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DRAFT OUTLINE OF AN INTELLECTUAL PROPERTY MANAGEMENT TOOLKIT
FOR DOCUMENTATION OF TRADITIONAL KNOWLEDGE

Document prepared by the Secretariat

I. OVERVIEW

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee") has decided to establish a toolkit to provide practical information on the intellectual property (IP) aspects of documentation of traditional knowledge (TK). This paper discusses the background to this decision, and the needs the toolkit is intended to meet. It provides a draft outline as the basis for development of the toolkit, and describes the extensive consultations already undertaken on this draft. Further input is sought on the draft and on the proposed elements of the toolkit, so that a pilot version of the toolkit can be developed, consulted upon and reviewed in advance of the fifth session of the Committee.

II. BACKGROUND

2. As traditional communities evolve under increasing external pressures and influences, and the customary frameworks for preserving and transmitting their TK come under strain, there is a potential role for alternative, often more formal, methods of recording and preserving TK. Documentation of TK and associated biological or genetic resources is potentially useful for a range of reasons, in the interests of both TK holders, and the broader public interest. Past documentation activities have focussed on preservation and dissemination of the TK and associated resources, while more recently there has been increasing focus on the IP aspects of documentation.

3. Sometimes the aims of documentation have been seen to contradict with the interests of the holders of TK and associated resources, including cultural interests and more specific IP related interests. There are concerns, for example, that documentation of TK could lead to misappropriation of TK and associated resources, and use of it in ways that were not anticipated and were not intended by the TK holders when they contributed their knowledge to the documentation project. This may, in turn, lead to cultural erosion and loss of cultural identity.

4. Equally, there are concerns that in the course of documentation, TK holders may be placing their knowledge into the public domain, without being informed about the consequences of this step, such as the loss of confidentiality and of other rights (for instance, the destruction of novelty, in cases when TK might otherwise be patentable). TK holders may not be aware that when they are disclosing TK, the person recording the TK may be acquiring certain, potentially valuable IP rights (such as copyright in written accounts derived from their oral disclosures). On the other hand, some communities or groups of TK holders view documentation in a positive light and have considered and effectively dealt with its potential negative impact. The process of documentation may actually help create or better define rights, whether these are rights to restrain unauthorized or inappropriate use of TK by third parties, or rights of TK holders themselves to derive commercial or economic benefit from the TK and associated resources.

5. Documentation of TK and associated resources therefore has potential benefits for TK holders, which is why a number of communities have initiated successful documentation projects. On the other hand, ill-considered documentation projects may damage TK holders' interests, including cultural, economic and IP interests. One important need is therefore to clarify the point that documentation can have different purposes, and that the approach taken to documentation will depend on the communities' own objectives.

6. For instance, it is vital not to overlook the distinction between documentation and entry of TK into the public domain. TK may be documented but remain firmly withheld from the public domain; on the other hand, it may be necessary to document TK that is already categorically in the public domain, but is in danger of dissipating (due to the erosion of traditional knowledge systems) or needs to be further documented for a specific purpose (such as a patent examination). Information may enter the public domain, and yet remain subject to restrictions on its use; this is, for instance, the function of a patent document, which projects technological knowledge into the public domain for universal access and information, while providing for specific rights on the practical implementation of the knowledge thus disclosed. A patent therefore serves as one kind of public documentation of knowledge. While one

focus in the documentation of TK has been the defensive goal of preventing third-party patents claiming TK or associated biological/genetic resources (in other words, as a defense against adverse patenting), technological solutions developed within TK systems may equally themselves form the subject of patents, to the benefit of the innovators and their communities. This dual function of the patents system – to document innovative TK, and to provide for IP rights on the TK – is illustrated by the patents on traditional medicine inventions which can be viewed on the Traditional Chinese Medicine Patents Database.¹

7. Accordingly, some communities have documented TK with the intention of keeping it secret, so that they can be confident it will be preserved for future generations, but retained only for access by certain approved parties, such as tribal elders, community members or initiates. The principle of ‘prior informed consent,’ most often discussed in the context of access to genetic resources,² may therefore be important in the documentation of knowledge disclosed by traditional communities. The point of access to the TK and associated genetic resources is pivotal in determining whether documentation is beneficial or injurious. For it is at this stage that the TK holders have the greatest say in the way their TK will be used. They can choose to entirely withhold the TK knowledge and the resources which it utilizes and creates, or to determine the precise conditions of its disclosure, including the decision to disclose it in confidence or subject to an agreement on how benefits ensuing from the disclosure would be shared.³ Since much hinges on the decisions made by the TK holders at this point, the need has been identified for enhanced awareness of the various options and understanding of their consequences right from the start of any documentation process.

