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

Eleventh Session
Geneva, July 3 to 12, 2007

THE PROTECTION OF TRADITIONAL KNOWLEDGE:
COLLATION OF WRITTEN COMMENTS ON THE LIST OF ISSUES

Document prepared by the Secretariat

I. SUMMARY

1. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) is currently considering the protection of traditional knowledge (“TK”):

(i) consideration of an agreed List of Issues concerning the protection of TK;
and

(ii) consideration of a draft set of “Revised Objectives and Principles for the Protection of Traditional Knowledge” (“Objectives and Principles”).

2. The working documents on protection of TK prepared for the eleventh session of the Committee, in line with the decisions taken at the tenth session, comprise:

(i) WIPO/GRTKF/IC/11/5(a): the present document, a collation of the written comments on the List of Issues which were submitted between the tenth and eleventh sessions, in line with a process agreed by the Committee at its tenth session: in particular, this document contains comments received up to May 18, 2007, and addenda will be issued in the event that further comments are received prior to the eleventh session;

(ii) WIPO/GRTKF/IC/11/5(b): a compilation of comments on the draft Objectives and Principles provided between the ninth and tenth sessions, in line with a commentary process agreed by the Committee at its ninth session and a format agreed at the tenth session;

(iii) WIPO/GRTKF/IC/11/5(c): the text of the draft Objectives and Principles, identical to the text that was circulated at the eighth, ninth and tenth sessions, but provided for ease of reference to assist in the reading of the present set of comments.

3. These documents therefore fit within an extensive set of Committee documentation on the protection of TK. The following table briefly sets out some key documents, to clarify the background to the current working documents:

Surveys, reports and comparative analysis of protection of TK at national, regional and international levels	WIPO/GRTKF/IC/3/7, WIPO/GRTKF/IC/3/8, WIPO/GRTKF/IC/3/9, WIPO/GRTKF/IC/4/7, WIPO/GRTKF/IC/4/8, WIPO/GRTKF/IC/5/7, WIPO/GRTKF/IC/5/8, WIPO/GRTKF/IC/6/4
First draft Objectives and Principles	WIPO/GRTKF/IC/7/5
Second draft Objectives and Principles (<i>incorporating comments submitted</i>)	WIPO/GRTKF/IC/8/5, WIPO/GRTKF/IC/9/5, WIPO/GRTKF/IC/10/5, WIPO/GRTKF/IC/11/5(c)
Comments submitted on second draft of Objectives and Principles	WIPO/GRTKF/IC/10/INF/2, WIPO/GRTKF/IC/10/INF/2 Add., WIPO/GRTKF/IC/10/INF/2 Add.2, WIPO/GRTKF/IC/10/INF/2 Add.3, WIPO/GRTKF/IC/10/INF/3, <i>compiled as WIPO/GRTKF/IC/11/5(b)</i>
Policy Options and Legal Mechanisms <i>implementing Objectives and Principles</i>	WIPO/GRTKF/IC/7/6 (first draft) WIPO/GRTKF/IC/9/INF/5 (second draft)
Comments on the List of Issues on the protection of TK	WIPO/GRTKF/IC/11/5(a)
Background documents on addressing the international dimension	WIPO/GRTKF/IC/6/6, WIPO/GRTKF/IC/8/6, WIPO/GRTKF/IC/9/6, WIPO/GRTKF/IC/10/6, WIPO/GRTKF/IC/11/6

II. BACKGROUND

4. The Committee has extensively reviewed legal and policy options for the protection of TK. This work has built on extensive international, regional and national experience with the protection of TK. This review has covered comprehensive analyses of existing national and regional legal mechanisms, panel presentations on diverse national experiences, common elements of TK protection, case studies, ongoing surveys of the international policy and legal environment as well as key principles and objectives of the protection of TK that received support in the Committee's earlier sessions. Previous documents, listed in the table above, provided full information on this earlier foundational work.

5. This extensive body of work and wide background of existing law was distilled into draft Objectives and Principles for protection of TK, commissioned by the Committee at its sixth session, and revised and reviewed over the course of the following four sessions. The draft Objectives and Principles have also been widely consulted upon beyond the Committee, and have been used, even as a draft, as a point of reference in several national, regional and other international legislative and policymaking processes. Several of these processes are drawing directly from the draft.

6. The draft Objectives and Principles are currently circulated as the Annex to WIPO/GRTKF/IC/11/5(c), for ease of reference and in particular to assist understanding the comments contained in the present document. This contains the identical text of the second draft of the Objectives and Principles that was also annexed to WIPO/GRTKF/IC/10/5, WIPO/GRTKF/IC/9/5, and WIPO/GRTKF/IC/8/5. This revised version, unchanged from the eighth to the current session, was the result of the first round of intersessional stakeholder review established by the Committee after it reviewed the first draft, WIPO/GRTKF/IC/7/5, at its seventh session. Thus the draft remains in the form in which it has been widely consulted upon and extensively reviewed in the Committee, and in many Member States and other policy processes.

7. The Committee again reviewed the draft Objectives and Principles at its ninth session, and initiated a second round of intersessional commentary and review. The written comments received between the ninth and tenth sessions in line with that process were posted on the internet and were circulated as information documents WIPO/GRTKF/IC/10/INF/2, WIPO/GRTKF/IC/10/INF/2 Add., WIPO/GRTKF/IC/10/INF/2 Add.2 and WIPO/GRTKF/IC/10/INF/2 Add.3 (English) and WIPO/GRTKF/IC/10/INF/3 (Spanish). The draft Objectives and Principles are complemented by a further document, an overview of policy options and legal mechanisms used in national laws for implementing the Objectives and Principles (WIPO/GRTKF/IC/9/INF/5 and an earlier draft WIPO/GRTKF/IC/7/6).

8. More broadly concerning outcomes of the Committee's work on TK protection, and noting that the Committee's renewed mandate refers to the international dimension of its work and excludes no outcome, it is recalled that previous Committee discussions have identified three aspects of possible outcomes, namely: (i) content or substance; (ii) form or legal status; and (iii) consultative and other working procedures necessary to achieve any agreed outcome.

III. THE COMMITTEE'S TENTH SESSION

9. At its tenth session (November 30 to December 8, 2006), the Committee decided as follows with respect to TK and traditional cultural expressions/expressions of folklore (TCEs/EoF):

“(i) Discussion will commence on the Issues (attached [to document WIPO/GRTKF/IC/10/7 Prov. as Annex I] in numerical order, if possible, during the current session, and will continue on that basis at the next session.

(ii) The existing documents (WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/10/5 and WIPO/GRTKF/IC/10/6) remain on the table in their existing form and existing positions in relation to them are noted.

(iii) The discussion on the issues is complementary to and without prejudice to existing positions in relation to the existing documents.

(iv) Delegations and observers are invited to submit comments on the Issues by end of March 2007. The Secretariat will collate the comments under each of the issues and distribute them by end of April. All comments will be posted on the Internet on receipt.

(v) In relation to existing comments on documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, the Secretariat will produce two tables (one for traditional knowledge and one for traditional cultural expressions/expressions of folklore) each containing two columns. In the first column, the titles of provisions in documents WIPO/GRTKF/IC/9/4 or WIPO/GRTKF/IC/9/5, as the case may be, will be reproduced, together with titles “general”, under the heading “Issues”. In the second column, the comments made by delegations and observers in relation to the titles in question will appear under the name of each delegation or observer.”

IV. DOCUMENTS FOR THE ELEVENTH SESSION

10. Pursuant to this decision of the Committee, the following complementary documents have been prepared for the eleventh session of the Committee:

(i) WIPO/GRTKF/IC/11/5(a): the present document, a collation of the written comments submitted between the tenth and eleventh sessions on “Traditional Knowledge: List of Issues”, as required in paragraph (iv) of the decision just quoted;

(ii) WIPO/GRTKF/IC/11/5(b): a compilation of comments on the draft Objectives and Principles provided between the ninth and tenth sessions, in line with the commentary process agreed by the Committee at its ninth session and the format agreed at the tenth session in paragraph (v) of the decision just quoted;

(iii) WIPO/GRTKF/IC/11/5(c): which encloses, for ease of reference, the text of the draft Objectives and Principles as contained in WIPO/GRTKF/IC/9/5, being identical to the text of Objectives and Principles circulated at the eighth, ninth and tenth sessions. This is provided especially to assist in following the table of comments provided in the present document. It is recalled that the tenth session’s decision just quoted states that “The existing documents (WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/10/5 and WIPO/GRTKF/IC/10/6) remain on the table in their existing form and existing positions in relation to them are noted” and that “The discussion on the issues is complementary to and without prejudice to existing positions in relation to the existing documents.”

