scheduled to take place in 2000.

62. In essence, Article 27, paragraph 3 (b), of the TRIPs Agreement defines the legal framework for the ownership of life, and is therefore of critical importance to the interests of indigenous and local communities. Its current wording gives indigenous and local communities a certain flexibility to negotiate with their Governments to provide for the protection of their plant resources through the implementation of sui generis legislation that is compatible with their cultural and traditional practices. This could also protect the diverse knowledge systems in relation to plant and other genetic resources.

63. In consideration of the high level of multi-agency activity seeking ways and means for the protection of traditional knowledge, a strong case remains for preserving the status quo with regard to Article 27, paragraph 3 (b), until consensus emerges on the best ways to harmonize policy, legislative and institutional mechanisms for the protection of traditional biodiversity-related knowledge at the international level and which takes into account the aspirations of indigenous and local communities with regard to such protection.

E. World Bank

64. During February and March 1999, the World Bank hosted discussions on the issue of knowledge and development. One of its forums was devoted to indigenous knowledge and IPR issues. It was noted that indigenous knowledge is an important, yet under-utilized resource in the development process. While numerous indigenous knowledge practices have evolved, especially in agriculture, health, environment, customary law and social institutions in various cultures and environments, there is a risk that, due to the advance and rapid dissemination of Western scientific knowledge, indigenous knowledge could be swamped or ignored. Concern was also expressed about a tendency of pharmaceutical and agro-industrial

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25/ Article 27, paragraph 3 (b), of the TRIPs Agreement states that:

"Members may also exclude from patentability:

(a) (…)

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

multinational corporations to appropriate indigenous knowledge, build upon it, and patent it without compensating the original owners of that knowledge. There is also concern that the trend towards strengthening IPRs could hurt developing countries and the indigenous and local communities within their jurisdictions. This applies not only to agreements that have already been reached but also to future issues that are constantly being brought forward as science and technology open up new issues in areas such as bio-engineering and software development that are still not fully covered by existing agreements and that can have secondary impacts. Thus, there is a need to find ways that will counterbalance some of these trends towards greater privatization of knowledge that can negatively affect poorer developing countries and small island developing States and their indigenous and local communities.