III. TRADITIONAL KNOWLEDGE HOLDERS’ NEEDS AND EXPECTATIONS

8. The need for practical information and technical assistance on IP management when documenting TK and associated biological or genetic resources was expressed by many communities taking part in the WIPO Fact-finding Mission on Intellectual Property and Traditional Knowledge in 1998-1999. The WIPO Report on the Fact-finding Missions summarizes the need expressed as follows:

“Legal and technical assistance with documentation projects was requested many times. From an IP perspective, a need was perceived by WIPO for advice and information on the IP aspects and implications of documentation. More particularly, there is a need for information and training on considering IPR implications before

¹ This can be accessed through the “WIPO Portal of Online Database” at: <http://www.wipo.int/globalissues/databases>

² Partly due to its incorporation in the Convention of Biological Diversity (CBD), which, in Article 15.5, stipulates that ‘access to genetic resources shall be subject to the prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.’”

³ Such a choice is recognized in the recently passed Peruvian Law of Protection of the Collective Knowledge of Indigenous Peoples (2002). This law was developed to protect the collective knowledge of indigenous peoples relating to the properties of biological resources, and provides for, *inter alia*, the establishment of three types of registers to document collective knowledge: the National Public Register, the National Confidential Register and the Local Register. One of the main purposes of the National Public Register would be to prevent the patenting of TK that is already in the public domain. The other two registers would not be publicly available.

documenting, managing the process of documentation from an IP perspective, securing and managing IPRs after documentation, and the standardization of TK documentation.”⁴

9. In view of the need expressed for such technical information and training, and in the context of its ongoing program of work on traditional knowledge, the Committee considered at its third session, held from June 13 to 21, 2002, the possible activity of developing a ‘toolkit’ to provide practical information on intellectual property and the documentation of traditional knowledge and associated genetic or biological resources. Document WIPO/GRTKF/IC/3/5 (Inventory of Traditional Knowledge -related Periodicals), presented the following option for the development of such a toolkit for consideration by the Committee:

“One very practical contribution that the Committee could make would be to consider ... in more detail ... the intellectual property implications arising out of the recording of traditional knowledge. For instance, the Committee could consider the compilation and publication of an “Intellectual Property Documentation Toolkit for Traditional Knowledge Holders.” Not only could this Toolkit inform and educate traditional knowledge holders and their representatives of the intellectual property implications of publication of traditional knowledge, and thereby enable any consent to such publication and dissemination to be ‘informed consent,’ but the Toolkit could also place a particular, and very pertinent, emphasis on the intellectual property implications of recording traditional knowledge (whether in a written format, by audio -tape or by video-tape) by traditional knowledge holder themselves.”⁵

10. The proposal to develop a toolkit found strong support among Committee participants⁶ and the Committee decided to adopt this activity, as set out in the above -mentioned document. The Chairman summarized the discussions on the toolkit elements contained in document WIPO/GRTKF/IC/3/6 as follows:

“The proposal for a Toolkit, as set in paragraph 100, had found support, but the Committee had clearly expressed its view that such Toolkit must be operative and functional, and should take account of the needs of the target groups.”⁷

11. Committee participants suggested that the toolkit should be written in simple language, which is accessible to all stakeholders and that it should be prepared in close cooperation with representatives of indigenous and local communities, and other relevant organizations, such as the Secretariat of the Convention on Biological Diversity (SCBD).⁸ In summary, the Chairman recalled that, “a number of Delegations had made specific observations including the following: the proposed Toolkit should be simple, balanced and developed with an advisory body.”⁹ It was also agreed that a draft outline of the toolkit should be presented to

⁴ See *WIPO Report on Fact -finding Missions on Intellectual Property and Traditional Knowledge*. Geneva: WIPO, 2001: p.227.

⁵ See document WIPO/GRTKF/IC/3/5, paragraph 19.

⁶ See statements in support of developing the toolkit, contained in paragraphs 99 to 106, and comments in paragraphs 106 to 110 of document WIPO/GRTKF/IC/3/17.

⁷ See document WIPO/GRTKF/IC/3/17, paragraph 130.

⁸ See document WIPO/GRTKF/IC/3/17, paragraphs 106 to 110.

⁹ See document WIPO/GRTKF/IC/3/17, paragraph 130

the Committee at its fourth session for review and comments, before the full text of the toolkit would be developed.

IV. DEVELOPMENT OF THE DRAFT OUTLINE FOR THE TOOLKIT

12. Pursuant to the decisions of the Committee and based on the substantive guidance provided by Committee participants, the Secretariat prepared a draft outline for the toolkit. This draft outline was circulated widely to a wider range of stakeholders and experts for their comments, additions and improvements.