11. The comments have been collated and reproduced directly as received, although, if necessary some typographical errors have been corrected to facilitate understanding of the

comments. The comments appear in the order in which they were received. Some comments were of a general nature and did not respond directly to any of the issues in the List of Issues. These comments were placed in a section headed "General". Some comments addressed one list of issues, but in fact seemed to cover both TK and TCE issues. Such comments were generally included in this collation as well as the TCE collation (WIPO/GRTKF/IC11/4(a)), which document should also be referred to. This document contains comments received up to May 18, 2007. An addendum or addenda will be issued in the event that further comments are received prior to the eleventh session.

12. The Committee is invited to:

(i) review and discuss the comments collated in the annex in relation to the List of Issues decided upon at the tenth session of the Committee, in relation to the comments on document WIPO/GRTKF/IC/9/5 contained in WIPO/GRTKF/IC/11/5(b) and the draft provisions contained in WIPO/GRTKF/IC/11/5(c); and

(ii) call for further comments from Committee participants on the List of Issues.

[Annex follows]

ANNEX

COMMENTS RECEIVED ON
THE LIST OF ISSUES CONCERNING PROTECTION OF
TRADITIONAL KNOWLEDGE

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GENERAL COMMENTS

Brazil

The following concerns should guide the discussions on the protection of TK within the competencies of WIPO, most of which, by and large, are touched upon by the draft international instrument under consideration on the Annex to document WIPO/GRTKF/IC/10/5:

- **Defensive protection:** Measures should be established to curb the misappropriation of TK, in particular to prevent and, when applicable, revert, the granting of IPRs without the authorization of the holders of TK, irrespective of whether the TK have been registered. In this connection, a provision should be incorporated to the effect that intellectual property applications should disclose the origin of the TKs, any associated genetic resources, as well as evidence of compliance of prior informed consent and benefit-sharing.
 - **Positive protection:** Without prejudice to the decision Members may take to protect TK via “sui generis” systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TK by examining, for example, possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TK;
 - **Prior informed consent and benefit-sharing:** ensure that communities enjoy rights over their TK by setting out the requirement of prior informed consent as a condition for their use by third parties, as well as compliance with benefit-sharing, when applicable;
 - **International dimension:** The Committee should address ways and means to facilitate the enforcement of national legislation on the protection of TK in third countries.
-

China

We notice that most of the issues about TK have been included in the ***Draft Objectives and Principles*** (annex of WIPO/GRTKF/IC/10/5). As an achievement of the collective efforts of the member states, the Draft offers a solid foundation for the discussion on the topic of GRTKF protection.

We thus believe that the future work in WIPO – IGC should concentrate the directions fixed in the ***Draft*** for the achievement of substantial progress.

Colombia

In response to the invitation issued by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to “*submit comments on the Issues by the end of March 2007*”, contained in Decision 8(iv) of agenda item 11 for the Tenth Session of this Committee (Document WIPO/GRTKF/IC/10/Decisions), the Government

of Colombia wishes to make the following remarks on each of the issues raised at the Tenth Session of the Intergovernmental Committee:

European Community

Germany, on behalf of the European Community (EC) and its 27 Member States would like to thank the Secretariat for preparing the list of Issues on Traditional Knowledge (TK) and for inviting delegations and observers to submit comments on these issues.

The EC wishes to reiterate its readiness to participate constructively in the discussion in the Committee on the protection of Traditional Knowledge. As reflected in particular in points 15 and 142 of the Initial Draft Report of the 10th Session of the IGC prepared by the WIPO Secretariat, we would like to reiterate our support for further work towards the development of international *sui generis* models or other non-binding options for the legal protection of TK. Moreover, in line with our preference for internationally agreed *sui generis* models, the Delegation would also like to reiterate that the final decision on the protection of TK should be left to the individual Contracting Party.

Within this context, and in line with our previous position, that the objectives and general principles needed to be discussed as a basis for further work, and our concerns about discussion on substantive provisions at this stage, we are pleased to provide comments on this list of issues. Moreover, we would also like to underline that in our point of view two questions are crucial: "What is the definition of TK?", and, "What objective is to be achieved?".

We believe that in order to establish an appropriate balance between interests of right holders and third parties, the concept of a public domain in respect of TK needs to be well analyzed. The European Community looks forward to continuing and deepening the discussion of these issues, with a view toward enriching all IGC members' understanding of these complex questions.

IFPMA

The questions asked by the WIPO Secretariat address key issues regarding traditional knowledge. We agree that these issues need to be considered in depth in the discussions at WIPO. As today there is no internationally agreed definition on "traditional knowledge". We believe that an agreed definition of what constitutes "traditional knowledge" and how it is distinguished from other knowledge is essential before remaining questions and issues can be discussed. Therefore, we consider it to be premature to take any decision to establish an international *sui generis* system of protection for traditional knowledge. Such a decision should not be made before having agreed on the definition on what it is that is to be protected by such a *sui generis* system.

Against this background, we also consider it to be premature to offer answers to the questions before a definition has been agreed. Nevertheless, we would like to address in this context one fundamental issue. We strongly believe that public domain knowledge should continue to be freely usable, even if such knowledge would be called by certain stakeholders "traditional

knowledge". However, in case some TK is still confidential it should be protectable as a trade secret and if otherwise possible by other forms of existing IP.

In contrast, TK which is in the public domain should not be patentable. In this context, please note that the IFPMA supports the recording of traditional knowledge associated with indigenous genetic resources in databases and the use of the resulting information in prior art searches for the examination of patent applications. This would help avoiding granting of patents for such TK and therefore facilitate the defensive protection of TK and could be further improved by establishment of an international internet portal for TK which would electronically link local and national databases on TK. In addition to the availability of TK from publicly accessible databanks, further harmonization of substantial issues of patent law, as under discussion at the Standing Committee of Patents (SCP) at WIPO with respect to a "Substantive Patent Law Treaty" (SPLT), should further improve the defensive protection of TK, namely by changing the legal status of oral disclosure, prior use or anything which is not in written form to be novelty destroying everywhere in the world ("Absolute Novelty Concept").

Japan

Japan recognizes that the issue of traditional knowledge is important for many member States. However, Japan believes that the depth of understanding among the member States on this issue is still insufficient for any kind of an agreement at the international level to be formed. Therefore, as the first step to deepening our understanding of traditional knowledge, we welcome fundamental discussions based on the List of Issues. In discussing the List of Issues, we believe that it is useful to discuss fundamental issues, such as the definition or the content of certain terms. We wish to point out that there are some issues that cannot be resolved because these fundamental issues are still unclear. Even before attempting to finalize the details of the wording of certain terminology, what is more problematic is the lack of formation common understanding or common perception as to what such words should mean. Arguing, however, that under these circumstances, it is impossible to agree on the detailed wording of definitions or that the definitions should be left to the national laws of member States is a failure in facing up to the problem squarely.

The List of Issues contains words such as "rights" and "protection," but at this stage, there is no consensus on establishing any new rights or forms of protection. We may use and touch on these words in the course of discussing each individual issue, but such usage is not indicative of Japan's position on the formulation of any new "rights" or "protection." Of course, we are aware that there are some pre-existing rights under customary laws and that they should be respected. However, even in such cases, we must point out that rights recognized by customary law in certain states or regions are not necessarily recognized in other jurisdictions. Japan submits the following comments on each issue. We will reserve further comments if necessary.

Kyrgyz Republic

Kyrgyzpatent presents its compliments to the World Intellectual Property Organization (WIPO) and referring to the letter of February 23, 2007 (ref. C.7430/OMPI-49) would like to thank for

the information provided and cooperation established with our office in the filed of protection of Traditional Knowledge, Traditional Cultural Expressions (Folklore) in the Kyrgyz Republic.

Since currently the issues of protection of Traditional Knowledge, Traditional Cultural Expressions (Folklore) are most urgent and discussed in international community, our office also observes the development of Traditional Knowledge and Traditional Cultural Expressions (Folklore) protection in other countries.

At present time the Kyrgyz Republic carries out certain works to investigate these fields.

However we would like to note that the work carried out by the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (ICGR) is also very important in the said fields.

Please find enclosed our comments to the lists of Issues adopted by ICGR.

Thank you in advance and looking forward to our further dialogue and fruitful cooperation in these fields.

