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**INTERGOVERNMENTAL COMMITTEE ON
INTELLECTUAL PROPERTY AND GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE AND FOLKLORE**

Second Session

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**PROGRESS REPORT ON THE STATUS OF TRADITIONAL KNOWLEDGE
AS PRIOR ART**

prepared by the Secretariat

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1. At the first Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”), held in Geneva from April 30 to May 3, 2001, the Member States determined the agenda of items on which work should proceed and adopted and prioritized certain tasks for the Committee.¹ Under Agenda Item 5.2, “Protection of Traditional Knowledge,” the Co-Chair concluded that “there was general support for Tasks B.1 to B.4,”² as identified in document WIPO/GRTKF/IC/1/3.³ By adopting, *inter alia*, Task B.3, the Member States expressed their wish to examine existing criteria and the need for possible new criteria which would allow the more effective integration of traditional knowledge documentation into searchable prior art.⁴ The present document provides a progress report on the status of traditional knowledge as prior art, in order to provide an information basis for the discussions of the Member States on this task.

I. INTRODUCTION

2. The term “prior art” generally refers to the entire body of knowledge which is available to the public before the filing date or, if priority is claimed, before the priority date, of an application for certain industrial property titles, principally patents, utility models and industrial designs. The identification of prior art constitutes a cornerstone for the substantive examination of applications for these titles, since requirements such as novelty and inventive step are established by comparing the claimed subject matter with the relevant prior art.

3. In recent years concern has been expressed in relation to the recognition of traditional knowledge as prior art. It has been claimed that patents have been granted for traditional knowledge-related inventions which did not fulfill the requirements of novelty and inventive step when compared with the relevant prior art. This prior art consisted of traditional knowledge which could not be identified by the patent-granting authority during the examination of the patent application. For example, the claim has been made that pharmaceutical patents were granted which had to be revoked, once the patented invention was compared with the teaching of traditional medicine which constituted relevant prior art.⁵

4. The broad development underlying this issue is that, as the reach of the intellectual property system in the global information society extends to new stakeholders, such as indigenous and local communities, their knowledge base, including in particular their traditional knowledge, constitutes an increasingly relevant body of prior art the effective identification of which is of increasing importance for the functioning of the intellectual property system. Traditional knowledge documentation data constitutes an important form of non-patent literature with specific characteristics. Some of those characteristics may necessitate specialized measures for traditional knowledge data to be adequately integrated and recognized as relevant non-patent literature.

¹ See document WIPO/GRTKF/IC/1/3, paragraph 88.

² See document WIPO/GRTKF/IC/1/13, paragraph 155. On Task B.3, see in particular paragraphs 22, 49, 60, 91, 130, 131, 139, 142, 143, 145, 146, 150, 152, 153 and 158.

³ See document WIPO/GRTKF/IC/1/3, paragraphs 71, 77, 80 and 86.

⁴ See document WIPO/GRTKF/IC/1/3, paragraph 80.

⁵ A well-known example is US 5,401,504 on Use of Turmeric in Wound Healing, issued March 28, 1995. All the patent claims were canceled by the USPTO as a result of a reexamination requested by the Council of Scientific and Industrial Research of India. See U.S. Patent and Trade Office Reexamination Certificate B1 (3500th), April 21, 1998.

5. The practical issue which the Member States wished to address under Task B.3 is that patent examiners cannot discover relevant traditional knowledge as prior art when they examine patent applications claiming traditional knowledge-related inventions. This is because they do not have access to traditional knowledge information in classified non-patent literature; because such information is not orderly arranged; and because there are no effective search tools for the retrieval of such information. This situation persists in spite of the fact that considerable traditional knowledge documentation data exists in most parts of the world. As previous WIPO activities on traditional knowledge have ascertained, documentation initiatives of indigenous and local communities and other national/regional institutions have documented large amounts of traditional knowledge in order to conserve it and to avoid its disappearance. Many initiatives have developed extensive compilations and traditional knowledge databases but have not elaborated intellectual property options or strategies to protect the traditional knowledge itself or its compilations.

6. Within these circumstances, the overall need in addressing traditional knowledge as prior art may be to create operational links between intellectual property offices (IP Offices), on the one hand, and these existing traditional knowledge documentation initiatives, on the other. The present document takes the approach that Member States might begin to address Task B.3 through practical measures to establish such linkages between IP Offices and traditional knowledge documentation initiatives. The objectives of such measures would include:

- enabling traditional knowledge documentation initiatives to make public domain traditional knowledge data available to IP Offices,
- allowing IP Offices to integrate public domain traditional knowledge documentation into their existing procedures for the filing, examination, granting and publication of IP titles, and
- to facilitate the electronic exchange and dissemination of standardized documentation data within existing IP information systems and for the general public, as appropriate.

7. If the development of such measures takes into account the needs and priorities of all stakeholders, they might (i) avoid the grant by IP Offices of patents for traditional knowledge-based inventions which are not novel and non-obvious; (ii) avoid the costs for traditional knowledge holders and other interested third parties of challenging such patents; and (iii) facilitate recognition of the technological value of traditional knowledge by all users of non-patent literature, including IP Offices, industry, researchers and the general public.

8. The establishment of such linkages would require that certain practical measures be taken by:

- (i) IP Offices to evolve and adapt their existing administrative procedures to integrate traditional knowledge documentation,
- (ii) traditional knowledge documentation initiatives to make traditional knowledge documentation available to IP Offices, and to manage intellectual property-aspects of their documentation work, and
- (iii) existing intellectual property information systems to develop procedures, standards and infrastructure for the exchange and dissemination of traditional knowledge documentation data.

9. These measures would have to take into account certain specificities of traditional knowledge. From the point of view of the patent system, traditional knowledge has distinct characteristics which raise issues about the prior art effect of technological information disclosed in the context of traditional knowledge systems. Traditional knowledge holders have pointed out during past WIPO activities that these characteristics require careful attention so as to preserve the integrity of the traditional knowledge in its social, cultural and economic dimensions. Some exemplary specificities are illustrated below:

- (a) Given the dynamic nature of traditional knowledge systems, alteration and modification of the content of such knowledge occurs without necessarily being identified as “new”, more frequently than with conventional non-patent literature and forms an ongoing feature of traditional knowledge. While all technological knowledge has its evolving nature, the authenticity, veracity and integrity of information are particularly important and intricate issues for traditional knowledge as prior art.
- (b) Traditional knowledge is often transmitted through oral traditions. In this case codification and fixation can already transform traditional knowledge into what it is not. Within this document reference is made primarily to codified traditional knowledge systems⁶ and it is proposed to begin work only on codified traditional knowledge systems.
- (c) Traditional knowledge is expressed in local languages and its expression is contingent upon such languages. While translation may also be an issue with respect to some modern technological knowledge, translation of traditional knowledge elements inescapably removes them from their original context and alters their relation to the tradition which constitutes them in the first place as traditional knowledge.
- (d) When knowledge is transferred from oral into written, printed, and electronic forms this involves not only a shift from one medium to another but also a cultural, semantic and symbolic transformation of the knowledge. Each “expert” who is involved in such transfers will convert the “knowledge” he or she is documenting. The media in which knowledge systems, or elements thereof, are fixed, expressed or recorded, inevitably shape the character of the knowledge itself. Consequently, the degree to which the electronic form and the original oral form of traditional knowledge relate to each other may affect the value of databases as a tool for the conservation of culture and knowledge.
- (e) The traditional knowledge must be “publicly available” in order to be considered as prior art. Given that some traditional knowledge is kept confidential within communities, this raises the question whether availability to the community is considered as “available to the public.”⁷ In particular, it may be necessary to examine the meaning of the term “publicly available” in relation to certain traditional knowledge elements for a better understanding of their prior art effect.

⁶ In the field of traditional medicine, for example, codified traditional knowledge systems include traditional Chinese medicine, Ayurvedic medicine, Siddha and Unani Tibb. See WHO document WHO/EDM/TRM/2001.1.

⁷ A general interpretation of patent law would suggest that knowledge is not available to the public if it is kept confidential (in the sense that there is an agreement to keep it confidential).

- (f) The timing of the disclosure of traditional knowledge in relation to the filing date of the relevant application or, where priority is claimed, the priority date of the application is another concern. Given the nature of traditional knowledge, in most cases the date of disclosure cannot be clearly determined. This could be a source of legal uncertainty, since determination of relevant dates is paramount patent examination.

10. Taking into account the specificities and characteristics of traditional knowledge as outlined above, the present document takes a limited approach to traditional knowledge as prior art in several respects:

(i) It focuses on prior art in respect of patents, utility models and utility certificates, due to limitations of space. It is important to note that the status of traditional knowledge as prior art is also relevant in relation to other industrial property rights, such as industrial designs. However, it is recorded that some delegations have explicitly “highlighted, in relation to task B.3, the necessity that the review of technical criteria for obtaining intellectual property protection did not remain confined to patents but extended to all forms of intellectual property protection.”⁸ It is proposed that, in due course, the Committee may wish to address the relationship of other forms of intellectual property protection to Task B.3.

(ii) The document focuses on practical measures that can be taken immediately to address this issue within the existing patent system and within current standards on the availability of patents. The Standing Committee on the Law of Patents (SCP) is currently discussing definitions of prior art in the context of the draft Substantive Patent Law Treaty. The present document recalls those discussions, but focuses on specific measures which can be taken without awaiting or prejudging the outcome of those discussions.

(iii) It is to be emphasized that unless expressly stated otherwise, this paper, whenever it uses the term “traditional knowledge” refers only to traditional knowledge which is *already in the public domain*. The document does not refer to traditional knowledge which has not been disclosed because it may have been kept secret by communities or individuals. As outlined in document WIPO/GRTKF/IC/1/3, the objective of Task B.3, and consequently the present document, is *not* to put traditional knowledge, which is currently not in the public domain, into the public domain. Rather the objective is to ensure that traditional knowledge which is already in the public domain, is fully recognized and practically identifiable as being in the public domain and therefore unpatentable.

11. This document provides a status report and suggestions for the discussions of the Member States in the following structure: Section II provides a review of WIPO’s past work on the status of traditional knowledge as prior art. Section III describes the work of other relevant organizations. Section IV elaborates the issues relevant to the status of traditional knowledge as prior art, and provides possible activities which the Member States may consider undertaking in order to implement Task B.3 of the Committee. Annex 1 lists some traditional knowledge-related periodicals, gazettes and newsletters, which document traditional knowledge. Annex 2 sets out a non-exhaustive list of existing online databases containing traditional knowledge documentation data. Finally, Annex 3 collates the possible activities which the Member States may consider undertaking and which were identified in Section IV of the present document.