13. In particular the draft outline was sent for comments to all indigenous Committee participants,¹⁰ and provided to the group of experts who had presented databases of documented traditional knowledge and associated biological or genetic resources at the third session of the Committee, namely experts from the Tulalip Tribes, China, India and Venezuela.¹¹ The document was further discussed and developed during several advisory missions which WIPO undertook in the inter-sessional period to three Member States who had requested technical assistance on IP and the documentation of TK associated with biological or genetic resources. These missions visited Pakistan, Thailand and Zimbabwe, where detailed discussions were held to tailor the toolkit to the practical needs arising in these countries, and the specific communities concerned. The draft toolkit outline was also presented to a global Scoping Meeting on Capacity Building Approaches for Access to Genetic Resources and Benefit-sharing, which was convened in Kuala Lumpur, Malaysia, from October 7 to 9, 2002, by the United Nations Environment Programme (UNEP) and the United Nations University (UNU).

14. Following an expression of interest at the third session of the Committee by Peru in contributing to the development of the toolkit, the draft outline was provided to Peru for comments and the comments received were incorporated in the revised draft outline. The draft outline was also provided to existing documentation institutions and initiatives, such as the Society for Research Into Sustainable Technologies and Institutions (SRISTI) and the International Centre for Insect Physiology and Ecology (ICIPE). Finally, the draft outline was sent for comments to the Secretariats of other relevant intergovernmental organizations, such as the SCBD, the Commission on Genetic Resources for Food and Agriculture (CGRFA) of the Food and Agriculture Organization of the United Nations (FAO), and the International Plant Genetic Resources Institute (IPGRI) of the Consultative Group on International Agricultural Research (CGIAR).

V. NEXT STEPS

15. A considerable number of comments and suggestions were received from this wide range of stakeholders. All comments have been incorporated or taken into account in the revised draft outline of the toolkit, which is annexed to the present document. The revised draft outline is also available on the Internet at the WIPO website for further comments by all stakeholders: see <http://www.wipo.int/globalissues>.

¹⁰ See the list of participants annexed to reports of the Committee, documents WIPO/GRTKF/IC/3/17, WIPO/GRTKF/IC/2/16 and WIPO/GRTKF/IC/1/13.

¹¹ See document WIPO/GRTKF/IC/3/17, paragraphs 158 to 162.

16. Arrange of further consultations on the draft toolkit, including regional workshops, is planned for the period prior to the fourth session of the Committee. Comments received before the fourth session of the Committee will be taken into account in the pilot version of the toolkit, which will be developed after the fourth session of the Committee.

17. In view of the need for extensive consultation expressed by the Committee at its third session, it is proposed that the development of the toolkit be undertaken in close involvement with delegations and observers participating in the work of the Committee, with particular involvement of indigenous representatives and experts with experience in documentation of TK and associated biological or genetic resources. Each consultation or seminar undertaken by WIPO which deals with IP, TK and related issues would involve direct consideration of the draft toolkit materials, such as the seminars for the Nordic and the Asia-Pacific regions held in November 2002. Successive draft materials will also be posted on the WIPO website for comments, and for further input from stakeholders.

18. The Intergovernmental Committee is invited to note and comment upon the content of this document and the annexed draft outline as the basis for development of a pilot version of the Intellectual Property Management Toolkit for Traditional Knowledge Documentation, and the proposed consultation processes for the further development of this material.

[Annex follows]

ANNEX

DRAFT OUTLINE

FOR COMMENT AND DISCUSSION

IP MANAGEMENT TOOLKIT FOR
TRADITIONAL KNOWLEDGE DOCUMENTATION

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1. INTRODUCTION

Key messages

The toolkit would open with some key messages:

- Documentation does not ensure legal protection for traditional knowledge (TK), and in fact it can inadvertently prejudice or destroy important rights and options;
- Documentation need not be the same as putting TK in the public domain, and documented TK can still be kept confidential or restricted; and
- There is no single way to approach documentation of TK, and there are many ways of defining and protecting IP-related interests; a community should carefully consider all its options and consult widely before undertaking a documentation program.

The introduction would stress that the toolkit is not intended to promote documentation of TK as an end in itself, but to provide an overview of the kind of issues that need to be considered when a community is planning a documentation project on its own initiative.

Opening narrative

These key messages would be illustrated through case studies, chosen to highlight the intellectual property (IP) implications that might follow from the documentation of traditional knowledge (TK) and associated biological and genetic resources. This would demonstrate in a concrete way how these implications can be managed, and would highlight:

- The different forms of TK documentation, and their potential uses;
- The potential negative consequences of TK documentation, and how to avoid them;
- The range of possible ways of interacting with the IP system, for positive and defensive protection;
- The practicalities of documentation, the paramount role of the community and the need for consultation and awareness;
- The limitations on documentation, and what it cannot achieve; and
- The need to clarify what purpose any particular documentation project aims to achieve.