Latvia

NOTE: As we see these questions the answers to them can not be equipollent. They depend on which stand you take - either you believe that TK must be protected or on the contrary - they are common heritage of the mankind. To us (Latvia) protection of TK is not a priority however we answer as if the protection of TK had been already decided and these questions are asked to shape the protection mechanism.

Switzerland

Introductory remarks: Switzerland is responding willingly to this questionnaire and considers these questions to be central to the Committee's future work. The questions should be answered in detail in the Committee's future discussions, so that traditional knowledge protection is effective and performs well. As a non-applicant country, Switzerland always tries to be active and constructive during discussions within the Committee. It is keen to highlight the importance of the responses from applicant countries and the representatives of native and local communities. These will be very useful for the continuation of work.

South Africa

Our proposal is based on the understanding that any further work of IGC will constitute a step towards developing an international binding instrument that protects TK/TCEs/GR. We once again reaffirm our stance that the IGC work must veer towards an accelerated completion hence we do not view that responses to decisions of the 10th IGC as mainly exploratory in nature with compilation of information and wide-ranging discussions for future work of the IGC. We find it

appropriate as we would like to think of being in an advantageous position of having a national Indigenous Knowledge Systems Policy in place which duly informs our position on the various questions and draft legislation that aligns our intellectual property rights legislation as well as formalized the IKS policy..

United States of America

At the Tenth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), Member States agreed to submit written comments on ten issues (List of Issues) related to the protection of Traditional Knowledge (TK) and Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF) with a view toward facilitating within the IGC a sustained discussion of the many complex substantive issues before the Committee. The United States welcomes that opportunity, and, toward that end, is pleased to submit these preliminary comments on the selected issues related to the protection, preservation and promotion of TK and TCEs/EoF. The United States also believes that reaching agreement on policy objectives and general principles on TK and TCEs/EoF will advance the work of the Committee.

The Lists of Issues for both TK and TCEs/EoF, in the view of the United States, provide a useful point of departure and a helpful framework for facilitating such a sustained discussion. Although many of these issues are not new to the Committee, to date the members of the IGC have not had the opportunity to engage in the kind of focused discussion needed to reach a consensus on these important questions. The United States also understands that these initial Lists of Issues will be further refined and elaborated by the Member States in their comments and during the course of the IGC's deliberations.

The United States notes that a number of the issues in the List of Issues are framed using words such as "protection" and "protected." Such words sometimes have been used within the IGC to refer to legal measures to address issues and concerns related to TK and TCEs/EoF, including protection under intellectual property laws. However, over the course of its deliberations, Committee participants have not placed limits on the discussion of TK and TCEs/EoF. Instead, the Committee consistently has taken a broad approach to addressing issues and concerns related to TK and TCEs/EoF, including discussion of measures to safeguard, preserve, and promote an environment of respect for TK and TCEs/EoF. Such an approach is consistent with the mandate of the Committee, which leaves no outcome excluded. Similarly, the United States believes that the terms of discussion of the List of Issues, which aims to facilitate consensus among Committee participants, must not prejudge the understanding of any particular issue or prescribe any particular outcome.

1. DEFINITION OF TRADITIONAL KNOWLEDGE THAT SHOULD BE PROTECTED

Brazil

The definition to be adopted should be anthropological, meaning that, inter alia, all knowledge dynamically produced, reproduced, maintained and transmitted by traditional methods, in a collective and inter-generational environment, and related to the identity and the socio-cultural integrity of a given community should be protected (including beliefs, spirituality, values and knowledge employed for the conservation of biodiversity).

In this context, the definition proposed in Article 3 (2) of the Annex to document WIPO/GRTKF/IC/10/5, transcribed below, represents adequate basis to discuss the issue:

“For the purpose of these principles only, the term “traditional knowledge” refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.”

China

The definition of TK in the current draft, Article 3 and 4 of Part III, substantive provisions, can be a basic for the discussion on this issue.

In addition, it should be taken into account that TK has been generated, preserved and transmitted in different approaches and by different people which might also include ethical groups (minorities). For example, Chinese traditional medicine is almost always preserved and transmitted by one or more ethical groups (including the minorities). So we propose that Article 4 be amended as:

Protection should be extended at least to that traditional knowledge which is: generated, preserved and transmitted in a traditional and intergenerational context; distinctively associated with a traditional or indigenous community, people **or ethnic groups** which preserves and transmits it between generations; and integral to the cultural identity of an indigenous or traditional community, people **or ethnic groups** which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.

Colombia

The Government of Colombia supports the definition of traditional knowledge contained in Article 3(2) of the substantive provisions included in documents WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/10/5, with the proviso that local communities should not be compared with indigenous communities. Thus, it is suggested to define such

knowledge as “the knowledge developed by indigenous or other local communities, including knowledge systems, creations, innovations and cultural expressions which have generally been handed down from generation to generation; and are considered to belong to a group of persons in particular and to their territory, and are developing constantly in response to the changing environment. The categories of traditional knowledge include: agricultural, scientific, technical, ecological and medicinal (related to medicines and remedies) knowledge as well as that related to biodiversity etc. Such knowledge is characterized by:

A holistic nature: traditional knowledge includes all the knowledge, innovations and traditional practices which form part of complex cultural systems where the knowledge is part of specific world visions, and mythical and historical traditions, with a view to access thereto and the exercise, learning and transmission thereof (TRIPS, JOB/02/60, 2002; WIPO/GRTKF/IC/6/12, 2003).

Its continuous development: traditional knowledge is complex and dynamic, and is in a permanent state of change and development.

It is a fundamental part of the entity of indigenous and local communities (WIPO/GRTKF/IC/4/8, 2002).

It is generally transmitted orally.

It is collective in nature.

For indigenous and certain local communities, traditional knowledge is closely related to the territory.

Eurasian Patent Office (EPO)

Traditional knowledge – is knowledge that is passed between generations, typical to a certain nation (community) and/or relating to the territory of habitation and is constantly developing along with environmental changes. A list of subjects relating to traditional knowledge (TK) needs to be specified.

European Community

The European Community (EC) and its Member States note that there is no internationally adopted definition of traditional knowledge (TK). In order to achieve the necessary legal certainty, TK should be defined so that it can be clearly identified and described.

Although several definitions of TK have been already advanced (WIPO, CBD, UNESCO), the definition contained in the WIPO Secretariat draft substantive provisions (Article 3 document WIPO/GRTKF/IC/10/5) is a good working definition and starting point for discussion. Despite the fact that a single exhaustive definition might not be appropriate in light of the diverse and dynamic nature of TK, and the differences in existing national laws on TK, it would be in the interests of right holders as well as national legislators to set out as clearly as

possible the general concept. Therefore, further efforts should be made at developing, defining and qualifying further the present working definition.

We welcome a deeper discussion on TK definition and further clarification of its scope followed by the drafting of a new TK definition generally more acceptable for all WIPO Member States.

FILAIE

We consider that this question can be divided into two parts, the first relating to the specific definition of traditional cultural expressions, which must reflect the concept of the devising of an original creation by a group of individuals constituting a community and which has developed these indigenous creations since ancestral times, and the fact that said creations, including changes thereto, have been handed down from generation to generation, have been perpetuated in time up to the present and continue in force. The subject of the traditional cultural expression must belong to and be recognized as the work of the specific community, which has devised and transmitted it.

The second issue refers to expressions of folklore that should be protected: in our opinion these must be all the original creations of the community in question and which must have as its sphere of application the whole series of creations reflected to a greater or lesser extent in the intellectual property laws in force in very different countries. We believe, however, that musical compositions, with or without words, dramatic and dramatico-musical works, including choreographs, pantomimes, and in general any artistic performance similar thereto, including theatrical works, as well as sculptures, works of painting, drawing, engraving, lithographs and graphic arts on any carrier, as well as applied or non-applied three-dimensional works, should be protected as subject matter for consideration. Indigenous craft designs and preparation of original items, including logotypes, denominations, and specific linguistic expressions used to denominate a region or people should also be included.

Ghana

Definition of traditional Knowledge:- this refers to tradition based literary, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols undisclosed information and all other tradition based innovation and creations resulting from intellectual activities in the industrial, scientific, literary or artistic fields.