⁸ See document WIPO/GRTKF/IC/1/13, paragraph 139, statement by the Delegation of Egypt.

II. PAST WIPO WORK

12. In the context of previous WIPO activities, discussions relevant to Task B.3 have been undertaken in the Standing Committee on Information Technology (SCIT), the Standing Committee on the Law of Patents (SCP), the Committee of Experts of the Special Union for the International Patent Classification and Main Program 11 on Global Intellectual Property Issues. This Section briefly summarizes the discussions and outcomes of these WIPO activities in chronological order.

Standing Committee on Information Technology (SCIT)

13. The WIPO Standing Committee on Information Technology (SCIT), at its Third Plenary Session, held in Geneva from June 14 to 15, 1999, adopted the SCIT Strategic Information Technology Plan Into the 21st Century, which includes, *inter alia*, the issue of the creation of traditional knowledge databases:

Creation of Knowledge Databases Including Traditional Knowledge

The SCIT recognizes the concern by WIPO Member States regarding the granting of intellectual property rights due to lack of traditional knowledge being documented in the public domain. The SCIT will take the initiative by including activities in its work program to support WIPO member states, in particular developing countries in their creation of database in the area of traditional knowledge available in public domain so that *prior art* gets established.⁹

14. At its Fourth Plenary Session, held in Geneva from December 6 to 10, 1999, the SCIT considered an Approach Paper for Establishing Traditional Knowledge Digital Libraries (TKDL) and how such a proposal should be addressed. The Approach Paper was considered in the context of Project 9 of the SCIT Strategic Information Technology Plan, which pertains to the development of WIPO's Intellectual Property Digital Libraries (IPDLs).¹⁰ The primary objective of WIPO's Intellectual Property Digital Libraries (IPDLs) Project is to facilitate access to, and exchange of, intellectual property information by the intellectual property community worldwide. One critical component of the IPDL project is the identification and/or development of data exchange standards to be used between digital libraries implemented by WIPO Member State offices, and the IPDL system implemented by the International Bureau. A goal of the IPDL Project is to provide a maximum level of integrated access to WIPO IP data collections.

15. The SCIT did not decide to create a new task to pursue the TKDL matter within the SCIT Work Program. However, the Member States suggested that the feasibility of electronic exchange of traditional knowledge documentation should be studied as part of the overall WIPO approach to intellectual property aspects of traditional knowledge.¹¹ Pursuant to this recommendation, the feasibility of the electronic exchange of documented traditional knowledge, including through TKDLs, is being studied in the context of WIPO's Main Program 11 on Global Intellectual Property Issues, which implements WIPO's overall

⁹ See document SCIT/3/2, Item 7.2.

¹⁰ See document SCIT/4/2, Annex II, page 90 to 102.

¹¹ See document SCIT/4/8, paragraph 41.

approach to intellectual property and traditional knowledge. The electronic exchange and dissemination of such subject matter is being studied by the Global Issues Program exclusively for traditional knowledge which is already in the public domain.

Standing Committee on the Law of Patents (SCP)

16. The SCP is currently discussing the definition of the term “prior art” for the purposes of the draft Substantive Patent Law Treaty, as described in Section IV.B below.¹² In addition, information gathering and analysis of prior art-related issues was undertaken by the SCP prior to the work on the draft Substantive Patent Law Treaty.

17. Pursuant to a request at the fourth session of the SCP, held in Geneva from November 6 to 10, 2000, the Secretariat issued a questionnaire concerning the prior art effect on patentability of information disclosed on the Internet. Almost all the countries indicated that information disclosed on the Internet constituted prior art, where such disclosure met the general requirements on prior art. However, many countries indicated that, due to the absence of experience and legal precedents, it was not possible to fully answer how the patent-granting authorities determined the contents and timing of the disclosure on the Internet.¹³ Whereas some patent-granting authorities limit the use of the Internet for the purposes of prior art searches to the searching of websites and databases of high credibility, other patent-granting authorities categorize websites depending on the credibility of the sites.

18. One question of the questionnaire asked whether the establishment and use of “archival services” that certify the time and contents of web pages in order to ensure the timing and contents of Internet disclosure would be desirable.¹⁴ Concerning such a certification service, many countries replied that such a service would be useful to guarantee the contents and the timing of the disclosure on the Internet. However, as regards the desirability and feasibility of the establishment and use of such a service, a number of countries cast doubts in terms of practicability, efficiency and costs.¹⁵

Committee of Experts of the Union of the International Patent Classification (IPC)

19. At its thirtieth Session, held in Geneva from February 19 to 23, 2001, the Committee of Experts of the Special Union for the International Patent Classification (“the IPC Union”) considered a draft Traditional Knowledge Resource Classification (TKRC) in order to take a decision concerning its proper relationship to the IPC. The Committee agreed that TKRC should be studied in detail. For conducting a study, the Committee decided to create a special task force. The mandate of the task force will be to elaborate advice on future development of TKRC.

¹² See document SCP/5/4, paragraph 23.

¹³ See document SCP/5/4, paragraph 20.

¹⁴ See Question 10, Annex, document SCP/5/4.

¹⁵ See document SCP/5/4, paragraph 23. Considering the suggestion issued by the Fourth Plenary Session of the SCIT and the issues outlined in paragraph 9(a) above, there is a need for further exploration of the desirability and feasibility of such services in respect of traditional knowledge as prior art.

Global Intellectual Property Issues

20. In the context of WIPO's Main Program 11 on Global Intellectual Property Issues, extensive work has been carried out on intellectual property and traditional knowledge, some of which touched upon the status of traditional knowledge as prior art. A series of nine fact-finding missions on traditional knowledge, innovations and creativity (FFMs) were undertaken "to identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations." Two of the needs identified by the FFMs concern "an analysis of how prior art is established for purposes of patent examinations in the context of TK" and "the prevention of the unauthorized acquisition of IPRs (particularly patents) over TK by documenting and publishing TK as searchable prior art, where so desired by the relevant TK holders."¹⁶

21. The Working Group on Biotechnology, at its meeting on November 8 and 9, 1999, recommended the establishment of nine projects related to the protection of inventions in the field of biotechnology. The Working Group decided to establish a questionnaire for the purpose of gathering information about the protection of biotechnological inventions, including certain aspects regarding intellectual property and genetic resources, in the Member States of WIPO. The questionnaire included the following question: "Does your legislation require that in assessing the novelty requirement, prior public use should be taken into account even if it is not documented?" (Question 12). The information obtained from the responses to the questions will be issued in a final report, based on a draft report written by the consultants who prepared the background document for the meeting of the Working Group.

22. From November 9 to 11, 2000, WIPO convened an Inter-Regional Meeting on Intellectual Property and Traditional Knowledge in Chiang Rai, Thailand, which adopted a Meeting Statement. The Statement recommends, among other things, that Governments should "where appropriate, facilitate the consideration of traditional knowledge in procedures for the grant of intellectual property rights, by *inter alia*: (i) assisting in the documentation and publication of traditional knowledge as searchable prior art; (ii) supporting proposals to include traditional knowledge subject matter in the International Patent Classification; and (iii) assisting with and supporting the inclusion of traditional knowledge databases and digital libraries in existing intellectual property information systems, as well as WIPONet."¹⁷

III. RELEVANT WORK OF OTHER ORGANIZATIONS

23. Besides the work of WIPO, a number of international organizations have undertaken activities which touch upon, or may have implications for, the status of traditional knowledge as prior art. These organizations include, *inter alia*, the World Health Organization, the Secretariat of the Convention on Biological Diversity, the United Nations Convention to Combat Desertification, the United Nations Educational, Scientific and Cultural Organization, the United Nations Conference on Trade and Development and the World Bank.

¹⁶ See, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*. Geneva: WIPO, 2001: page 281.

¹⁷ See Meeting Statement, WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge, Chiang Rai, Thailand, November 9 to 11, 2000: paragraph 1(c).

World Health Organization (WHO)

24. A WHO Inter-Regional Workshop on Intellectual Property Rights in the Context of Traditional Medicine was held in Bangkok, Thailand from December 6 to 8, 2000. The objectives of the Workshop included, *inter alia*, the identification of areas of traditional medicine where intellectual property rights protection is of major concern. The Workshop made, *inter alia*, the following recommendation:

Traditional knowledge which is in the public domain needs to be documented in the form of traditional knowledge digital libraries in the respective countries with the help of WHO to WIPO's work in this area. Such information needs to be exchanged and disseminated through systems or mechanisms relating to intellectual property rights.¹⁸

25. The Workshop was convened by the Traditional Medicine Team of the WHO, which coordinates a worldwide network of 19 Traditional Medicine Cooperating Centers in ten countries (Belgium, China, Democratic People's Republic of Korea, Italy, Japan, Republic of Korea, Romania, Sudan, United States of America and Vietnam). Through the Traditional Medicine Team, WHO supports Member States and the Centers in their efforts to formulate national policies on traditional medicine, to study the potential usefulness of traditional medicine, to upgrade the knowledge of traditional health practitioners, and to inform the general public about proven traditional health practices.

Convention on Biological Diversity (CBD)

26. Article 17.2, CBD, on Exchange of Information provides that "such exchange of information shall include ... specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1." Furthermore, the CBD provides that each Contracting Party shall "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices."¹⁹

27. Consequently, the Decisions of the Conference of the Parties (COP) to the CBD, as well as the Programme of Work under several subsidiary bodies of the CBD, include elements relevant to the status as prior art of knowledge, innovations and practices embodying traditional lifestyles of indigenous and local communities relevant to the conservation and sustainable use of biological diversity.

28. The CBD Programme of Work on the Implementation of Article 8(j) and Related Provisions of the Convention on Biological Diversity, as contained in the Annex to Decision V/16 of the fifth COP, held in Nairobi, Kenya, from May 15 to 26, 2000, provides under Task 10 of Element 6, 'Monitoring Elements': "The Ad Hoc Working Group [on Article 8(j) and Related Provisions] to develop standards and guidelines for the reporting and prevention of

¹⁸ See document WHO/EDM/TRM/2001.1, page 34, recommendation 6.