A note on language and structure

While the present outline is written in relatively technical language, the actual draft toolkit would be written in neutral, more general language, more suitable for a diverse and general readership. It may be necessary in future to translate the toolkit into national and community languages, to make it more accessible to user groups, but it is suggested that the overall structure, approach and contents should be developed first. This outline seeks to provide a survey of all the material that would be included in the toolkit, to ensure that it is comprehensive and inclusive. It is recognized that in actual use it would not be appropriate to give a detailed account. Hence, when the toolkit is developed for the actual user, the suggested material would not be presented in detail in the same order – it would be set out in a more layered and approachable format, with a general overview being backed up with more technical details for access when they are needed, and suggestions for how to access further information and legal and technical advice.

What is documentation?

The introduction would clarify what is actually meant by ‘documentation’ (i.e. it may involve capturing intangible knowledge, or recording and preserving on new media, material that has already been documented in traditional ways), and would clarify that documentation need not be same as placing information in the public domain. It would discuss the difference between TK as such, and the particular mechanisms used to protect and document it; in other words, showing how knowledge itself, and the tools for documenting and protecting the knowledge, are distinct.

Defining traditional knowledge

The toolkit would briefly describe approaches to defining or describing ‘traditional knowledge,’ through a range of examples and case studies. It would illustrate how this general term can accommodate the understanding of TK holders as to what constitutes their traditional knowledge, as well as the role of any customary laws. The relationship between traditional knowledge and genetic or biological resources would also be discussed, and the implications of dealing with genetic and biological resources that are associated with TK. Discussion of TK throughout the toolkit would include reference to associated genetic and biological resources.

Setting IP in context

This section would explain that IP mechanisms are one set of tools, but that there are other alternative or complementary mechanisms by which TK can be preserved, such as the continued application of customary law, technical measures such as data security, and non *suigeneris* forms of protection, where these have been implemented.

Applying the toolkit in practice

This section would discuss the practical context in which the toolkit is used, including:

- The need for consultation as an integral part of planning a documentation exercise;
- The need to clarify community needs and expectations, and to ensure that decisions are made with full awareness of their consequences;
- The need to localize and customize the general advice and information given in the toolkit; and
- Ways of taking account of cultural differences and concerns in preparing for and undertaking documentation.

The role of various users of the toolkit would be discussed, including through special chapters directed at the respective stakeholders, their specific needs and roles, including:

- TK holders, indigenous and local communities and their representatives;
- Legal or policy advisors of TK holders;
- Research and educational institutes;
- Private sector partners; and
- Government and public sector agencies.

References to codes of conduct, ethical guidelines and documentation policies would supplement this section, to illustrate the general principles that have been developed and applied in the course of documentation projects.

1.1 Objectives

This section would specify what the toolkit is intended to achieve. It aims to enable TK holders to assess their IP options, and plan for and implement informed IP policy choices when documenting TK, and associated biological/genetic resources. The toolkit will consider the following three phases of documentation, and will be structured according to each phase, so as to illustrate more clearly the diverse IP issues that arise at each stage of documentation:

- *Before* documentation, creating awareness and setting objectives;
- *During* the documentation process, practical management of IP issues; and
- *After* documentation, options for the acquisition, exercise and enforcement of IP rights, and other protection mechanisms.

While the principal objective focuses on the needs and interests of TK holders, the toolkit would also be addressed to a wide range of stakeholders, with the aim of promoting cooperation between these various parties, and, ultimately, the more effective promotion of the interests of TK holders:

- Indigenous peoples, local communities and other custodians of TK and related biological/genetic resources;
- TK documentation institutions and initiatives (museums, archives, botanical gardens, etc.);
- Research institutions (universities, participatory breeding programs, etc.); and
- Governments undertaking documentation initiatives.

This section would emphasize the applied and practical nature of the objectives of the toolkit, and would stress that it is not intended to suggest that any approach is mandatory or even recommended. It is intended, rather, to describe some tools that are available, to discuss how they can be successfully used and thereby to enable informed choices by TK holders themselves. The aim is to allow stakeholders to determine whether, and in what cases, IP rights are the appropriate legal and practical tools for their objectives concerning their TK and associated biological/genetic resources.

This section would also describe how the toolkit was developed with widespread stakeholder involvement, starting in 1998 during the WIPO Fact-finding Missions, and provide a range of statements by TK holders concerning their needs and expectations in this area.¹²

¹² The need for such a toolkit was initially expressed during the WIPO Fact-finding Mission on IP Needs and Expectations of Traditional Knowledge Holders; see WIPO Fact-finding Mission Report, p. 249.