Traditional Knowledge should be protected comprises information held in human memories that is by recall and the practice of learned skills in a useful way in day to day life. However, what is generally recognized is that it is a multi faceted concept encompassing several components. These may range from traditional Knowledge systems in the field of medicine and healing, biodiversity conservation, the environment, food and agricultural techniques and so on. WIPO currently uses the term “traditional knowledge” to refer to traditional – based literary, artistic or scientific works; performances, invention, information and all other traditional – based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. Tradition – based refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation;

are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment. Categories of traditional knowledge could include agricultural knowledge, scientific knowledge, technical knowledge, ecological knowledge, medicinal knowledge, “expressions of folklore” in the form of music, dance, song handicrafts, designs, stories and art work; elements of languages, such as names, geographical indications and symbols, and movable cultural properties. Excluded from this description of traditional knowledge would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of “heritage” in the broad sense.

Traditional based; refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation and are generally regarded as pertaining to a particular people or its territory and are constantly evolving in response to a changing environment.

It is therefore imperative that the community at large should be recognized as the sole beneficiary of such protection and also be accorded the rights to protect able Traditional Knowledge.

Guatemala

Decree No. 26-97, revised by Decree No. 81-98 of the Congress of the Republic of Guatemala. Law for the Protection of the National Cultural Heritage:

Intangible cultural heritage: this is constituted by institutions, traditions and customs such as: the oral, musical, medicinal, culinary, craft, religious, dance and theatre traditions. This covers the cultural property which is more than 50 years old, from the time of its construction or creation and which has historical or artistic value, and may include property less than 50 years old but which is of relevant interest for art, history, science, architecture and general culture, and contributes to the strengthening of the identity of the Guatemalan people.

Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states:

Intangible cultural heritage: this is the uses, representations, expressions, **knowledge and techniques together with the instruments, objects, artifacts and cultural fora inherent in communities and groups** and in some cases individuals, for which it is recognized as an integral part of their cultural heritage. This **intangible cultural heritage which is handed down from generation to generation is constantly recreated by communities and groups on the basis of their environment, their interaction with nature and their history.**

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

The productions containing characteristic elements of the artistic and **traditional heritage developed and perpetuated by a community or by individuals, reflecting the traditional artistic expectations of that community.**

ICC

This question, and the related questions of the objectives sought to be achieved and of what the substance of any rights and exceptions should be, is one on which consensus will be needed before any progress can be made. Those who will be called to respect the rights sought will in any event require:

reasonable certainty as to what is protected, and what is not; reasonable certainty as to the extent to which it is protected, and what use if any can still be freely made of it (eg, mere possession? private study? research use?); a clear nexus between the knowledge and the claimant of rights in it; a proper justification for the rights claimed, which must be proportionate; a fair and effective system for enforcing the rights and adjudicating disputes.

IPA

For publishers to be able to publish works related to TK with economic and legal certainty, a clear and concise definition of the protected subject-matter is required, leaving no room for ambiguity.

Given the severe impact that such protection may have, IPA suggests the narrowest possible definition, protection only very important ritual or religious matters.

IPO

As noted in WIPO document WIPO/GRTKF/IC/3/8, the scope of protected subject matter may be kept open-ended and undefined, or it may be limited to specific forms of TK that meets certain criteria. In order to provide certainty to both rightholders and the public, it is important that the scope of protected subject matter be limited to specific TK that meets well defined criteria.

As a fundamental matter, information or knowledge that has entered the public domain cannot be recaptured, as the public has legitimate rights to such information. Indeed, such publicly available information is often the basis for new inventions or creative works. Thus, in order to be available for protection, protected TK must be defined as that which has not become publicly known. The requirement that TK be secret in order to be protected is analogous to the protections afforded to undisclosed trade secret information in many national and international laws. Generally, trade secret laws require that the information be (1) commercially valuable; (2) not in the public domain; and (3) subject to reasonable efforts to maintain its secrecy. Similar elements should also be required for protected TK.

Discussions relating to the protection of TK in the IGC have also focused on the perceived misappropriation of TK, and in response, recent deliberations have included the possibility of using databases of publicly known TK as an aid to patent examiners. It is important to note that secret TK would not be available as prior art in the examination of patent applications. Therefore, independently developed inventions that meet the criteria of novelty, inventive step and industrial applicability would not be examples of misappropriation. Conversely, publicly

known TK could be cited against such inventions, but such public TK would not be considered protected TK.

Japan

The expression “traditional knowledge” gives you a rough idea of what it means in general, but from legal perspective, the expression is very vague. Before defining this expression, the meanings of “traditional,” “knowledge,” and “[traditional knowledge] that should be protected” should be made clear. The following is for illustrating issues necessary to deepen understanding.

Meaning of “traditional”

The word “traditional” has the basic implication that “someone passes information down to someone else along a temporal dimension.”

Temporal dimension: For the passing down of information to future generations, it is not clear around how many generations would be sufficient to be deemed “traditional?” Nor is it clear whether information that has not been passed down to the current generation or one that has ceased to be passed down in the past could be seen as “traditional”?

From who to who: Information can be passed down through various relationships such as the relationships which exist between parents and children, among families/relatives (i.e. relationship by blood), within a local community, within an indigenous group, or within a country. Actors conveying information can also be changed. For example, a piece of information that had been passed down in Family A can be handed down to Family B or widely disseminated in Community C to which Family A has belonged for a certain period of time, or another piece of information that had been handed down in Community D can go out of style and may be only passed on from generation to generation in Family E.

Meaning of “knowledge”

The word “knowledge” implies “value,” “state of management,” and “level of public ownership.”

Value

The value of knowledge ranges from “beneficial to all human beings” (e.g. beneficial effect of an herbal medicine) to “valuable only within a certain group” (e.g. religious ceremony).

State of management

The expression “state of management” ranges from “something managed in secret” to “something that is publicly used and not particularly managed” or “something that is actively provided to outside parties.”

Level of public ownership: The expression “level of public ownership” covers “knowledge that is already in the public domain and used freely by the public,” “knowledge that is used only by interested parties and kept secret,” and “knowledge that is not secret but not yet

commercially used.” The meaning of the word “commercially” may vary due to the scale of business and other factors.

The content of “knowledge” may be changeable in the course of passing down through improvements and other factors. In that case, how widely or through how many generations must the “knowledge” be passed down after undergoing such changes to be deemed traditional knowledge? If any improvement is added to a certain piece of knowledge by an actor other than the actor to whom the knowledge was passed, can the “improved” knowledge be defined as “traditional knowledge”?

As mentioned above, the concept of “traditional knowledge” covers a wide range of factors. Japan wishes to know what particular factors demander countries have in mind when they refer to “traditional knowledge.”

Traditional knowledge “that should be protected”

There is a view that the meaning of the expression “traditional knowledge” can be made clear if the requirements for protecting “traditional knowledge” are clearly established, even if the meaning of the expression “traditional knowledge” itself is vague. However, it should be noted that no consensus about “protection” has yet been reached. The following opinions about the List of Issues are just for the purpose of discussion and this does not mean that Japan agrees to start discussion on the listed issues for any other purpose than for clarification.

The criteria for “[traditional knowledge] that should be protected” is inextricably linked with the criteria for judging what benefits society can enjoy by protecting traditional knowledge. Will “traditional knowledge” be made widely available to the public (as are patents and copyrights) with the aim of enhancing technology and culture for succeeding generations? Or will the maintenance of “traditional knowledge” itself be regarded as serving the public interest? Taking all these questions into account, discussions should focus on public interest and the benefit to society. Without discussing such public interest, it will not be made clear if any protection is necessary or what should be protected.

The subject matter of protection may vary by form/level of protection. The level of protection required to ensure that “traditional knowledge is respected” can cover a substantially wide range of traditional knowledge. If the level of protection is that of granting an exclusive right, the scope of the subject matter to be protected will be greatly narrowed. In addition, a level of protection such as granting a right to demand license fees or providing government subsidies is conceivable.

To clarify the expression “[traditional knowledge] that should be protected,” the discussion about public interest, identification of existing problems, and practical needs for protection is indispensable.

Latvia

NOTE: As we see these questions the answers to them can not be equipollent. They depend on which stand you take - either you believe that TK must be protected or on the contrary - they are common heritage of the mankind. To us (Latvia) protection of TK is not a priority however

we answer as if the protection of TK had been already decided and these questions are asked to shape the protection mechanism.

We believe that definition of TK should not be formulated in so called „holistic approach” (including spiritual, religious and similar aspects) instead it should be formulated as technical knowledge linked with resources (not only genetic but also other natural resources) it exploits. The definition given in Article 3 of the WIPO document “Revised provisions for the Protection of Traditional Knowledge” could be a basis for the final definition.