¹⁹ Article 8(j), CBD.

unlawful appropriation of traditional knowledge and related genetic resources.”²⁰ Decision V/16 further specifies that “this Programme of work shall ... as far as possible, be carried out in collaboration with other relevant organizations, including the World Intellectual Property Organization (WIPO).”²¹ In its Statement to the first meeting of the Ad-Hoc Open-Ended Inter-sessional Working Group on Article 8(j) and Related Provisions, held in Sevilla, Spain, from March 27 to 31, 2000, WIPO indicated its willingness to assist with the implementation of Task 10 of the Indicative List of Activities that Could be Carried Out Under the Tasks Identified in the Programme of Work on Article 8(j) and Related Provisions of the CBD (document UNEP/CBD/WG8J/1/INF/1).²²

29. In Decision V/16 the fifth COP also “[r]equests Parties to support the development of registers of traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity” (paragraph 17). The Secretariat of the CBD has commenced work on the First Phase of the Programme of Work contained in the Annex of Decision V/16. This work will be discussed and advanced at the Second Meeting of the Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions.

30. Furthermore, members of the Panel of Experts on Access and Benefit-sharing “expressed concerns regarding the obtaining of intellectual property rights where there is potential misapplication of the formal requirements for protection.” The Report of the Panel noted that some members “expressed concerns that the scope of protection under intellectual property rights regimes may prejudice the legitimate interests of indigenous and local communities in respect of their knowledge, innovations and practices.” In conclusions, the Panel “agreed that the development of registers of traditional knowledge could promote the identification and accessibility of prior art.”²³

United Nations Convention to Combat Desertification (UNCCD)

31. The UNCCD provides that Parties shall protect, promote and use relevant traditional and local technology, know-how, and practices and, to that end, shall undertake to “make inventories of such technology, knowledge, know-how and practices and their potential uses with the participation of local populations, and disseminate such information, where appropriate, in cooperation with relevant intergovernmental and non-governmental organizations” (Article 18.2(a)). It provides further that regional activities may include “preparing inventories of technologies, knowledge, know-how and practices, as well as traditional and local technologies and know-how, and promoting their dissemination and use” (Article 6(b)).

United Nations Educational, Scientific and Cultural Organization (UNESCO)

32. UNESCO has produced, jointly with the International Crafts Association, a guidebook entitled *Crafts: methodological guide to the collection of data*.²⁴ Using this guidebook, and

²⁰ See Decision V/16, Annex, III. Second Phase of the Programme of Work, Element 6, Task 10.

²¹ See Decision V/16 of the fifth COP, Annex, IV Ways and Means.

²² Statement by the WIPO to the first meeting of the Ad-Hoc Open-Ended Inter-sessional.

²³ See document UNEP/CBD/COP/5/8, paragraphs 136 to 138.

²⁴ UNESCO/ICA, *Crafts: methodological guide to the collection of data* (by Jocelyn Etienne-Nugue) Paris: UNESCO/ICA, 1990.

following its wide distribution to UNESCO Member States in English, French, Spanish and Arabic, computerized databases will gradually be established by UNESCO, which will be accessible through international networks. This network for the worldwide collection and dissemination of data on craft forms and techniques will have its focal point in the International Centre for the Promotion of Crafts, which was established in September 1996 in Fez, Morocco.

33. The UNESCO Programme for the Preservation and Revitalization of Intangible Cultural Heritage has launched a publication series to help specialists catalogue and compile inventories of cultural forms, since they are constantly changing and may disappear forever on the death of their creators. The first volume in this series is a *Handbook for the Study of Traditional Music and Musical Instruments*.²⁵ A handbook for the study of vernacular architectural styles is in preparation.

United Nations Conference on Trade and Development (UNCTAD)

34. In the Background Note for an Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, held in Geneva from October 30 to November 1, 2000, UNCTAD noted that “[d]ocumentation of TK ... in ordered collections or databases ... can contribute to preserving and protecting that knowledge” and noted that “such documentation can help to demonstrate the existence of prior art in the case of patent claims based upon TK.”²⁶ The Recommendations of the Expert Meeting include, *inter alia*, that UNCTAD should “assist in the formation of databases on TK at national and international levels to disseminate information and ensure consistency among different organizations.”²⁷

World Trade Organization (WTO)

35. Members of the World Trade Organization (WTO) have discussed the status of traditional knowledge as prior art in the Committee on Trade and Environment (CTE) and in the TRIPS Council. In particular, a contribution on the protection of biodiversity and traditional knowledge contained a section on ‘Documentation of traditional knowledge’ and noted that such documentation “would check patents based on TK in the public domain that are today difficult to prevent due to lack of availability of information with patent examiners”.²⁸ The document reviewed several documentation initiatives in India and concluded that “[i]n the recent past, there have been several cases of bio-piracy of TK from India. For preventing such instances in future there is a need for developing digital databases of prior art related to herbs already in the public domain. Following patents on brinjal, etc., in India, an exercise has been initiated to prepare easily navigable computerized database of documented TK relating to use of medicinal and other plants (which is already under public domain) known as Traditional Knowledge Digital Library (TKDL). Such digital database

²⁵ Dournon, Geneviève. *Handbook for the Study of Traditional Music and Musical Instruments*. Paris: UNESCO, 1999.

²⁶ See document TD/B/COM.1/EM.13/2, paragraphs 57 and 59.

²⁷ See document TD/B/COM.1/EM.13/L.1, paragraph 41.

²⁸ See document WT/CTE/W/156, IP/C/W/198, paragraphs 16 to 23.

would enable Patent Offices all over the world to search and examine any prevalent use/prior art, and thereby prevent grant of such patents and bio-piracy.”²⁹

36. In a subsequent communication to the Council for Trade-Related Aspects of Intellectual Property Rights (“TRIPS Council”) on the review of Article 27.3(b), TRIPS, the proposal of an international database on traditional knowledge was taken up and several features of such an international database on traditional knowledge were proposed. The communication proposed, *inter alia*, that “[s]uch a database on traditional knowledge may have the following features:

- It should be established at the international level. Only this will ensure that all national, regional and international patent authorities and relevant judicial authorities have adequate access to information on traditional knowledge.
- It would seem preferable to electronically link existing regional, national and local databases. ... such an international database would primarily function as a gateway to these other databases. ...
- Such an international database should be established and administered by WIPO. ... WIPO already has the necessary expertise and technical capacity to establish and administer the proposed database. WIPO should carry out its efforts on this database in close cooperation with other relevant international bodies that have competence in the field of traditional knowledge, including in particular the CBD.”³⁰

The suggested features for the proposed international database on traditional knowledge include eight specifications, which are provided in detail under Section V.A.5.³¹

The World Bank

37. The World Bank has launched an Indigenous Knowledge Program, with the objective of mainstreaming indigenous/traditional knowledge into the activities of development partners and to optimize the benefits of development assistance, especially to the poor. This goal is being achieved through different strategies, which include a database on traditional knowledge and practices with over 200 case studies.³² All practices in the database are summarized and references to a more detailed description of the practice are included. A reference is either made through a hyperlink or a bibliographic reference, to an organization or to an individual. The World Bank also publishes a newsletter entitled "Indigenous Knowledge Notes"³³ which present, in some detail, locally driven solutions to complex issues. The Program furthermore supports over 15 resource centers across Africa that focus on identification, documentation and dissemination of traditional knowledge and practices.

²⁹ See *ibid.*, paragraph 22. For details on the proposal for Traditional Knowledge Digital Libraries (TKDLs) see paragraphs 13 to 15 and 89 to 97 of this document.

³⁰ See document IP/C/W/284, paragraph 17.

³¹ See paragraph 94 for the eight features of an international database of traditional knowledge, as contained in document IP/C/W/284.

³² Available at <<http://www.worldbank.org/afri/ik/datab.htm>>.

³³ Available at <<http://www.worldbank.org/afri/ik/iknotes.htm>>.

IV. DEFINITIONS OF PRIOR ART AND THEIR RELATIONSHIP TO TRADITIONAL KNOWLEDGE

38. In light of the past work undertaken by WIPO and other organizations, issues relevant to the status of traditional knowledge as prior art can be organized in two categories, namely (a) the definition of prior art in relation to traditional knowledge, and (b) practical measures for the improvement of the availability, searchability and exchangeability of traditional knowledge-related non-patent literature. This section briefly surveys how the term prior art is defined at the international and regional levels and used in national and regional patent practice. Section V will then focus on practical measures that could be taken to improve the availability, searchability and exchangeability of traditional knowledge as prior art.

39. Existing legislation and practice, both nationally and internationally, differ widely in how the term prior art is defined and used in patent practice. The present section reviews definitions of the term in existing laws as well as its use in the practices of certain national and regional patent Offices. The section first refers to definitions of the term in international patent treaties which are currently in force or under development (in particular the Patent Cooperation Treaty (PCT) and the draft Substantive Patent Law Treaty) and then reviews the definition of the term, as well as its use in patent practice, at the regional and national levels (in particular in the European Patent Convention (EPC), Japan and the United States of America).

IV.A Patent Cooperation Treaty (PCT)

40. Article 15 of the Patent Cooperation Treaty (PCT) provides that each international application shall be the subject of international search. The objective of the international search is “to discover relevant prior art.”³⁴ Rule 33.1 of the Regulations Under the PCT provides the following definition of relevant prior art for the purposes of Article 15(2), PCT:

“relevant prior art shall consist of everything which has been made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) and which is capable of being of assistance in determining that the claimed invention is or is not new and that it does or does not involve an inventive step (i.e., that it is or is not obvious), provided that the making available to the public occurred prior to the international filing date.”³⁵

41. Rule 33.2 of the Regulations Under the PCT on “Fields to be Covered by the International Search” provides that the international search “shall cover all those technical fields, and shall be carried out on the basis of all those search files, which may contain material pertinent to the invention.”³⁶ The international search embraces all the subject matter that is generally recognized as equivalent to the subject matter of the claimed invention for all or certain of its features, even though, in its specifics, the invention as described in the international application is different.³⁷

³⁴ Articles 15(1) and 15(2), PCT, respectively.

³⁵ Rule 33.1(a), Regulations Under the PCT (as in force from March 1, 2001).

³⁶ Rule 33.2(a), Regulations Under the PCT.

³⁷ Rule 33.2(d), Regulations Under the PCT.