1.2 What this Toolkit is Not

In the protection, preservation and dissemination of TK, the IP system needs to be kept in balance with other practical and legal mechanisms, and the role of IP rights should neither be understated nor overemphasized. It can also be misleading to rely on a general description of the IP system in making very specific decisions on IP matters; for instance, whether to sign a particular agreement, or whether to seek patent protection or to rely on confidentiality/trade secret protection.

This section would therefore explain what the toolkit cannot provide, and will suggest possible ways of supplementing the toolkit to gain information in these other areas. This section will explain that the toolkit will:

- Not suggest that TK should be put into the public domain;
- Not provide a full introduction to IP law and practice, nor substitute for specific legal or technical advice on whether individual elements of TK and associated biological/genetic resources can or should be protected by IP rights;
- Not propose or assess options for legislative action on TK, or interpret legislation;
- Not provide advice on protection for TK beyond national legal systems; and
- Not advise on collecting genetic or biological resources.

In addition, the toolkit will not cover traditional cultural expressions, as such, which have been protected by national laws on copyright and related rights, and in some cases *suigeneris* folklore protection. The toolkit will be drafted so as to complement, and as appropriate refer to, the forthcoming "WIPO Practical Manual for the Legal Protection of Traditional Cultural Expressions."

1.3 How to use this Toolkit

The toolkit would consist of diverse textual and non-textual elements which can be used independently, including case studies, diagrams, flowcharts, checklists and illustrations. This section would give advice to the toolkit user on:

- The process-oriented structure of the toolkit;
- Using Decision Trees;
- Using Checklists of "Do's and Don'ts"; and
- Using individual sections and chapters independently.

It would also stress the need for alternative, and more focussed sources, of advice, and give disclaimers accordingly.

2. BEFORE THE DOCUMENTATION PROCESS

The toolkit would state clearly the need for caution prior to documentation of TK, especially undisclosed TK, or TK disclosed within a limited context. It would underscore the consequences of documentation, and describe the mechanisms that can be used to deal with the consequences. The following is a checklist of the kind of IP issues that may need to be

considered as part of the initial project planning of a TK documentation project, and before any actual documentation takes place:

CHECKLIST

Before documenting TK and associated biological or genetic resources

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

2.1 Defining the Objectives of Documentation

As noted in the Checklist above, a key first step, which should be undertaken before any documentation proceeds, is to define the IP objectives of the documentation initiative. This would assist in the development of a strategy to manage the IP implications of the documentation process.

This section would provide the toolkit user with a set of questions, to encourage consultation regarding a community's goals in undertaking the documentation initiative. The answers given may help users to shape their objectives, and their strategy, especially when different, or even divergent, sets of goals and interests are identified that may need to be reconciled before going forward to the next phase.

For instance, why do you wish to take part in the planned TK documentation project?
Do you aim to:

- Prevent others from claiming IP rights, such as patents, over your TK and associated biological/genetic resources?
- Develop IP rights in your TK and associated biological/genetic resources, as a basis for a community industry?
- Prevent others from misusing your TK and any associated biological/genetic resources?
- Avoid culturally offensive use of your TK?
- License the use of your TK and associated biological/genetic resources to commercial partners?
- Disseminate selected elements of your TK to a wider public audience or to other groups, such as other communities of TK holders?
- Preserve your TK for the benefit of future generations of your community?
- Achieve a combination of any of the above, or different objectives entirely?

Community interests and concerns

Behind the specific objective of the documentation exercise is likely to be a set of interests and concerns on the part of the community. Reflecting and consulting on these is likely to help in setting the more immediate objectives of the exercise, as well as help determine which IP tools should be chosen and how they should be used. The interests and concerns can be clarified, again by discussing a set of questions.

For instance, what interests do you or your community wish to promote? Do your concerns include:

- Defending against misappropriation, misuse or unfair commercial use of your TK and associated biological/genetic resources?
- Restricting access to sacred/secret TK or for other cultural reasons?
- Preserving the cultural integrity of the TK?
- Exploring the potential economic, commercial or developmental implications of your TK?
- Promoting traditional or community industries and commercial enterprises?
- Supporting research partnerships or technology exchange partnerships related to technical aspects of your TK and associated biological/genetic resources?
- Ensuring recognition of traditional ownership of TK, and the attribution of the traditional origins of your TK and genetic resources when published or used by others?
- Using the TK to help conserve the environment and manage natural resources?
- Exchanging TK information between your community and other communities?
- Documenting your ownership of TK as part of arrangements for giving prior informed consent for access to the TK?
- Promoting the dissemination of your traditional culture to the public, nationally or internationally, to promote a wider understanding of your culture?
- A combination of any of those, or other interests not mentioned here?