Ogiek

According to the Ogiek Community (Hunter-Gatherer) Traditional knowledge should be defined as an origin means of invention and creativity of ideas and use that sustains indigenous people’s livelihoods. Traditional knowledge is unique among many indigenous and non-indigenous people’s definition should recognize the transmitting process of TK from a current generation to the next in an attempt of protecting it from the verge of extinction through copyrights and patterning. For instance, the forest provided firewood, herbal medicine, and wild fruits besides acted as secret sites for the ogiek culture; any mechanisms applied in protecting the forest will safeguard the interest and value of the community.

Raipon

The traditional knowledge relating to the system of traditional life activity includes:

- knowledge of the methods of use of natural resources and forms of economic activity of indigenous peoples and ethnic communities of the north, related to reindeer breeding and other northern forms of rearing local and aboriginal breeds of domestic animals, fishing, the river, lake, maritime and maritime hunting industry, hunting for meat and fur, market gardening and the gathering of wild plants;
 - knowledge of territories with essential biological resources, populations of domesticated and wild animals, knowledge of the system of seasonal and spatial arrangement of fixed and industrial settlements, cattle shelters and routes of nomadic camps;
 - knowledge of the methods of economic management of different areas of land and natural climatic zones;
 - the traditional system of self-management and economic organization ensuring the durability of the use of renewable natural resources and transfer of ecologically and ethically important information: the traditional economic calendar, methods of collecting, gathering and processing produce, skills in the manufacture of work instruments and objects for use in the home, industrial restrictions, temporary removal from economic circulation of areas of land in the form of special zones restricted to visits, knowledge of edible and medicinal plants, forms of distribution of lands and produce, domestic trades and raising of children.
-

South Africa

Whilst we agree with the definition WIPO/GRTKF/10/5 in Article 3 we recommend an inclusion that “IK will be passed from generation to generation and between generations.” In addition to the definition we propose the following: To include in TK technical know-how. Include spirituality. Include ‘memory’ amongst resources section under article 3 In article 4 (iii) add “traditional and local”

South Africa will continue to use Indigenous Knowledge (IK) as opposed to the use of Traditional Knowledge (TK). The use of this terminology is in sync with our IKS policy, proposed amendments to our IP legislations, and draft Access and benefit regulations etc. Any international recognition or use of this term? This might support the use of IK as opposed to TK.

Switzerland

Switzerland considers that the WIPO working definition (para. 25 of document WIPO/GRTKF/IC/3/9) would be a very good option, as well as a very good basis for discussion.

Tunisia

Traditional knowledge includes the processes acquired by peoples through the know-how, skills and creativity, which they inherit. It is the handing-down of culture, from one generation to another.

Traditional knowledge should be preserved because it contains indicators of the identity and specific nature of a nation. In Tunisia, the fields of application of such traditional knowledge are as follows:

- crafts,
 - culinary aspects,
 - the art of living,
 - the art of building,
 - agriculture and nature,
 - medicinal knowledge.
-

United States of America

A definition of traditional knowledge (TK) is important in order to ensure a common understanding of the debate among WIPO Members. There are many issues that need to be more fully considered in the IGC in order to build upon the vast amounts of study already done in the Committee and to take the next step of achieving agreement among Members. While much discussion has taken place, more work needs to be done to better identify convergences among Members.

As was noted in document WIPO/GRTK/IC/6/4, paragraph 57, two uses of the term ‘traditional knowledge’ have become customary in the Committee: first, a general sense (TK lato sensu), which embraces the content of knowledge itself as well as traditional cultural expressions (TCEs)/expressions of folklore, and distinctive signs and symbols associated with TK; and, second, a more precise sense (TK stricto sensu), which refers to “the content or substance of traditional know-how, skills, practices and learning;” this can be recognized as distinct subject matter, even though this “content or substance may be considered integral with traditional ways of expressing the knowledge and the traditional context in which the knowledge is developed, preserved and transmitted.” However, while it is helpful to have these distinctions, even use of the stricter definition leads to many questions. The first being how to delineate with greater precision, if possible, the boundaries between TK and TCEs/EoF, and whether there are any traditional cultural expressions that are not expressions of traditional knowledge. While definitive answers to these questions may not be achievable, further discussion of the inter-relationship between TK and TCEs/EoF would appear warranted in order to assess these two issues as envisioned with respect to the existing List of Issues.

Paragraph 58 of document 6/4 provides the following parameters when considering characteristics of TK, those being knowledge that is:

- generated, preserved and transmitted in a traditional context;
- distinctively associated with the traditional or Indigenous culture or community which preserves and transmits it between generations;
- linked to a local or Indigenous community through a sense of custodianship, guardianship or cultural responsibility, such as a sense of obligation to preserve the knowledge or a sense that to permit misappropriation or demeaning usage would be harmful or offensive; this relationship may be expressed formally or informally by customary law or practices;
- ‘knowledge’ in the sense that it originates from intellectual activity in a wide range of social, cultural, environmental and technological contexts; and
- identified by the source community as being TK.¹

While such parameters are helpful in assessing broad characteristics of TK, it appears that there are wide divergences existing in the IGC as to what subject matter may be considered to fall under this rubric. In addition, it is not clear whether all Members share the view that these are all essential characteristics of TK. In that light, clarification of these matters is essential.

A number of fundamental questions arise. For example, does the “traditional” context imply a time frame, e.g., should only that knowledge or expression from the past that is now recognized as traditional be protected? If so, can innovations taking place in the modern day ever be considered to fall under the definition of TK? What if these innovations are attributable to a particular individual – rather than being deemed “collective”? Can an innovation that is patented by an individual from a particular community, which is subject to an ownership right by that individual, also be claimed by the community as traditional knowledge, solely on the basis that the individual is a member of the community? Would this apply even if the innovation is not related to pre-existing TK?

There are many other issues that will arise during the IGC deliberations as we take the necessary next steps in deepening the understanding of the issues and attempt to further

¹ See WIPO/GRTKF/IC/5/8, para. 69 and WIPO/GRTKF/IC/5/12, para. 45.

common understandings and agreement. The issue of defining TK also includes the difficult question of identifying TK, or elements thereof, which “should be protected.” As noted in our general comments, the United States understands the use of the term “protection” to include a broad range of measures (including legal and non-legal measures) to address specific issues and concerns related to TCEs/EoF and TK. It would be productive for the IGC to examine in greater detail what TK, or related elements, are capable of protection under existing legal and non-legal mechanisms.

One further issue is the diffusion of what may have once constituted “traditional knowledge” that now may be considered to be in the public domain of different jurisdictions. Existing systems of intellectual property promote innovation and sharing of knowledge and thereby are directed toward providing protection for limited time to inventions or creations. After the term of protection, the invention or creation is no longer subject to exclusive rights. The nature of the word “traditional” indicates a link to the past. It appears that much knowledge that could be, by some measure, considered “traditional” may already be diffused widely throughout the world as common knowledge or widely used knowledge at least in those economic and social sectors where that knowledge is relevant. In that light, it may well be that much of ~~the~~ knowledge has fallen into the public domain and is thereby available for use by the public at large without restriction in many jurisdictions. Attempts to take existing public information and to reassert private ownership retrospectively would appear to give rise to several issues and have significant consequences not only on intellectual property law, but more broadly.

2. WHO SHOULD BENEFIT FROM ANY SUCH PROTECTION OR
WHO HOLD THE RIGHTS TO PROTECTABLE TRADITIONAL KNOWLEDGE?

Brazil

Discussion on this issue should follow developments in relevant international fora. The provisions in Articles 4 and 5 of the Annex to document WIPO/GRTKF/IC/10/5, transcribed below, represent adequate basis to discuss the issue:

“ARTICLE 5

BENEFICIARIES OF PROTECTION

Protection of traditional knowledge should benefit the communities who generate, preserve and transmit the knowledge in a traditional and intergenerational context, who are associated with it and who identify with it in accordance with Article 4. Protection should accordingly benefit the indigenous and traditional communities themselves that hold traditional knowledge in this manner, as well as recognized individuals within these communities and peoples. Entitlement to the benefits of protection should, as far as possible and appropriate, take account of the customary protocols, understandings, laws and practices of these communities and peoples.”

“ARTICLE 4

ELIGIBILITY FOR PROTECTION

Protection should be extended at least to that traditional knowledge which is:

- (i) generated, preserved and transmitted in a traditional and intergenerational context;
- (ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and
- (iii) integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.”

China

Article 5 of the part III, substantive provisions, in the current draft,,could be a basis for the discussion on this issue.