42. Regarding the orientation of the international search, the Regulations Under the PCT provide that “[i]n so far as possible and reasonable, the international search shall cover the entire subject matter to which the claims are directed or to which they might reasonably be expected to be directed after they have been amended.”³⁸

43. Rule 33.1(b) of the Regulations Under the PCT specifies that

“[w]hen any written disclosure refers to an oral disclosure, use, exhibition, or other means whereby the contents of the written disclosure were made available to the public, and such making available to the public occurred on a date prior to the international filing date, the international search report shall separately mention that fact and the date on which it occurred if the making available to the public of the written disclosure occurred on a date which is the same as, or later than, the international filing date.”³⁹

44. Oral disclosure, use, exhibition or other means of disclosure are therefore not relevant prior art for the purposes of an international search unless substantiated by a written disclosure. Given the non-binding nature of an international search under Article 27(5), PCT, this provision might nevertheless have certain implications for the status of traditional knowledge as prior art in general. However, “[t]he date on which the written disclosure was made available to the public may have been *after* the filing date of the international application.”⁴⁰

45. In the international search, the competent International Searching Authority, which undertakes the search, “shall endeavor to discover as much of the relevant prior art as its facilities permit, and shall, in any case, consult the documentation specified in the Regulations.”⁴¹ The undertaking before the Intergovernmental Committee under Task B.3 is to discuss how these facilities could be further improved to permit the International Searching Authority to discover relevant traditional knowledge when it constitutes prior art in relation to the invention claimed in the international application. Possible measures which might improve these facilities and which the Member States might wish to discuss are identified in Section V below.

46. Under Chapter II, PCT, upon demand of the applicant, his international application may be the subject of an international preliminary examination,⁴² which is carried out by the International Preliminary Examining Authority.⁴³ The objective of the international preliminary examination is to formulate a preliminary and non-binding opinion on the questions whether the claimed invention appears to be novel, involve an inventive step and to be industrially applicable.⁴⁴ Article 33(2), PCT, provides that “[f]or the purposes of the international preliminary examination, a claimed invention shall be considered novel if it is not anticipated by the prior art as defined in the Regulations.” For the same purpose, “a claimed invention shall be considered to involve an inventive step if, having regard to the prior art as defined in the Regulations, it is not, at the prescribed relevant date, obvious to a

³⁸ Rule 33.3(b), Regulations Under the PCT. Emphasis added.

³⁹ Rule 33.1(b), Regulations Under the PCT.

⁴⁰ PCT International Search Guidelines, chapter. VI § 1.2 (emphasis added).

⁴¹ Article 15(4), PCT

⁴² See Article 31(1), PCT.

⁴³ See Article 32(1), PCT.

⁴⁴ See Article 33(1), PCT.

person skilled in the art.”⁴⁵ However, the international preliminary examination report, which is established by the International Preliminary Examining Authority,⁴⁶ does not contain any statement on the question whether the claimed invention is or seems to be patentable or unpatentable according to any national law. It merely states, subject to the provisions of Article 35(3), PCT, “in relation to each claim, whether the claim appears to satisfy the criteria of novelty, inventive step (non-obviousness), and industrial applicability, as defined for the purposes of the international preliminary examination in Article 33(1) to (4)”, PCT.⁴⁷

47. Rule 64.1(a) on Prior Art for International Preliminary Examination provides that for the purposes of international preliminary examination “everything made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) shall be considered prior art provided that such making available occurred prior to the relevant date.”⁴⁸ Of particular importance in the context of traditional knowledge is the prior art effect of non-written disclosure. Rule 64.2 on Non-Written Disclosures provides that “[i]n cases where the making available to the public occurred by means of an oral disclosure, use, exhibition or other non-written means (“non-written disclosure”) before the relevant date as defined in Rule 64.1(b) and the date of such non-written disclosure is indicated in a written disclosure which has been made available to the public on a date which is the same as, or later than, the relevant date, the non-written disclosure shall not be considered part of the prior art for the purposes of Article 33(2) and (3). Nevertheless, the international preliminary examination report shall call attention to such non-written disclosure in the manner provided for in Rule 70.9.”⁴⁹

48. It is important to note that Article 27(5), PCT, on National Requirements limits the purpose of the above-mentioned definitions of prior art to international procedure and expressly states the freedom of Contracting Parties to apply the respective definitions of prior art in their national laws when determining the patentability of an invention claimed in an international application:

“Nothing in this Treaty and the Regulations is intended to be construed as prescribing anything that would limit the freedom of each Contracting State to prescribe such substantive conditions of patentability as it desires. In particular, any provision in this Treaty and the Regulations concerning the definition of prior art is exclusively for the purposes of the international procedure and, consequently, any Contracting State is free to apply, when determining the patentability of an invention claimed in an international application, the criteria of its national law in respect of prior art and other conditions of patentability not constituting requirements as to the form and contents of application.”

⁴⁵ See Article 33(3), PCT.

⁴⁶ The Minimum Requirements for International Preliminary Examining Authorities include, *inter alia*, that the Office or organization “must have at its ready disposal at least the minimum documentation referred to in Rule 34, properly arranged for examination purposes;” Rule 63.1(ii), Regulations Under the PCT.

⁴⁷ See Article 35(2), PCT.

⁴⁸ See Rule 64.1(a), Regulations Under the PCT.

⁴⁹ See Rule 64.2, Regulations Under the PCT.

IV.B Draft Substantive Patent Law Treaty

49. Certain draft provisions for a future legal instrument on the substantive harmonization of patent law, commonly referred to as the draft Substantive Patent Law Treaty, were submitted to the fifth session of the Standing Committee on the Law of Patents (SCP), held in Geneva from May 14 to 19, 2001. These provisions contained two alternatives for a draft article on the definition of prior art.⁵⁰ The first alternative is based on existing texts, such as the PCT or the Draft Treaty Supplementing the Paris Convention as Far as Patents Are Concerned⁵¹. It provides that “[t]he prior art shall consist of everything which, before the filing date or, where priority is claimed, the priority date of the application claiming the invention, has been made available to the public anywhere in the world, as prescribed in the Regulations” (Alternative A). The second alternative uses more contemporary language and provides that, subject to certain provisions, “the prior art with respect to a particular claim shall consist of all information which has been made available to the public anywhere in the world, as prescribed in the Regulations, before the filing date or, where priority is claimed, the priority date of the application which discloses the subject matter of the claim” (Alternative B).

50. The draft provisions on the definition of prior art basically provide that any information made available to the public, anywhere in the world, in any form, including in written form, by oral communication, by display and through use, shall constitute prior art, if it has been made available to the public before the filing date, or, where applicable, the priority date. The SCP supported this approach, according to which the place of disclosure did not have any restrictive effect on the definition of prior art. At its fifth session of the SCP, one delegation wondered whether the term “information” in Alternative B includes a physical entity or an act of conduct. Further, the representative of one non-governmental organization noted that “the capturing of information, including information ... in the field of traditional knowledge, was important.”⁵²

51. Discussions on the draft Substantive Patent Law Treaty will continue in the SCP and the Intergovernmental Committee may wish to take note of the progress of those discussions and, if appropriate, provide its recommendations, if any, on the status of traditional knowledge in the definition of prior art to the SCP for consideration in its discussions on the draft Substantive Patent Law Treaty.

52. Besides international instruments currently in force or under development, patent laws and practices at the regional and national levels vary widely. Prior art in certain countries is defined to include everything that has been made available to the public anywhere in the world by any means, whereas in other countries, non-written disclosures, such as oral disclosures, or use outside their jurisdiction, do not form part of the prior art, and thus do not constitute a bar to patentability. However, many patent offices do not conduct substantive examination of patent applications themselves, since this requires extensive human and financial resources. Many developing countries maintain cooperation agreements with large national or regional patent-granting authorities, and, e.g., send their applications to the European Patent Office (EPO), the Japanese Patent Office (JPO) or the United States Patent and Trademark Office (USPTO). In 2000, 89.7% of international searches for international

⁵⁰ See document SCP/5/2, Article 8, “Definition of Prior Art.”

⁵¹ See documents PLT/DC/3 and PLT/DC/69.

⁵² See document SCP/5/6 Prov., paragraph 78.

applications (i.e., searches for 81,650 international applications) were carried out by these three offices as International Searching Authorities.⁵³ The remaining part of this section will therefore review the relevant provisions and practices under the European Patent Convention (EPC), in Japan and in the United States of America.

IV.C European Patent Convention

53. The European Patent Convention (EPC) defines prior art as follows:

“The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the filing of the European patent application.”⁵⁴

54. With reference to this provision of the EPC, the *Guidelines for Examination in the European Patent Office* (EPO) emphasize that “[t]he width of this definition should be noted. There are no restrictions whatever as to the geographical location where, or the language or manner in which the relevant information was made available to the public; also no age limit is stipulated for the documents or other sources of the information. However certain specific exclusions exist (see IV, 8).”⁵⁵ All traditional knowledge comprised in this wide definition of the state of the art is recognized as prior art by the EPO, for the purposes of Article 54(2), EPC.

55. The EPO has taken significant steps to improve its coverage of, and access to, sources of non-patent literature (NPL). The availability of NPL to examiners has been improved to allow searching in more NPL publications and to allow faster access to NPL. This activity includes loading of copies of commercial databases in-house at the EPO (INSPEC, ELSEVIER, BIOSIS, COMPENDEX, etc.) and an annual subscription to 1,400 journals from which 120,000 articles are copied and added yearly to the classified collection. Other examples include the cooperation within Europe by the EPO and some of its Member States to forge consortium contracts with publication houses/commercial hosts for access to their NPL databases.

IV.D Japan

56. Section 29 of the Japanese Patent Law (JPL) provides for absolute novelty as in the case of the EPC. This means that (i) inventions which were publicly known, (ii) inventions which were publicly worked, and (iii) inventions which were described in a distributed publication or made available to the public through telecommunication lines in Japan or elsewhere prior to the filing date or priority date constitute prior art. In particular, the JPL provides that any person who has made an invention which is industrially applicable may obtain a patent for the

⁵³ In 2000, 60.9% of international applications (55,414 applications) were sent to the EPO, 19.1% (17,386 applications) to the USPTO, and 9.7% (8,850 applications) to the JPO. See, *Information Note. The Patent Cooperation Treaty (PCT) in 2000*. WIPO, Geneva, February 13, 2001.da

⁵⁴ See EPC, Article 54(2).

⁵⁵ See *Guidelines for Examination in the European Patent Office*, Part C, Chapter IV, paragraph 5.1.

invention, with the exception, *inter alia*, of “inventions which have been described in a publication distributed in Japan or elsewhere or inventions which became available to the general public through telecommunication lines in such places prior to the filing of patent applications.”⁵⁶

57. On December 10, 1999, the Japanese Patent Office (JPO) released ‘Operational Guidelines on Treatment of Technical Information Disclosed on the Internet as Prior Art’ which offer guidance on the treatment as prior art of “inventions which became available to the general public through telecommunication lines prior to the filing of patent applications.”