Scope for diverse goals and interests

This section would stress, by means of illustrative examples, that different IP objectives and interests may attach to different elements or aspects of TK, and would describe how different documentation and protection mechanisms can correspond to these assorted interests and objectives. For instance, within one traditional community's overall collective knowledge, there may be:

- Different elements of TK that are secret, or relate to sacred material that is to be preserved, but not revealed beyond certain members of the community;
- Knowledge about environmental management or medical treatment that the community wishes to share with other communities, or to commercialize to promote community industries;
- Knowledge of a general nature that has been expressed widely, but needs to be written down to be preserved;
- Technical innovations developed within the traditional framework that may be eligible for patent protection; and
- Knowledge associated with tangible expressions of traditional culture.

2.2 Conducting an IP Assessment

This section would discuss the process of reviewing the IP aspects of TK and associated biological/genetic resources, and assessing the available options. It would stress that this review needs to be carefully based on the agreed interests and objectives (as defined in the above section). Yet it would suggest that in the course of reviewing the practical options and their implications, it may be necessary to return to the IP objectives, and redefine them, as the communities' understanding of the available options evolves.

Assessing the subject matter to be documented

The first step in assessing options would be to review the subject matter which is to be documented. This section would facilitate such an IP assessment through guided questions, tables and flowcharts. Again, it would stress that given the diversity of TK, it is possible for different types of TK to fit within a number of these categories.

The assessment questions might include:

- Is the TK you wish to document:
 - secret;
 - sacred;
 - individually or communally held;
 - in oral traditions;
 - part of a larger and structured TK systems, codes or classifications;
 - subject to customary restrictions for use or disclosure;
 - already partially documented in some form; or
 - associated in some way with biological or genetic resources?

- Does the TK you intend to document include:
 - technical knowhow;
 - visual designs;
 - distinctive signs or symbols; or
 - literary or artistic expressions?

- If there are genetic resources associated with the TK, are they:
 - also to be documented,
 - covered by legal or ethical measures that govern access to the resources,
 - covered by a specific regime, such as the Multilateral System to be created by the International Treaty on Plant Genetic Resources for Food and Agriculture, or
 - imbued with distinctive characteristics developed through local selection, breeding or processing?

- If technical know-how is involved, is it:
 - undisclosed, or disclosed to:
 - the general public
 - the community
 - individuals, such as researchers or journalists
 - uncommercialized, or commercialized as:
 - part of local industrial traditions or community enterprises,
 - part of a business agreement with a third party;

- codified or uncodified?

Examples would illustrate what these terms mean and their relevance to a traditional context.

Assessing applicable IP laws

The availability of IP protection for documented TK and associated biological/genetic resources, and the means to defend against others' claims of IP rights, will be determined by national IP laws. It is therefore important to assess what IP laws apply and what procedures to follow. This section would offer guidance and references to undertake such a assessment. It would provide guidance on:

- Identifying applicable IP laws;
- Information sources and references (national IP offices, WIPO Collection of Laws for Electronic Access (CLEA), etc);
- Working with national/regional Intellectual Property Offices;
- Seeking technical legal advice on the application of IP laws, and using legal advisors.

Assessing other applicable legal regimes

IP tools cover only certain aspects of TK and associated biological/genetic resources. This section would discuss the role of other legal regimes and their potential interaction with the IP system, and give illustrative examples. It would not elaborate on these measures, because of their diversity and because they lie beyond the scope of the toolkit, but would describe potential sources of information in this area. It would mention the following areas:

- Identifying customary laws and clarifying their potential role;
- Identifying community protocols and community agreements, and clarifying their potential role;
- Identifying access and benefit -sharing frameworks applicable to associated genetic resources, and assessing their relationship to the TK documentation process;
- Identifying relevant cultural heritage legislation and assessing its relationship to the TK documentation process ;
- Ways of identifying and working with relevant national authorities; and
- References to further information sources (e.g. relevant publications and programs of the CBD, the FAO, UNESCO and the WHO).

2.3 Conducting Stakeholder Consultations

Objectives should be set through comprehensive stakeholder consultations, in particular with the full and effective participation of TK holders and custodians of associated biological resources. This section would address main elements of ensuring appropriate stakeholder involvement in setting IP objectives for the documentation process, including:

- Identifying the key stakeholders;
- Stakeholder involvement and process considerations: the need for broad -based consultations;

- Obtaining prior informed consent (PIC);
- Ensuring benefit -sharing on mutually agreed terms;
- Strengthening the capacity of stakeholders to participate effectively and to protect their interests, by providing information, legal and technical advice, and the development of skills needed at each stage of planning and documentation.

This section would refer to guidelines on stakeholder involvement set out in other contexts, such as:

- The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (CBD); and
- The Recommendations for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place On, or Which Are Likely to Impact On, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities (CBD).