Associated with the issue above, ethical groups should be taken into account for the confirmation of the rights' holder. And we also think that the uniqueness of origin TK would not be derogated from its wide transmitting. Both the origin and primary creators of TK should be respected and protected properly.

Colombia

The Government of Colombia supports the definition of beneficiary contained in Article 5 of the substantive provisions included in documents WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/10/5. In that regard, it should be pointed out that Andean Decision 391, Article 7, recognizes and assesses traditional knowledge, innovations and practices associated with a genetic resource, and the capacity of communities to take decisions thereon, therefore the holders of any right associated with traditional knowledge would be precisely said communities which are defined as the human group whose social, cultural and economic conditions distinguish it from other sectors of the national community, is governed wholly or partially by its own customs or traditions or by special legislation and, whatever its legal situation, retains its own social, economic, cultural and political institutions, or part thereof.

However, given that the Convention on Biological Diversity recognizes the right of indigenous and local communities to participate in and authorize the use of its traditional knowledge relevant to the conservation and sustainable use of biodiversity, the right to participate and decide on the use of traditional knowledge must not be limited to knowledge associated with genetic resources, but in general to all the components of biodiversity which would include the biological resource.

Given the particular nature of the resources covered by traditional knowledge, the existence of a sui generis protection system is justified and which, although it should develop the provisions relating to access to genetic resources established in Decision 391 of the Cartagena Agreement, should also recognize the specific features of the cases in which access processes affect the traditional knowledge dimension and, depending on the above, regulate associated practices in order to guarantee both the protection of knowledge itself, and the fair and equitable sharing of benefits.

Eurasian Patent Office (EPO)

The term “holders of traditional knowledge” is related to anyone who creates, develops and uses TK in traditional conditions (in a traditional way of life or traditional housekeeping) as well as passes it over. Holders of TK are the ones who should benefit from commercialization of TK.

European Community

Considering existing human rights instruments, the EC and its Member States believe that protection of traditional knowledge should benefit the communities who generate, preserve and transmit the knowledge in a traditional and intergenerational context, who are associated with it and who identify with it. Benefits from the protection should accordingly flow to the indigenous and traditional communities that hold TK in this manner, as well as to recognized individuals within these communities and people. It could however be difficult in practice to delimit the sphere of groups in title of protection as a clear common understanding of what constitutes such communities is hard to obtain.

FILAIE

Undoubtedly the sole beneficiary of this type of protection should be the indigenous community or ancestral people that has created an original traditional culture. Such benefit should be channeled towards direct action, through the relevant provisions, so that the maximum benefits accrue directly to the community.

Ghana

The beneficiaries of the protection of traditional knowledge (genetic resources) may be divided into two categories viz:-

i. Holders or Owners of the knowledge viz individuals, traditional communities, casts, families, ethnic groups, nations and sub regions. For instance, in West Africa except with slight differences in species and use, kente, yam, gari, and palm fruits are widely used in the sub region.

ii. derived right owners such as modern researchers, innovators and extractors of traditional knowledge.

The beneficiaries of protection under the instrument must include indigenous communities, nations and sub-regions which own and maintain the traditional knowledge and secondary owners of rights such as collectors, researchers, extractors and developers.

Researchers, collectors and extractors of information regarding traditional knowledge to be given limited recognition. Shared serendipity applications of traditional knowledge folklore (that is discoveries made by accident). Provision must be made for shared ownership of the commercial exploitation of knowledge that is developed from traditional knowledge.

Guatemala

Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states:

Sustainable development communities, groups and individuals.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

The native communities and peoples that are authors.

ICC

The communities that are originators or custodians of the knowledge, and that have made it available to users. National governments will need to determine what communities should be recognized for this purpose, according to transparent and agreed principles.

IPA

For publishers to be able to publish works related to TK with economic and legal certainty, a clear and concise definition of who could be potential beneficiaries is required, leaving no room for ambiguity. Only the originators or custodians of TK should benefit from protection, and they must be clearly identifiable through the application of transparent and agreed principles.

IPO

Rights in protected TK would be established by national law, and so the country in which the TK exists should provide the public with advance notice of the class of subject matter that it considers protected TK. It is also the responsibility of the country to fairly allocate the benefit of such protection to its members.

Japan

As mentioned in the above item 1, there are various ways/relationships in which “traditional knowledge” is passed on, e.g., parent-child, families/relatives, communities, indigenous groups, and countries. However, the scope of a “community” or an indigenous group and so on -are not clearly enough for internationally common understanding.

Also, it is not clear if the succession of traditional knowledge over generations by such a community as a religious community, which is not founded on kinship, can be regarded as a beneficiary community. We cannot see any justifiable grounds for an organization which is firmly united not be deemed as an eligible beneficiary just because the organization members are not biologically related while a loosely united community such as a country is regarded as an eligible beneficiary.

There are other forms of communities not founded on kinship such as Internet communities. Members of these communities do not live together. -The communities have not lasted for more than one generation;- The members of these communities gather for the same purpose or because of sharing the same idea. Certainly, these communities are not traditional communities and are not considered as beneficiary communities under the traditional definition. However, why these communities should be treated differently in comparison with traditional communities is not made clear.

If the traditional knowledge is just passed down within a limited circle in a community or an indigenous group, etc., how should these people be treated? For instance, how the following relationships should be treated from perspective of benefit has yet to be made clear: a) the relationship between Country A and Indigenous Group X when Indigenous Group X of Country A has been maintaining/passing on the traditional knowledge; b) the relationship between Country A, Country B, and Indigenous Group X when Indigenous Group X existing in both Country A and Country B has been maintaining/passing on the traditional knowledge; c)

the relationship between Country A, Indigenous Group X, and Indigenous Group Y when Indigenous Groups X and Y both existing in Country A have respectively been maintaining/passing on the traditional knowledge; and d) the relationship between Country A, Country B, Indigenous Group X, and Indigenous Group Y when Indigenous Groups X and Y existing in both Country A and Country B have respectively been maintaining/passing on the traditional knowledge. These circumstances are not limited to countries and indigenous groups but also applicable to families and communities, etc.

There would be many cases where the community cannot exercise its rights against outside parties even when it tries to do so, due to lack of a clear decision making mechanism or representative in the community. Some have proposed that the State may exercise rights in proxy for its internal communities. When States are allowed to act as beneficiaries in proxy for indigenous peoples, there might be a problem of whether the State will act to legitimately represent the welfare and benefit of the indigenous peoples.

If certain knowledge that existed as traditional knowledge in the past in an indigenous group is not passed on or used today, how should such knowledge be treated? This problem is linked with the basic problem of whether maintenance/succession in the present day is a precondition of traditional knowledge.

If Community X has been passing on Traditional Knowledge A and Community Y has been passing on Traditional Knowledge A+ α , which was derived from Traditional Knowledge A, how should the relationship between Community X and Community Y be treated? Are there any differences in the treatment of the case in which Community Y developed Traditional Knowledge A+ α from Traditional Knowledge A of Community X and the case in which Community Y has independently been passing down Traditional Knowledge A+ α ?

As mentioned above, there might be plural beneficiaries/right-holders of Traditional Knowledge. Therefore, the scope of a community etc. should be clarified, and it would be necessary to set guideline in order to clarify relations between the interested parties.

Latvia

We believe that it is difficult to define right holders by one common definition that fits all. We do not believe that this could be done internationally. We believe that firstly this should be defined nationally in case by case manner.

Ogiek

The right to hold the TK is vested among the inventors and the community that appreciated its vitality in using it on their daily activities. It is the basis local level decision-making in education, natural resource management, hunting & gathering, health care, food preparation and a host of other activities in rural communities. Indigenous people as communal and individuals by sharing equitable benefits which arise from the use of their knowledge, innovations and relevant practices for conservation and sustainable use of its components are direct beneficiaries, then the Governments through charging registration fees and Foreigners for commercial purposes.

Raipon

Individual representatives or groups of holders of such knowledge.

South Africa

We are of the stance that the current system of protecting IPRs are limited to private monopoly rights and therefore incompatible with the protection of IK. We proceed on the premise that IK is held as part of a community's heritage passed down from generation to generation, and should not be allowed either to be privatized or commercially exploited for individual gain; or to slip into the "public domain." Hence, our assertion is that the first beneficiary of indigenous knowledge must be the community directly connected with the knowledge accessed and to be protected.

Read conjointly with the aforesaid we propose that where there is no clear and/or identifiable beneficiary the State or its delegated authority will act as the custodian of the rights, and the products derived from the IPR/TK of the communities .