58. These guidelines may apply, for example, to online databases of traditional knowledge documentation data, such as the databases listed in Annex 2 of this document. This is the case because a “line” is defined in the Guidelines as “a two-way transmission line, generally constituted by send and receive channels,” which includes not only websites but also online databases. The Guidelines define the term “general public” as meaning “unspecified persons in general.”⁵⁷ The Guidelines provide that ““available to the general public” means that information is in a state where it can be seen by unspecified persons, and does not necessarily imply that it has actually been accessed.”⁵⁸

59. Information of an online traditional knowledge database would be considered as being available to the general public if it is linked with any other site on the Internet, registered with any search engine, or the URL of the site is published in a means providing information to the general public (for example, a widely-known newspaper or magazine), and if, at the same time, public access to the site is not restricted. The online traditional knowledge database would be considered as accessible by unspecified persons even if access requires a password, if anybody can access it by acquiring a password through a set of non-discriminating procedures (regardless of whether there is a charge for the acquisition of a password). An online database that is accessible by the mere payment of a fee is considered as a website accessible by unspecified persons.

60. The Guidelines further provide that, in principle, information without an indication of the time of publication is not to be cited by the examiners. There are certain exceptions of cases where citation can be made (see Art. 3.1.1.(3) of the Guidelines) and normally the time of posting on the Internet is considered the time of publication. Therefore, if certain traditional knowledge is uploaded onto the Internet on date X, that would be the date of publication. If the holders of the traditional knowledge wish to argue that the knowledge had been publicly available prior to that date, they would have to prove this availability separately. This may have implications for traditional knowledge as prior art and should be taken into account when designing initiatives to establish traditional knowledge databases and digital libraries, as described in Section V.A.5 below. For technical information disclosed on the Internet, it is specified that the question of whether the information became available before the filing of the patent application is judged based on the time of publication indicated in the cited electronic technical information. Finally, the Guidelines specify that electronic technical information retrieved from the Internet etc. must be cited in compliance with WIPO Standard ST.14 (see Section V.B.1 below).

⁵⁶ Section 29(1)(iii),

⁵⁷ See *Operational Guidelines on Treatment of Technical Information Disclosed on the Internet as Prior Art*, JPO, December 10, 1999, Article 2(2).

⁵⁸ See *Ibid.*, Article 2(3).

IV.E United States of America

61. Section 102 of the U.S. Patent Act does not state a general definition of the term “prior art,” but establishes a statutory bar against the grant of a patent in certain specified conditions. Specifically, 35 United States Code (U.S.C.) Section 102(a), (b) and (f), concerning ‘Conditions of patentability; novelty and loss of right to patents,’ provides that

“A person shall be entitled to a patent unless –

- (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States”

62. The Section provides a rule-bound method of determining which material will defeat a patent application describing an identical invention or render obvious an application that claims only a small advance over this prior art. Prior foreign activity anticipates a U.S. patent only if the foreign activity is described in a printed form, including a patent or patent application. However, prior foreign knowledge, use and invention are excluded from the prior art relevant to a U.S. patent application.

63. The Code of Federal Regulations provides that, on taking up an application for examination, the examiner “shall make a thorough investigation of the *available* prior art relating to the subject matter of the claimed invention.”⁵⁹ A primary condition for the consideration of foreign prior art under Section 102 is therefore its “availability” to the examining officer. To aid the officers in the discharge of this and other duties, the Commissioner maintains a library of scientific and other works and periodicals, both foreign and domestic, in the Patent and Trademark Office.⁶⁰ The technical literature, foreign patent documents, and reference and online search services which are available there “provide material which must be known or searched to determine whether claims of applications are directly anticipated and therefore unpatentable under the provisions of 35 U.S.C. 102.”⁶¹

64. Nevertheless, in certain cases examiners were not able to ascertain at the time when patents for traditional knowledge-related inventions were granted that there existed traditional knowledge-related non-patent literature which taught the use of the invention. In order to address this issue and prevent the patenting of traditionally used remedies, the USPTO has suggested to “address the need of creating more easily accessible non-patent literature databases that deal with traditional knowledge. ... With the help of the developing countries, traditional knowledge can be documented, captured electronically, and placed in the

⁵⁹ 37 CFR §1.104(a)(1). Emphasis added.

⁶⁰ 35 U.S.C. 8 provides that “The Commissioner shall maintain a library of scientific and other works and periodicals, both foreign and domestic, in the Patent and Trademark Office to aid the officers in the discharge of their duties.”

⁶¹ USPTO. *Manual of Patent Examining Procedure* (MPEP) (Edition 7 Revision 1 (E7R1), February, 2000), § 901.06(a).

appropriate classification systems so that it can be more easily searched and retrieved.”⁶² This would provide a framework to integrate traditional knowledge databases into patent information systems which are seamlessly searchable for patent examination purposes.

65. Additionally, Section 1.104 of Chapter 37 of the Code of Federal Regulations provides that “[a]n international-type search will be made in all national applications filed on and after June 1, 1978.”⁶³ This provides that also national applications shall be subject to an international search, with the objective to discover “everything which has been made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) and which is capable of being of assistance in determining that the claimed invention is or is not new and that it does or does not involve an inventive step (i.e., that it is or is not obvious), provided that the making available to the public occurred prior to the international filing date.”⁶⁴ The relevance of this provision to traditional knowledge will be developed in the next section, which addresses practical measures for the improvement of availability, searchability and exchangeability of traditional knowledge-related non-patent literature.

V. PRACTICAL MEASURES FOR THE IMPROVEMENT OF THE AVAILABILITY, SEARCHABILITY AND EXCHANGABILITY OF TRADITIONAL KNOWLEDGE-RELATED NON-PATENT LITERATURE

66. The basic problem to be addressed under Task B.3 of the Committee is that patent examiners cannot discover relevant traditional knowledge as prior art when they are examining patent applications as to substance. However, extensive data on traditional knowledge which is in the public domain is available from documentation initiatives undertaken by indigenous and local communities and other institutions, which have been working to conserve traditional knowledge. As indicated in the introduction above, the present paper takes the approach that Member States might begin to address the relevant issues by building bridges between IP Offices and these traditional knowledge documentation initiatives. Such bridge building would enable IP Offices to integrate standardized traditional knowledge documentation into their procedures for filing, examination, publication and granting of intellectual property titles. It might further facilitate the electronic exchange and dissemination of public domain traditional knowledge data within intellectual property information systems.

67. Such bridge building would require certain practical measures to be taken both by IP Offices and by traditional knowledge documentation initiatives. The following Section first identifies possible measures that could be taken by IP Offices and the IP system for an improved integration of traditional knowledge into prior art searches, and then describes possible measures on the part of traditional knowledge documentation initiatives that could facilitate this integration.

⁶² Letter by Mr. Robert W. Saifer, Director, International Liaison Staff, United States Patent and Trademark Office (USPTO), addressed to Dr. R. A. Mashelkar, Director General, Council of Scientific and Industrial Research (CSIR), Government of India, dated August 27, 1999.

⁶³ 37 CFR §1.104(a)(3).

⁶⁴ Rule 33.1(a), Regulations Under the PCT. See Section IV.A above on the importance of this provision.

V.A Measures Related to Procedures of Patent-granting Authorities

68. In the context of previous WIPO activities, Member States, traditional knowledge holders and other stakeholders have identified certain measures which might improve the status of traditional knowledge as prior art in the context of the existing procedures for the filing, examination, publication, granting and registration of intellectual property titles and documents. These include, *inter alia*, measures for (1) the classification of traditional knowledge documentation in patent documents and non-patent literature, in particular through the International Patent Classification; (2) the integration of traditional knowledge-related periodicals in minimum documentation lists for non-patent literature; (3) the further evolution of search and examination procedures; and (4) increased searching of databases and digital libraries containing traditional knowledge documentation data. The following sections provide background information for the discussions of the Member States on these possible measures.

V.A.1 Classification of Traditional Knowledge Documentation

69. The total number of patent documents published by national and regional patent offices and WIPO exceeds one million every year. An efficient classification system is indispensable for the retrieval ("search") of those documents which in respect of a given technological or scientific problem reflect the prior art. Such a system exists in the form of the International Patent Classification (IPC). The primary purpose of the IPC is the establishment of an effective search tool for the retrieval of patent documents, in order to verify the novelty and evaluate the inventive step of patent applications.⁶⁵ Approximately 95% of all patent documents currently published in the world bear IPC classification symbols.

70. The IPC is a classification system which divides technology into almost 69,000 subdivisions, each subdivision being identified by a separate symbol. Before publication, the patent document is "classified," i.e. the staff of the industrial property office assign it the classification symbols which correspond to the technical fields to which the invention relates. The symbols are printed on the front page of the published document.

71. Any person wishing to know which patent documents contain information on a given technical field only needs to refer to the IPC to find which one of the approximately 69,000 terms relate to that field. It is then possible to find all the documents that have been assigned that symbol. This operation is called "retrieval."

72. In order to provide access to traditional knowledge documentation data as part of searchable prior art, appropriate classification tools will be indispensable. With a view to facilitating such access to traditional medicine documentation from India, a task force, which was formed by the Government of India, has developed a draft Traditional Knowledge Resource Classification (TKRC), relating primarily to traditional systems of Indian medicine (Ayurveda, Siddha, Unani Tibb). The development of the TKRC has been influenced to a considerable extent by the structure of the IPC.

73. At the request of India, the International Bureau of WIPO provided initial recommendations on the draft TKRC, which were aimed at the simplification of the

⁶⁵ See, documents PCPI/6/6, paragraph 18 and Annex V, and document IPC/CE/XI/6, paragraph 14, which prepared and approved the 'Philosophy of the IPC Revision Work'.

classification structure and the use of more general terminology, in order to facilitate the further expansion of the classification system to traditional knowledge documentation of other countries.

74. The IPC could also be applied, to a certain extent, for the classification of traditional knowledge relating to traditional medicine. However the development of more detailed classification tools for traditional knowledge, such as the TKRC, would significantly increase the efficiency of information retrieval. In view of the potential value of the draft TKRC for accessing published traditional knowledge documentation as prior art, its relationship with the IPC requires thorough examination.

75. At its thirtieth Session, held in Geneva from February 19 to 23, 2001, the Committee of Experts of the Special Union for the International Patent Classification (“the IPC Union”) considered the draft TKRC in order to take a decision concerning its proper relationship to the IPC. The Committee welcomed the initiative of India and agreed that TKRC should be studied in detail. For conducting a study, the Committee decided to create a special task force. The mandate of the task force will be to elaborate advice on future development of TKRC, in particular with a view to its expansion to documentation of other countries, and to investigate how its proper relationship to IPC should be established. The TKRC could be linked or even partially integrated into the IPC.

76. The Intergovernmental Committee may wish to take note of the reports of the task force of the Committee of Experts of the IPC Union and coordinate its work under Task B.3 when it concerns the classification of traditional knowledge with that task force, as appropriate.