2.4 Developing an IP Management Strategy to Implement the IP Objectives

Once the objectives have been defined, an IP strategy can be developed to implement those objectives during the documentation process. This section would suggest how to derive practical strategies from the objectives discussed in Section 2.1. These could be:

- Defensive protection strategies;
- Positive protection strategies; or
- Combinations of defensive and positive strategies for different elements of the documented TK and associated resources.

Once the IP objectives and the consequent IP management strategy have been established, the documentation process can be prepared accordingly. This section would provide some practical considerations while preparing the immediate documentation work. They could include:

- IP-considerations in preparing structured or semi-structured data collection (e.g., questionnaires, interview outlines, etc); this would include sample questionnaires used by existing documentation initiatives;
- IP-considerations in narrative data collection;
- IP-considerations in preparing for audio-visual fixation;
- IP-considerations in documenting associated genetic or biological resources; and
- IP-considerations in local language barriers.

3. DURING THE DOCUMENTATION PROCESS

CHECKLIST

During the documentation process

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

This section will underscore the need for TK holders to avoid relinquishing their entitlement to IP rights during the documentation process, both in terms of relationships with other parties and in relation to the public, unless this is consistent with the agreed strategy.

3.1 Recording TK and Associated Biological/Genetic Resources

A crucial step in the documentation process is the recording, or 'fixation', of the TK in a material form or when TK is copied onto another medium. This occurs, for example, when:

- A spoken tradition is written down or taped;
- A traditional method is filmed; or
- An ancient manuscript is scanned or copied.

This step is critical, since it is often at this point when IP rights are in the expression are determined. This present section would therefore cover the following areas, and would summarize relevant IP principles in user-friendly checklists:

- Rights in TK and associated biological/genetic resources;
- Rights in the fixated documentation data; and
- Rights in compilations, adaptations, translations of the documentation data.

If the IP strategy developed in Section 2 involves applications for certain industrial property rights, in particular industrial designs or patents, the recording of the TK should take into account existing industrial property documentation standards and other relevant standards for the documentation of TK and biological/genetic resources. This section would provide guidance on the application of:

- Existing WIPO Industrial Property Documentation Standards (ST.2, ST.3, ST.9, ST.14, ST.80, ST.81; see Annex); and
- Other existing documentation standards for TK and biological/genetic resources (e.g., ITC/UNESCO; ICOM, etc; see Annex).

The toolkit would also illustrate the application of such documentation standards and classifications by providing practical examples and images of standardized and classified documentation data.

This section would continue by discussing the particular needs that arise if TK is being documented as the basis of a possible patent application, including:

- The need for confidentiality, particularly in the initial stages;
- The patent disclosure requirement in principle and practice;
- The implications of publication of a patent application; and
- The importance of specialized drafting skills in preparing patent documents.

3.2 Managing Disclosure

During the documentation process, the most immediate risk to future industrial property protection of new TK elements and new uses of biological/genetic resources is their public disclosure. This section will provide case studies of how existing documentation initiatives have managed disclosure, and lessons learned from such work, and will offer practical advice on managing disclosure during the documentation process by:

- Explaining the difference between prior art and the public domain;
- Explaining the legal implications of disclosure, including through:
 - disclosure in writing (including drawings and illustrations);
 - public use;
 - oral disclosure;
 - sale or offering for sale;
 - making available to the public on demand in the digital environment, etc.; and
- Explaining the role of the grace period (available in certain countries);

3.3 Managing Confidentiality

Since documentation initiatives may involve a considerable number of factors, maintaining confidentiality may require detailed consideration. This section would provide advice on managing confidentiality during the documentation process by providing:

- Key IP clauses for confidentiality contracts among documentation partners;
- Sample confidentiality contracts which have been used in documentation initiatives; and
- Case studies and lessons learned from existing documentation initiatives about maintaining confidentiality during documentation.

4. AFTER THE DOCUMENTATION PROCESSCHECKLISTAfter documentation

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

4.1 Positive Protection: Acquisition of IPRS

If the IP strategy developed in Section 2 involves the acquisition of IP rights, this section will provide information on the basic steps and procedures for acquiring such rights, including through flowcharts and decision making trees. This section would cover the main industrial property titles which are relevant to TK and associated biological/genetic resources, including:

- Repression of unfair competition, and protection of undisclosed information or trade secrets;
- Trademarks, collective marks and certification marks;
- Geographical indications (indications of source or appellations of origin);
- Industrial designs (including textile designs);
- Patents and utility models;
- Plant variety protection; and
- *Sui generis* TK legislation.