In addition to this subsection we propose the insertion of "indigenous, traditional and 'local' communities." We further recommend the insert of 'traditional' before knowledge holders

Switzerland

The owner of the rights in such protection should be the person who satisfies the requirements for obtaining protection. It may be imagined that this is the creator and/or the holder of traditional knowledge, and there may be several right holders (if a population is the holder of traditional knowledge) who would be joint holders. It is important to note that traditional knowledge is often collective in nature.

Tunisia

Governments, peoples and holders of such knowledge.

United States of America

The IGC has explored in very broad terms the complex issue of the beneficiaries of measures to protect TK. Similar to the case of TCEs/EoF, this topic includes complicated issues related to the web of interests of many stakeholders, including the roles of states and their nationals, immigrant communities, governmental authorities, and the indigenous peoples and traditional and other cultural communities. The inherent problem of defining beneficiaries is made all the more difficult in a world where individuals and groups readily cross national borders and geographic boundaries.

In the deliberations to date, Committee participants have not had the opportunity to undertake a sustained discussion and reach a clear understanding of these complex issues, much less reach a consensus on the scope and meaning of such important terms as “indigenous peoples,” “traditional,” and “other cultural communities.” The United States believes that the IGC would benefit from further study, informed by representatives from many stakeholder groups, including indigenous groups, of existing mechanisms to protect TK, with a view toward deepening the understanding of the Committee on the most successful strategies to identify beneficiary groups and to resolve the sometimes competing claims of beneficiaries.

3. WHAT OBJECTIVE IS SOUGHT TO BE ACHIEVED THROUGH ACCORDING INTELLECTUAL PROPERTY PROTECTION (ECONOMIC RIGHTS, MORAL RIGHTS)?

Brazil

Considering that work of the Committee is circumscribed by WIPO's mandate, one specific objective that must be addressed is the setting out of measures aimed at preventing and curbing the misappropriation of TK by the granting of IPRs. Particular attention should be given to the need to render the IP system compatible with the relevant provisions of other international instruments that govern access to TK, such as the Convention on Biological Diversity. Accordingly, discussions on the issue should ensure that the granting of IPRs related to traditional knowledge is contingent upon compliance with the requirements of prior informed consent and benefit-sharing, by demanding that IP applications disclose evidence to that effect.

Also, since the issue is being discussed within the framework of WIPO, the Committee should examine possible "positive" measures necessary to ensure protection of TK under existing categories of intellectual property rights that respect the specific features of the former, and without prejudice to the possibility that Members may decide to accord protection to TK via "sui generis" systems.

In this respect, along with draft Articles 6 and 7, the draft objectives proposed in document WIPO/GRTKF/IC/10/5, transcribed below, represent adequate basis to discuss the issue, in particular objective number (xiv) – Preclude the grant of improper IP rights to unauthorized parties - that touches more directly upon WIPO's competencies:

“Recognize value

(i) recognize the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are fundamentally important for indigenous and local communities and have equal scientific value as other knowledge systems;

Promote respect

(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge holders; and for the contribution which traditional knowledge holders have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology;

Meet the actual needs of holders of traditional knowledge

(iii) be guided by the aspirations and expectations expressed directly by traditional knowledge holders, respect their rights as holders and custodians of traditional knowledge, contribute to

their welfare and economic, cultural and social benefit and reward the contribution made by them to their communities and to the progress of science and socially beneficial technology;

Promote conservation and preservation of traditional knowledge

(iv) promote and support the conservation and preservation of traditional knowledge by respecting, preserving, protecting and maintaining traditional knowledge systems and providing incentives to the custodians of those knowledge systems to maintain and safeguard their knowledge systems;

Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems

(v) be undertaken in a manner that empowers traditional knowledge holders to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and the need to tailor solutions that meet the distinctive nature of such systems, bearing in mind that such solutions should be balanced and equitable, should ensure that conventional intellectual property regimes operate in a manner supportive of the protection of traditional knowledge against misappropriation, and should effectively empower traditional knowledge holders to exercise due rights and authority over their own knowledge;

Support traditional knowledge systems

(vi) respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;

Contribute to safeguarding traditional knowledge

(vii) contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary practices, norms, laws and understandings of traditional knowledge holders, for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general;

Repress unfair and inequitable uses

(viii) repress the misappropriation of traditional knowledge and other unfair commercial and non-commercial activities, recognizing the need to adapt approaches for the repression of misappropriation of traditional knowledge to national and local needs;

Respect for and cooperation with relevant international agreements and processes

(ix) take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit-sharing from genetic resources which are associated with that traditional knowledge;

Promote innovation and creativity

(x) encourage, reward and protect tradition-based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous and traditional communities, including, subject to the consent of the traditional knowledge holders, by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge;

Ensure prior informed consent and exchanges based on mutually agreed terms

(xi) ensure prior informed consent and exchanges based on mutually agreed terms, in coordination with existing international and national regimes governing access to genetic resources;

Promote equitable benefit-sharing

(xii) promote the fair and equitable sharing and distribution of monetary and non-monetary benefits arising from the use of traditional knowledge, in consistency with other applicable international regimes, the principle of prior informed consent and including through fair and equitable compensation in special cases where the individual holder is not identifiable or the knowledge has been disclosed;

Promote community development and legitimate trading activities

(xiii) if so desired by the holders of traditional knowledge, promote the use of traditional knowledge for community-based development, recognizing the rights of traditional and local communities over their knowledge; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where traditional knowledge holders seek such development and opportunities consistent with their right to freely pursue economic development;

Preclude the grant of improper IP rights to unauthorized parties

(xiv) curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources, by requiring, in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit-sharing conditions have been complied with in the country of origin;

Enhance transparency and mutual confidence

(xv) enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct and the principles of free and prior informed consent;

Complement protection of traditional cultural expressions

(xvi) operate consistently with protection of traditional cultural expressions and expressions of folklore, respecting that for many traditional communities their knowledge and cultural expressions form an indivisible part of their holistic identity.”

“ARTICLE 6

FAIR AND EQUITABLE BENEFIT-SHARING
AND RECOGNITION OF KNOWLEDGE HOLDERS

1. The benefits of protection of traditional knowledge to which its holders are entitled include the fair and equitable sharing of benefits arising out of the commercial or industrial use of that traditional knowledge.
2. Use of traditional knowledge for non-commercial purposes need only give rise to non-monetary benefits, such as access to research outcomes and involvement of the source community in research and educational activities.
3. Those using traditional knowledge beyond its traditional context should mention its source, acknowledge its holders, and use it in a manner that respects the cultural values of its holders.
4. Legal means should be available to provide remedies for traditional knowledge holders in cases where the fair and equitable sharing of benefits as provided for in paragraphs 1 and 2 has not occurred, or where knowledge holders were not recognized as provided for by paragraph 3.
5. Customary laws within local communities may play an important role in sharing benefits that may arise from the use of traditional knowledge.”

“ARTICLE 7

PRINCIPLE OF PRIOR INFORMED CONSENT

1. The principle of prior informed consent should govern any access of traditional knowledge from its traditional holders, subject to these principles and relevant national laws.
2. The holder of traditional knowledge shall be entitled to grant prior informed consent for access to traditional knowledge, or to approve the grant of such consent by an appropriate national authority, as provided by applicable national legislation.
3. Measures and mechanisms for implementing the principle of prior informed consent should be understandable, appropriate, and not burdensome for all relevant stakeholders, in particular for traditional knowledge holders; should ensure clarity and legal certainty; and should provide for mutually agreed terms for the equitable sharing of benefits arising from any agreed use of that knowledge.”

China

As we understand, the “intellectual property” mentioned above would not be limited to the existing systems, but also include the new systems related that may come into being in the future.

We believe the objective includes both economic rights and moral rights. And the content of the part I, Policy Objectives, in the current draft, could be a basis for the discussion on this issue.

Colombia

The system of sui generis protection of traditional knowledge could recognize both the economic rights and moral rights of the owners of said knowledge insofar as it would be a sui generis instrument that would not be subject in the strict sense of the term to the requirements of the system of intellectual property rights as it is currently established. This is in line with all the objectives proposed by the Intergovernmental Committee at the seventh and eighth sessions (document WIPO/GRTKF/IC/8/5).

Eurasian Patent Office (EPO)

Introduction of TK legal protection aimed at prevention of TK misappropriation and use, will promote preservation of TK and equitable benefit sharing of TK between holders. It should promote fair benefit sharing arising from the use of TK. Realization of rights of TK holders includes right of TK disclosure and use, the right to make profits, the right to claim authorship and to be named, right to prevent distortion, abusive or erroneous use. The means of TK protection shall depend on the way the subject matter for protection shall be determined.