V.A.2 Traditional knowledge and the “minimum documentation” for International and International-Type Searches

77. Article 15(4), PCT, provides that in the context of international searches “[t]he International Searching Authority ... shall endeavor to discover as much of the relevant prior art as its facilities permit, and shall, in any case, consult the documentation specified in the Regulations.” The “documentation specified in the Regulations” is specified in Rule 34 of the Regulations Under the PCT and is generally referred to as the PCT minimum documentation. Rule 34 provides that the minimum documentation shall include certain national patent documents, as specified in the Regulations, the published international applications, the published regional applications for patents and inventors’ certificates, the published regional patents and inventors’ certificates, and “such other published items of non-patent literature as the International Searching Authorities shall agree upon and which shall be published in a list by the International Bureau when agreed upon for the first time and whenever changed.”⁶⁶

78. Currently the International Searching Authorities have agreed that, for the purposes of this Rule, the published items of non-patent literature to be included in the minimum documentation should be the items published in 134 periodicals during the five-year period preceding the time at which the international search report is established.⁶⁷ It is understood

⁶⁶ Rule 34.1(b)(iii) of the Regulations Under the PCT.

⁶⁷ See “Minimum Documentation” Under Rule 34.1(b)(iii) of the Regulations Under the PCT’ in: *WIPO Handbook on Industrial Property Information and Documentation*.

that the International Searching Authority would not be precluded from consulting issues of these publications published prior to the beginning of this five-year period.

79. In the PCT International Search Guidelines the international search documentation is defined as “a document collection that is systematically arranged (or otherwise systematically accessible) for search purposes according to the subject matter content of the documents, which are primarily patent documents supplemented by a number of articles from periodicals and other items of non-patent literature.”⁶⁸

80. The minimum documentation is updated periodically and the present list was agreed upon by the International Searching Authorities on the occasion of the fourth Plenary Session of the SCIT, held in Geneva from December 6 to 10, 1999, with effect from January 1, 2000. As a possible measure to improve the availability of traditional knowledge-related NPL in the context of international searches it might be possible to consider recommending the integration of periodicals, gazettes and newsletters which document traditional knowledge into the minimum documentation list. An illustrative and non-exhaustive list of such periodicals, gazettes and newsletters, which are published by various traditional knowledge documentation initiatives, are listed in Annex 2.

81. *Possible Activity 1: The Committee may wish to compile an inventory of existing traditional knowledge-related periodicals, which document and disclose traditional knowledge data, with a view to discussing a possible recommendation that certain periodicals may be considered by the International Search Authorities for integration into the minimum documentation list under the PCT.*

V.A.3 Traditional Knowledge and the *Journal of Patent Associated Literature* (JOPAL)

82. Based on the minimum documentation list of the PCT, the *Journal of Patent Associated Literature* (JOPAL) was established and first published in 1981 through an international cooperation among national and regional patent-granting authorities. JOPAL was initiated with the objective of developing a centralized database of classified bibliographic data to be used as a search aid by IP Offices for prior art searching of technical and scientific non-patent literature. The participating intellectual property offices produce bibliographic details and classification of selected articles as a by-product of the systematic maintenance of their search files and they submit the details of the selected articles to the Secretariat of WIPO for data capture and inclusion in the database. Originally published in paper form, the database, which is updated monthly, is now provided as a searchable database accessible via the Internet from the WIPO Intellectual Property Digital Libraries (IPDL) site.⁶⁹

83. At its fourth Plenary Session, held in Geneva from December 6 to 10, 1999, the SCIT requested the Secretariat to conduct a Survey on the current use of JOPAL and on the use of alternative sources of NPL.⁷⁰ Forty-one IP Offices responded to the survey⁷¹ and the results

⁶⁸ Paragraph IX-2.1, PCT International Search Guidelines (as in force from 18 September 1998).

⁶⁹ Available at <<http://www.wipo.int/scit/en/jopal/jopal.htm>>. The database contains data relating to the period 1981 to date, i.e., all data as previously published on the last issue of the JOPAL CD-ROM (Disc: 1997/3) and all subsequently published data.

⁷⁰ See document SCIT/4/8, paragraph 26.

⁷¹ See project file SCIT/P 9/00, Annexes 3 to 44.

of the survey and options for future directions of the JOPAL project were presented in a status report to the sixth Plenary Session of the SCIT, held in Geneva from January 22 to 26, 2001.⁷² Following discussion of the status report, the consensus view which was expressed by the delegations participating in the session was that the JOPAL service should continue. However, the Committee concluded that in its present form, JOPAL did not appear to provide a platform of sufficient utility to IP Offices to support their NPL prior art searching and that consideration has to be given to the steps that might be taken to support access to NPL and the future role that JOPAL could play. Following discussion on options of other more extended services,⁷³ the delegations expressed the view that a follow-up proposal detailing costs and benefits should be put before the Committee before it gave an opinion on the future direction for the JOPAL project.⁷⁴

84. *Possible Activity 2: Subject to the discussions of the Committee on possible Activity 1 and subject to the decisions of the SCIT on future directions of the JOPAL Project, the Committee may wish to prioritize the traditional knowledge-related periodicals compiled under possible Activity 1, with a view to discussing a possible recommendation that the SCIT might consider the potential integration of the prioritized periodicals into the JOPAL Project.*

V.A.4 Traditional Knowledge and Search and Examination Procedures for National Applications

85. While the minimum documentation specified in Rule 34 of the Regulations Under the PCT sets a minimum standard for documentation which shall be consulted in the context of International Searches on international applications, the documentation consulted during the searches on national applications varies widely according to the law and practice of national and regional patent-granting authorities. It has been suggested that examination procedures should integrate more effectively the guidelines for “international-type searches” into the examination process for national patent applications.⁷⁵

86. Besides the international search on international applications, the PCT further provides that, subject to the national law of the Contracting State so permitting, an “international-type search” may be carried out on national applications at the request of the applicant. Article 15(5)(a), PCT, provides that “the applicant who files a national application with the national Office of or acting for such State may, subject to the conditions provided for in such law, request that a search similar to an international search (“international-type search”) be carried out on such application.”⁷⁶

87. Besides the applicant, the national Office of a Contracting State “may subject any national application filed with it to an international-type search.”⁷⁷ The international-type search is carried out by the International Searching Authority which would be competent for

⁷² See document SCIT/6/4.

⁷³ See options (c) and (d) as outlined in paragraph 12 of document SCIT/6/4.

⁷⁴ See document SCIT/6/7, paragraph 25.

⁷⁵ See, for example, comments presented in response to USPTO Request for Comments on Issues Related to the Identification of Prior Art During the Examination of Patent Application (RIN 0651-ZA02, Federal Register Notice: May 27, 1999 (64 Fed. Reg. 28803)).

⁷⁶ Article 15(5)(a), PCT.

⁷⁷ Article 15(5)(b), PCT.

an international search if the national application were an international application.⁷⁸ In some jurisdictions, examiners must already perform an “international-type” search as part of every examination of a national application.⁷⁹ In practice, however, examiners mostly perform international-type searches only for applications that enter the national stage after they have gone through the international stage under the PCT.⁸⁰

88. *Possible Activity 3: The Committee may wish to discuss possible recommendations to take into account the status of traditional knowledge as prior art in future amendments of existing guidelines for search and examination of patent applications, as well as possible recommendations that international-type searches be made in national applications, subject to the capacities of concerned intellectual property offices, in particular those of developing and least developed countries.*

V.A.5 Traditional Knowledge Databases and Digital Libraries (TKDLs)

89. Numerous suggestions have been made that the status of traditional knowledge as prior art might be improved if patent examiners searched online databases of documented traditional knowledge. A non-exhaustive list of traditional knowledge databases, which are currently online, is provided in Annex 2.

90. WIPO has conducted a survey on “Experiences gained in the use of computerized search systems useful for the purposes of search and examination.”⁸¹ The survey concluded that computerized search systems are more suitable for general orientation searches, rather than novelty searches.⁸² In particular the survey concluded that for searching non-patent literature, online systems seem to be the most productive. Reasons for the productivity of online systems in non-patent literature searches include: generally satisfactory coverage of backlog files; long established experience in computerization of non-patent literature searching; less strict requirements of patent offices in respect of non-patent literature as compared with patent documentation, etc.

91. The Survey also identified the main problems encountered with the use of computerized systems. These included a lack of confidence and reliability with regard to the completeness of coverage of documents; limited coverage in time of computerized systems (this will be a particularly grave problem in the case of traditional knowledge-related NPL); lack of standardization, in particular with regard to command language and the recording of data elements; overlaps of subject areas by subject-related search systems combined with difficulties in cross-file searching; absence of illustrations and drawings online; regular

⁷⁸ Article 15(5)(c), PCT.

⁷⁹ For example, in the United States of America, see 37 CFR § 1.104(a)(3), see Section IV.E above.

⁸⁰ In the United States, however, 37 C.F.R. § 1.9 defines a “national application” to include any U.S. application for patent filed under 35 U.S.C. § 111, not only applications entering the national stage from international applications.

⁸¹ See ‘Experiences Gained in the Use of Computerized Search Systems Useful for the Purposes of Search and Examination. Summary of Conclusions’ *WIPO Handbook on Industrial Property Information and Documentation*, Part 6.

⁸² For example, searches for the purposes of preparing technological information surveys. However, since the time when the survey was conducted, computerized systems have improved considerably.

training-needs for examiners involved in online searching; and the fact that many computerized NPL databases are not specific enough from the point of view of patent search.