Copyright and documented TK

This section would also briefly describe the main practical uses of copyright and related rights protection, as well as *sui generis* database protection, in relation to documented TK and associated biological/genetic resources. It would describe how copyright is acquired, and how it can be shared or transferred through contractor employment arrangements. It would discuss how different forms of copyright and related rights (including database rights) can apply to a general collection of documented TK and associated biological/genetic resources, and how such rights can be managed and negotiated.

It would also provide a brief overview of the direct use of copyright, related rights and cognate *sui generis* systems (such as national laws on folklore protection) to protect traditional cultural expressions. This topic will be more fully explored in the proposed WIPO "Practical Manual for the Legal Protection of Traditional Cultural Expressions."

Collective ownership or interest in IP rights

One difficulty raised by commentators in the application of IP rights to TK subject matter is the collective nature of such knowledge, and the collective sense of ownership of, or interest in, TK. Finding some kind of practical solution to the need to reflect community or collective ownership in formal IP titles can be an important aspect in planning for and securing IP rights relating to TK. This section would discuss possible approaches to collective ownership or interest in IP rights that are based on documented TK. It would illustrate some of the approaches that have been taken in practice to deal with this need, while noting that the available options may depend on national law, and the legal characteristics of the community or collective entity.

4.2 Defensive Protection: Public Disclosure

Defensive protection of TK and associated biological/genetic resources concerns the prevention of the acquisition of IP over TK and related resources by parties other than the customary holders of the TK and the resources. The most effective measure for defensive protection is the public disclosure of the TK by making it available to IPOffices for prior art searches.

This section would provide practical information on the defensive protection of TK and associated resources, including on:

- Prior art searches and other procedures of IPOffices relevant to defensive protection;
- The importance of the date of disclosure of the TK and associated resources;
- Measures which have been used by holders of TK and associated resources for defensive protection, such as:
 - systematic full disclosure;
 - synoptic disclosure;
 - phased documentation;
- Possible use of online databases of TK and associated resources, and the Internet as a means for defensive protection; and
- Possible shortcomings of defensive protection and public disclosure, and ways of balancing these shortcomings against the benefits.

4.3 Establishment and Use of Databases for TK and Associated Biological/Genetic Resources

Online databases are an increasingly common tool for use in collecting, maintaining and protecting TK. If required, a draft "Database Toolkit" could be prepared in addition to the present document, the "Documentation Toolkit." This section would briefly provide outline information on:

- Use of databases for defensive protection of TK and associated biological/genetic resources;
- Use of databases for positive protection of database contents; and
- Legal rights in the database itself.

4.4 Enforcement of IPRS

The positive legal protection of TK, and associated biological/genetic resources, will be ineffective unless IPRS can be enforced. The practical problems related to the enforcement of IP go beyond legal issues, and include limitations on resources, infrastructure and specialist legal or IP skills. In addressing the needs resulting from these limitations, this section would include information *inter alia* on:

- Discovering infringement: monitoring products related to legally protected TK and associated biological/genetic resources;
- Options for enforcement of IP in documented TK and associated biological/genetic resources;
- Examples of collective acquisition and management of IPRS in TK;
- Options for alternative dispute resolution, such as mediation of disputes concerning TK and associated biological/genetic resources; and
- References to further sources of information and legal advice (e.g., Legal Aid organizations specializing in IP; IP training sources for custodians of TK, and associated resources; training courses relating to the negotiation and enforcement of contract etc.).

5. CONCLUSION

This section will summarize the contents of the toolkit. It will describe how the toolkit needs to evolve in line with the development of the IP frameworks for TK protection. It will encourage feedback on the toolkit from all stakeholders, in particular TK holders and documentation institutions.

This section will stress that the toolkit does not purport to provide a complete or definitive solution to the problems faced by TK holders, and the management of related IP issues. Nonetheless, it will stress the aim to increase awareness of options, and of building the capacity of TK holders to exercise these options to advance their interests.

Appendices to the Toolkit
(not contained in the present document)

1. Complete Checklist of Dos and Don'ts (for each stage of the process)
2. Glossary and Use of Terms
3. List of Illustrations, Cases, Diagrams and Decision Trees
4. References
5. List of Contributors
6. Documentation standards applicable to TK and associated biological/genetic resources:
 - WIPO Industrial Property Documentation Standards: WIPO Standards ST.2, ST.3, ST.9, ST.14, ST.80, ST.81;
 - other applicable documentation standards: standards for associated genetic and biological resources; UNESCO/ITC: "Crafts: methodological guide to the collection of data"; ICOM - CIDOC Standards, etc
7. Classification systems applicable to TK:
 - International Patent Classification (IPC) (following its current revision to incorporate TK subject matter);
 - Other applicable classification systems for TK and associated biological/genetic resources;
8. List of international agreements with possible relevance to the protection of TK and associated biological/genetic resources.

[End of Annex and of document]