92. A proposal to address the availability of traditional knowledge-related non-patent literature by adapting WIPO's concept of Intellectual Property Digital Libraries (IPDLs) was made in the SCIT at its fourth Plenary Session. The proposal recommended the establishment of Traditional Knowledge Digital Libraries (TKDLs), which have been described as follows:

We need to address the need of creating more easily accessible non-patent literature databases that deal with traditional knowledge. [...] It is proposed that the developing world should create a Traditional Knowledge Digital Library (TKDL). The TKDL portal should have a web-based search interface providing full text search and retrieval of traditional knowledge. The TKDL portal should have full data on traditional medicine and practices including the pertinent scientific literature. Such a portal should include cross references, key words, comprehensive search interfaces, indexing & retrieval and it should have a secured access on the web. In the future, TKDL can increase its canvas beyond traditional medicine and include other innovations based on traditional knowledge. The methodology and standards used in the creation of the TKDL portals should be the same as those established by several of IP offices such as USPTO, European Patent Offices or WIPO's Intellectual Property Digital Library (IPDL).⁸³

93. The TKDL proposal was referred by the SCIT to WIPO's overall program on traditional knowledge with the suggestion that the feasibility of electronic exchange of traditional knowledge documentation should be studied in detail.⁸⁴

94. Similar proposals have been made in other fora, where specific features of an international traditional knowledge database were elaborated. A recent communication to the TRIPS Council of the WTO proposed that an international database of traditional knowledge should be established and that the database could have the following eight features:

- "It should be established at the international level. Only this will ensure that all national, regional and international patent authorities and relevant judicial authorities have adequate access to information on traditional knowledge.
- As the recording of traditional knowledge in one single international database would likely be a very costly endeavour, it would seem preferable to electronically link existing regional, national and local databases. Thus, rather than recording traditional knowledge itself, such an international database would primarily function as a gateway to these other databases. In other words, the international database could provide a network of regional, national and local databases and would function similar to the Clearing House Mechanism of the CBD.
- Such an international database should be established and administered by WIPO. This organisation is in the foreground as it is best placed to administer such a database in the

⁸³ Dr. R. A. Mashelkar, "The Role of Intellectual Property in Building Capacity for Innovation for Development" *WIPO Panel Discussion* at the ECOSOC High-level Segment on the Role of Information Technology in a Knowledge-based Economy, United Nations, New York, May 24, 2000: page 9.

⁸⁴ See document SCIT/4/8, paragraph 41.

context of ongoing similar projects for automation. WIPO, therefore, already has the necessary expertise and technical capacity to establish and administer the proposed database. WIPO should carry out its efforts on this database in close cooperation with other relevant international bodies that have competence in the field of traditional knowledge, including in particular the CBD.

- The recording of traditional knowledge in the database should be voluntary, that is, recording may only take place if the holders of the knowledge in question agree. The recording, however, should not constitute a prerequisite for the existence of any rights regarding traditional knowledge.
- The holders of traditional knowledge may specify that some elements of their knowledge may not be disclosed to the public, i.e., it would be accessible only to the patent granting authorities.
- The knowledge recorded in this database should be organised in standardised classifications. Only this ensures that the patent granting and judicial authorities are able to perform comprehensive and conclusive searches.
- The information contained in the database should be recorded in several languages.
- The recording of the traditional knowledge should be as easy as possible. Furthermore, the recorded knowledge should be updated as necessary. This would ensure that traditional knowledge, which is constantly created and improved, is always recorded in its newest form. Keeping the recorded knowledge up-to-date appears to be much easier in regional, national and local databases than updating one large international database. Besides the lower costs mentioned above, the ease of updating recorded traditional knowledge also speaks in favour of linking existing regional, national and local databases rather than recording traditional knowledge in a single international database.’⁸⁵

95. In response to such requests and proposals, an initial online proto-type, which may serve as a basis for a feasibility study, has been developed at WIPO by the IPDL Project and is being tested by Main Program 11 on Global Intellectual Property Issues. This proto-type includes the traditional uses of fifty medicinal plants from South Asia and is based on the information compiled in a CD-ROM by the Council of Scientific and Industrial Research of India.⁸⁶ All the traditional knowledge-related information contained in this proto-type is public domain information and may constitute prior art in relation to inventions utilizing components of those plants.

96. A feasibility study on the electronic exchange of traditional knowledge documentation as non-patent literature could be based on such a proto-type and a questionnaire addressed to the users and providers of the traditional knowledge data contained in the proto-type. Building on existing surveys undertaken by WIPO on the use of computerized systems for search and examination, certain elements would need to be addressed in a feasibility study of the electronic exchange of traditional knowledge documentation.

⁸⁵ See document IP/C/W/284, paragraph 17.

⁸⁶ *Health Heritage*. Produced and published by the Unit for Research and Development of Information Products (URDIP) of the Council for Scientific and Industrial Research (CSIR), Government of India.

(i) *User needs*: The study would seek to assess the needs of patent-granting authorities when using such a system, in particular patent examiners working on IPC classes in which traditional knowledge-related applications are primarily classified.⁸⁷ Such needs could include, *inter alia*, the need for: specialized search tools for search and retrieval of traditional knowledge data; classification systems for traditional knowledge data; application of intellectual property documentation standards to traditional knowledge data; possible integration of data into existing intellectual property information systems;

(ii) *Provider needs*: The study would seek to assess the needs of traditional knowledge documentation initiatives in providing public domain traditional knowledge data to such a system. Besides undertaking a survey on the availability of such documentation, needs which may require discussion in this area include: conditions under which the initiatives would be willing to contribute documentation data; IP-management during the traditional knowledge documentation process; practicalities of data provision; classification; local languages and translation issues; existing documentation standards which are already being applied to traditional knowledge data; other objectives of traditional knowledge documentation, such as the conservation of traditional knowledge, etc.

97. *Possible Activity 4: The Committee may wish to study the feasibility of electronic exchange of public domain traditional knowledge documentation data, including through the establishment of international online traditional knowledge databases and digital libraries, taking into account differences in the needs of different stakeholders and the specificity of traditional knowledge in different regions, languages, media and legal contexts.*

V.B Measures Related to Procedures of Traditional Knowledge Documentation Initiatives

98. Access to standardized traditional knowledge documentation data as non-patent literature, which was identified above as the basic problem in the examination of traditional knowledge-related patent applications, has an additional aspect to it, which cannot be resolved unilaterally by patent-granting authorities. This additional aspect concerns the role of traditional knowledge holders and traditional knowledge documentation initiatives which are ongoingly documenting traditional knowledge. If the IP system were to embrace traditional knowledge holders and documentation initiatives, certain measures would have to be taken as a precondition for the traditional knowledge documentation initiatives of indigenous and local communities to provide documentation data to national and regional patent offices. Most importantly, the wider application of traditional knowledge should include the approval and involvement of the indigenous and local communities who are the holders of such knowledge, innovations and practices.⁸⁸ The present section provides information on such measures complementary to those mentioned in Section V.A.

⁸⁷ For example the class classified in the IPC as A 61 K (Preparations for Medical, Dental, or Toilet Purposes), in particular subclasses A61K 33/00 - 33/44, A61K 35/00 - 35/76 and A61K 35/78 - 35/84.

⁸⁸ Article 8(j), CBD, provides that Contracting Parties shall “promote ... wider application [of traditional knowledge] with the approval and involvement of the holders of such knowledge, innovations and practices.”

99. These include, *inter alia*, the coordination of widely used intellectual property documentation standards and existing traditional knowledge documentation standards; effective and strategic management of intellectual property-implications during the traditional knowledge documentation process; coordination between classification systems for traditional knowledge, associated biological resources and non-patent literature; and the achievement of synergies between the intellectual property-specific use of traditional knowledge documentation data with other objectives of traditional knowledge documentation.

V.B.1 Existing Intellectual Property Documentation Standards and Existing Traditional Knowledge Documentation Standards

100. WIPO's past work in the area of industrial property information and documentation has resulted over the years in some 50 WIPO Standards, Recommendations and Guidelines related to industrial property information and documentation. These Standards aim to harmonize practices by all industrial property offices and to facilitate the international transmission, exchange and dissemination of industrial property information (for both text and images).

101. WIPO Standards are expressed in the form of recommendations and are directed to States and international organizations, in particular to their industrial property Offices, to the Secretariat of WIPO, and to any other national or international institution interested in industrial property documentation and information.

102. WIPO Standards relevant to the scope of this document can be grouped into seven categories: (i) Standards of a general nature, common to information and documentation relating to any industrial property right; (ii) Standards relating to patent documents in general; (iii) specific Standards applicable to secondary publications such as official gazettes, indexes and abstracts; (iv) specific Standards in respect of microforms; (v) specific Standards in respect of machine-readable carriers of industrial property information; (vi) specific Standards relating to trademark information and documentation; (vii) specific Standards relating to industrial design information and documentation.

103. Specific standards which may be of relevance in the context of the documentation of traditional knowledge as prior art for industrial property purposes include: Standard ST.2 (Standard Manner for Designating Calendar Dates by Using the Gregorian Calendar); Standard ST.3 (Recommended Standard on Two-letter Codes for the Representation of States, Other Entities and Intergovernmental Organizations); Standard ST.9 (Recommendation Concerning Bibliographic Data On and Relating To Patents and SPCs); Standard ST.14 (Recommendation on the Inclusion of References Cited in Patent Documents); Standard ST.80 (Recommendation Concerning Bibliographic Data Relating to Industrial Designs (Identification and Minimum requirements)); Standard ST.81 (Recommendation Concerning the Content and Layout of Industrial Design Gazettes).⁸⁹

104. The applicability of such standards for use in traditional knowledge documentation would need to be assessed and, as appropriate, existing standards could be applied or further developed. When assessing the applicability of such standards, existing international

⁸⁹ See *WIPO Handbook on Industrial Property Information and Documentation*. Part 3.

standards which have been developed for the standardized documentation of traditional knowledge-related subject matter would have to be taken into account. For example, UNESCO has developed a methodological guide to the collection of data on crafts.⁹⁰ This methodological guide includes certain recommendations for the standardization of data on traditional textile, woodwork, and metalwork designs. In relation to such existing international standards for the documentation of traditional knowledge-related subject matter, particular attention should be given, for example, to the applicability of WIPO Standard ST.80. While the scope of the present document does not cover the status of traditional knowledge as prior art in respect of industrial designs, as mentioned in paragraph 10(i) above, the Committee may wish to address this issue in due course.

105. The harmonization of existing IP documentation standards and traditional knowledge documentation standards, and their consistent application, would be important for IP Offices to enable them to integrate standardized traditional knowledge documentation data into their existing procedures for filing, examining, publishing and granting IP titles. It would also be important for traditional knowledge documentation initiatives to structure their documentation work in such a way as to fulfill the minimum documentation requirements for the acquisition, exercise and enforcement of certain intellectual property rights in their traditional knowledge, if they decide to legally protect those traditional knowledge elements which fulfill the requirements of protection.

106. *Possible Activity 5: The Committee may wish to examine the applicability of existing intellectual property documentation standards to traditional knowledge-related subject matter and the relationship of these standards with existing traditional knowledge documentation standards.*

V.B.2 Intellectual Property Management During the Documentation Process

107. To protect the interests of traditional knowledge holders who provide documentation data to IP Offices, the Offices would have to offer the traditional knowledge holders and documentation initiatives practical advice and assistance in developing and implementing intellectual property strategy during their documentation work. This advice would aim to ensure that only traditional knowledge which is already in the public domain is provided as non-patent literature to the IPOs and that no options are waived by the traditional knowledge holders or documentation initiatives to themselves acquire IPRs over their traditional knowledge. This section is based on the assumption that the disclosure of traditional knowledge preempts its protection. Such an assumption is only valid in relation to the current patent and utility model systems. But if options for *sui generis* protection of traditional knowledge were available, traditional knowledge could be protected regardless of its public availability (subject, however, to certain criteria set out in said protection system).

108. Existing traditional knowledge documentation initiatives are mostly undertaken by indigenous and local communities or national/regional institutions which have traditionally undertaken activities in the cultural, environmental or development fields rather than specialized work in intellectual property. Therefore the communities or institutions often undertake documentation work without considering the intellectual property implications of

⁹⁰ UNESCO/ICA. "Crafts: methodological guide to the collection of data" (by Jocelyn Etienne-Nugue) Paris: UNESCO/ICA, 1990.

their work. In the field of traditional medicine, for example, the disclosure of documentation data may destroy the novelty of a formulation and therefore waive the possibility, if any, of acquiring patent protection for it.

109. Improving the status of public domain traditional knowledge as prior art would therefore also involve the provision of practical advice to documentation initiatives on managing intellectual property rights during the documentation process. Essentially, intellectual property rights would have to be managed in respect of:

- (i) possible rights in the underlying traditional knowledge of which copies are made in the documentation process;
- (ii) rights in the documentation data and associated works; and
- (iii) rights in the collections and compilations of such data and works at the level of traditional knowledge databases.

110. In order to manage the IP implications of their work, traditional knowledge documentation initiatives have themselves developed strategies regarding the destruction of novelty through documentation. Depending on the objectives of the initiatives, the IP strategies and proposals they developed included: (i) systematic intentional disclosure;⁹¹ (ii) a phased approach to documentation;⁹² (iii) synoptic presentation of documented traditional knowledge⁹³; (iv) a registration system which would grant petty patent-like protection for the documented innovation until the traditional knowledge holder can file an application for a utility patent.⁹⁴

111. *Possible Activity 6: The Committee may wish to discuss ways and means of providing assistance to indigenous peoples and local communities as well as national/regional traditional knowledge documentation initiatives to manage the intellectual property implications during the documentation process.*

V.B.3 Synergies With Other Objectives of Traditional Knowledge Documentation

112. Traditional knowledge documentation initiatives have undertaken their work in relation to a wide range of policy objectives, including the promotion of innovation and creativity, the prevention of loss of traditional knowledge, the conservation of biological diversity, the equitable sharing of benefits arising from its use, the safeguarding of national culture and identity, and people-to-people learning for sustainable resource management and development strategies.

⁹¹ Practiced, for example, by the Farmers' Rights Information System (FRIS) of the M. S. Swaminathan Research Foundation (MSSRF) (Chennai, India) for documented traditional agricultural knowledge and the approach proposed for traditional medicine in the form of Traditional Knowledge Digital Libraries (TKDL) of the Council of Scientific and Industrial Research (New Delhi, India).

⁹² Practiced by the Oman Center of Traditional Music (Muscat, Sultanate of Oman).

⁹³ Practiced, for example, by the Honeybee Newsletter of the Society for Research Into Sustainable Technologies and Institutions (SRISTI) (Ahmedabad, India).

⁹⁴ Proposed by SRISTI and National Innovation Fund (New Delhi, India).

113. While documentation was considered to be essential for all these objectives, traditional knowledge holders have been increasingly reluctant to divulge their knowledge, because of stories of biopiracy on the one hand and the destruction of novelty of their knowledge on the other hand. It will be essential to identify and maximize synergies between the objectives and the intellectual property system's use of traditional knowledge documentation data.

V.B.4 Interfaces Between the Documentation and Protection of Traditional Knowledge

114. Besides the multiple objectives of traditional knowledge documentation, traditional knowledge documentation may also have interfaces with national systems for the legal protection of traditional knowledge.

115. Member States, indigenous peoples and local communities are increasingly developing registers of traditional knowledge as tools to promote and protect traditional knowledge. Registries typically take the form of databases, i.e. compilations of traditional knowledge data. Such registries are compiled by communities or by community groups, for the benefit of the communities. Where those outside the community have access, there is typically an effort to control access so as to define the terms on which the knowledge is used, including provisions for sharing of benefits from use with the providers.

116. Initiatives undertaken by a number of indigenous and local communities have concluded that registries and databases of traditional knowledge constitute useful devices to organize their knowledge in an empowering manner which is conducive both to the protection and improved management of their knowledge.

117. A registry is an ordered collection or repository of information. The term registry implies that the information in the repository acquires a certain legal status by virtue of being included on the registry. Consequently, a registry is not only a compilation, list or database which serves merely the purpose of providing retrievable data to defined users. A registry is a list or database in which specified information can be registered in order to confer legal rights relating to that information. The registration of an item of information in a registry puts that information "on the record" and records the fact that the registrant asserts a claim to that information.

118. Widely acclaimed traditional knowledge registries or databases have been developed by various initiatives in India, Peru, the Philippines, and by the Inuit of Nunavik and the Dene in Canada. Such registers may provide a valuable source of public domain traditional knowledge and exchangeability of information on registered traditional knowledge from these registers with existing intellectual property information systems may become important, if legal protection is accorded to registered knowledge.

VI. CONCLUSION

119. In recent years patents for traditional knowledge-based inventions were granted, and subsequently revoked, because the relevant traditional knowledge could not be discovered as prior art when the patent application was being examined. This has raised concerns about the recognition and availability of traditional knowledge as searchable prior art. Task B.3 of the Intergovernmental Committee addresses these concerns and is intended to develop criteria for

the effective integration of traditional knowledge into searchable prior art. During its past work WIPO has addressed different aspects of traditional knowledge as prior art, including those pertaining to classification, identification, documentation and search. However, additional practical measures for the improvement of the availability, searchability and exchange of traditional knowledge as prior art are required. Possible measures, and practical activities to implement them, are identified in the present document as an information basis for the discussions of Member States on Task B.3 of the Committee.

120. The Intergovernmental Committee is invited to take note of the foregoing status report on traditional knowledge as prior art and to adopt and prioritize possible activities for the implementation of Task B.3 of the Committee, in particular those identified in paragraphs 81, 84, 87, 97, 106 and 111 above.

[Annex 1 follows]

ANNEX 1

Non-exhaustive List of Traditional Knowledge-related
Periodicals, Gazettes and Newsletters

- Al Ma'thurat Al Sha'biyyah. A Quarterly Review of Folklore. (Gulf Cooperation Council Folklore Center)
- Indigenous Knowledge and Development Monitor: Newsletter of the Global Network of Indigenous Knowledge Resource Centers (Nuffic Center for International Research and Advisory Networks)
- Indigenous Knowledge Notes (World Bank, Africa Region's Knowledge and Learning Center)
- Honeybee Newsletter: Newsletter for Documentation and Experimentation of Local Innovations Developed by Farmers, Pastoralists, Artisans, and Horticulturalists. (Society for Research Into Sustainable Technologies and Institutions)
- Journal of Ethnobiology (Society of Ethnobiology)
- Partners (Global Knowledge Partnership Secretariat, World Bank)
- Biodiversity Conservation Strategy Update (World Resources Institute)
- CIKARD News (Center for Indigenous Knowledge for Agriculture and Rural Development)
- IFPP Newsletter (Indigenous Food Plants Programme)
- ILEIA Newsletter (Information Centre for Low-External-Input Agriculture)
- International Traditional Medicine Newsletter (Program for Collaborative Research in the Pharmaceutical Sciences, University of Illinois)
- IWGIA Newsletter (International Work Group for Indigenous Affairs)
- TEK Talk: A Newsletter on Traditional Ecological Knowledge (The Editor, Ottawa, Canada)

[Annex 2 follows]

ANNEX 2

Non-exhaustive List of Existing Online Databases
Containing Traditional Knowledge Documentation Data

- Dr. Duke's Phytochemical and Ethnobotanical Databases, <www.ars-grin.gov/duke>
- Farmers' Rights Information Service, <<http://www.msrif.org.sg/Fris9809/index.html>>
- NAPRALERT (Natural Products Alert),
<<http://www.cas.org/ONLINE/DBSS/napralertss.html/>>
- Nuffic/CIRAN International Indigenous Knowledge (IK) Network,
<www.nuffic.nl/ciran/ik.html>
- Nunavut Environmental Database, <<http://136.159.147.171/ned/>>
- Phytochemical Society of North America's "Links to Phytochemical Resources on the Web," <www.fin.edu/orgs/psna/links.html>
- "Prelude" database of traditional veterinary medicine, Tropical Diseases Webring,
<http://pc4.sisc.ucl.ac.be/prelude/prelude_HomePage.html>
- Society for Research and Initiatives for Sustainable Technologies and Institutions (SRISTI), <<http://csf.Colorado.EDU/sristi/>>
- World Bank, "Database of Indigenous Knowledge and Practices" in Sub-Saharan Africa,
<www.worldbank.org/afr/ik/datab.htm>

[Annex 3 follows]

ANNEX 3

Possible Activities for the Implementation of
Task B.3 of the Intergovernmental Committee

Possible Activity 1: The Committee may wish to compile an inventory of existing traditional knowledge-related periodicals, which document and disclose traditional knowledge, with a view to discussing a possible recommendation that certain periodicals may be considered by the International Search Authorities for integration into the minimum documentation list under the PCT.

Possible Activity 2: Subject to the discussions of the Committee on possible Activity 1 and the discussions of the SCIT on the evolution of the JOPAL Project, the Committee may wish to prioritize the traditional knowledge-related periodicals, with a view to discussing a possible recommendation that certain periodicals may be considered by the International Search Authorities for integration into the JOPAL Project.

Possible Activity 3: The Committee may wish to discuss possible recommendations to take into account the status of traditional knowledge as prior art in future amendments of existing guidelines for search and examination of patent applications as well as possible recommendations that international-type searches be made in national applications.

Possible Activity 4: The Committee may wish to study the feasibility of electronic exchange of public domain traditional knowledge documentation data, including through the establishment of international online traditional knowledge databases and digital libraries, taking into account differences in the needs of different stakeholders and the specificity of traditional knowledge in different regions, languages, media and legal contexts.

Possible Activity 5: The Committee may wish to examine the applicability of existing intellectual property documentation standards to traditional knowledge-related subject matter and the relationship of these standards with existing traditional knowledge documentation standards.

Possible Activity 6: The Committee may wish to discuss ways and means of providing assistance to traditional knowledge documentation initiatives to manage the intellectual property implications during the documentation process.

[End of Annex 3 and of document]