European Community

Traditional knowledge is not initially created in order to be exploited and so reach as broad a public as possible (which could be said to be the *raison d'être* of copyright and other IP-rights). TK was originally intended solely for the community from which it originated and whose traditions and beliefs it embodies. Some TK is even of a secret nature, transmitted from generation to generation through certain members of the community. Thus, any damage caused by exploitation of such knowledge against the will of the community is not necessarily of an economic, but could be rather a moral nature. Therefore, at least at first sight, moral rights appear capable of assuring a satisfactory protection of these non-economic interests. However, and contrary to Traditional Cultural Expressions, the link between TK and biodiversity, established under the CBD and the Bonn Guidelines, indicate that economic rights objectives are also relevant.

The EC and its Member States believe that the objective of the protection of TK should be a means of securing the diversity of TK and maintaining it for future generations. . It should be focused on the protection against misappropriation of TK. Existing international and national laws already contain rules against misappropriation of related intangible rights such as geographical indications.

We believe that in order to establish an appropriate balance between interests of TK holders and third parties the function of the concept of a public domain in respect of TK needs to be well analyzed.

FILAIE

The proposed objective should include both economic and moral rights. We favor the legal formula of rights of remuneration relating to public communication, fixation, reproduction, etc., collectively managed either through the community itself, as the sole holder of the rights, or through effective collective rights administration organizations.

Ghana

1. To acknowledge ownership of traditional knowledge
2. To protect the rights of the owners.
3. To encourage collection, storage, collation, retrieval and use of traditional knowledge
4. To facilitate research extraction and development rights in traditional knowledge.
5. To make same available for the benefit of mankind.
6. To guarantee adequate remuneration to the beneficiaries.

The objective for the protection of Traditional Knowledge as provided in document GRTKF/9/INF/5 is too limited. It is true that some researchers, extractors and innovators who come by traditional knowledge, most often misappropriate this knowledge. The source of the information is not acknowledged and little or no financial benefit ensure to the owners or holders of the knowledge from the exploitation of the traditional knowledge. Misappropriation should not be the only basis or objective for the protection of traditional knowledge. It is necessary to expand the objectives for the protection of traditional knowledge.

Guatemala

Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states:

Respect for the intangible cultural heritage of communities, groups and individuals as to the awareness, at the local, national and international level, of the importance of the intangible cultural heritage, and for their reciprocal recognition.

Safeguarding means the measures designed to guarantee the viability of the intangible cultural heritage, including identification, documentation, research, preservation, protection, promotion, enhancement and transmission, basically through formal and informal education, and the revitalization of the various aspects of the heritage.

ICC

This is the key issue upon which consensus is needed, since it will determine what knowledge should be protectable and the substance of rights and exceptions. Both moral and economic rights may be capable of protection, provided the protection sought is proportionate.

IPA

IPA believes that with respect to TK, the primary focus should be put on the protection of moral rights. Overall publishing TK is not a highly profitable business, despite the anecdotal evidence that points to the exceptional cases, rather than the typical publishing enterprise.

The focus of any policy in this area must be to incentivise more publishing, not to add costs or commercial uncertainty to an already risky publishing venture. Prescribed economic rights would add to such risks and disincentivise publishers further from publishing in this area.

IPO

The fair and equitable sharing of benefits arising from the use or commercialization of TK must necessarily allow for an access to such TK (WIPO/GRTKF/IC/3/8). The ability to license, or otherwise transfer, rights in protected TK is a necessary objective. License fees or royalties are possible forms of consideration and may be fairly based on the relative contribution of the TK to the final commercialized product.

Alternatively, holders of TK may determine that they wish to continue to maintain their TK as a trade secret, or to develop or otherwise commercialize their TK without according any rights to third parties. They may even choose to develop their TK into a patented invention, thereby using the patent system to generate greater public benefit as well as revenues.

Japan

There is an opinion that IP right protection should be extended to traditional knowledge considering its industrial value. This opinion, however, does not clearly contain or identify any justifiable reason why traditional knowledge is eligible for such protection. If the purpose of the protection of traditional knowledge is to correct the inequities in economic development to ensure sustainable development of certain communities by providing a new financial resource, discussion should be conducted as to whether the protection of traditional knowledge is an appropriate way to achieve these purposes.

Currently, the main purposes of an IP protection system are to (i) give incentive to creators by protecting their creations and (ii) vitalize industries and society. In this context, the right for protection should be valid for only a limited period of time to encourage use by third parties for further development and to secure the balance between the interests of right holders and public interests. However, it might be problematic to enable only a certain generation to enjoy the benefits derived from traditional knowledge that has long been passed down. Moreover, there will be no financial incentive for the generations after the expiration of the IP right to maintain and pass down the traditional knowledge. On the other hand, from the viewpoint of public interests, it is also inappropriate to grant an IP right that will stay valid forever.

There is another opinion that traditional knowledge should be protected as a moral right, in consideration of values that have long been fostered in an indigenous population or local community. If moral rights protection is made applicable to traditional knowledge, right

holders should be protected against any acts infringing their moral rights. However, the scope of such acts has yet to be clearly defined. For serious moral right infringements, protection under the Civil Code or other general laws may be applicable even if no IP right protection is available.

Latvia

What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?

As we understand the protection through intellectual property rights mainly is sought for economic reasons in a form of some kind of remuneration. Obligation to accord moral rights in a form of acknowledgment of the origin of TK could be auxiliary.

Ogiek

The objectives sought to be achieved in IPR through protection of TK need to be approached from the best practices and mechanism put in place to ensure the role of tradition knowledge systems have been protected and transmitted to the next generations. Through the tradition knowledge TK products like honey, arrow etc. the locals earns income hence improve their livelihoods. Any behavior that exposes the TK to non-TK holders should be prohibited and unaccepted. WIPO committee needs to entrench limitation to prevent exploitation and misuse of TK by non-holders.

Raipon

Moral and economic objectives.

South Africa

Some, but not all, of our concerns would be met by the recommendations set out by the below mentioned objectives for intellectual property protections. Hence we support the introduction of: Sustainable development; Preservation. Within this context we draw attention to the fact IP protection should be distinguished from the concepts of 'preservation' and 'safeguarding.' By contrast safeguarding in the context of cultural heritage refers generally to the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability. Promotion. We are of the view that the recognition and promotion of IP protection for contemporary creativity can in turn support such economic development. We note that there now appears to be wide recognition that IP protocols have the ultimate objective of enhancing social welfare. Hence the potential socio-economic benefit needs to be emphasized. Social cohesion Prevent misappropriation / abuse Protect against Unauthorised use of existing IPR. We endorse the comments subsumed in draft objectives WIPO 10/5 Pg. 3-5

The range of the overall protection of the social and cultural communities from which the IK emerges recognizing IK as a knowledge system, the rights of the holders of such knowledge must be guaranteed - e.g. against appropriation from outside the community, and to issues of fairness and justice in benefit sharing. Our assertion is that for IP protection to transpire it should be compatible with and supportive of a wide range of policy objectives related to the protection and conservations of IK, including: the establishment of legal certainty regarding rights in IK, the survival of indigenous cultures - which translates into matter of survival as an Indigenous people and as a community, the recognition of customary law and practices governing IK, the recognition of customary laws and protocols that govern the creation, transmission, reproduction and utilization of IK, the repatriation of cultural heritage, and the recording, maintenance, protection and promotion of oral tradition **Behavior –unacceptable**

Misappropriation

We are of the view that any acquisition or appropriation of IK/TCE/GR by unfair or illicit means constitutes an act of misappropriation. We further propose that any commercial benefit derived from the use of IK/TCE/GR contrary to any honest practice that gains inequitable monetary advantage constitutes misappropriation. This is also applicable to person/s accessing the knowledge that knows or is negligent in failing to know. Regarding text 10/4 we query protection against the misappropriation of TK. Our particular concern regards: What is fair use and what is misappropriation? Is the public domain legitimate? Distortion We are concerned at the rampant manipulation and distortion of IK/TCE/GR. Given the nature of IK/TCE/GR the presentation of indigenous cultural material in a manner of promoting integrity requires careful consideration.

Contrary to Constitution/ domestic legislation / international instruments / human rights South Africa has a bundle of legislation that seeks to protect IK/TCE/GR hence we are the view that any violation of these pieces of legislation will constitute behavior, which is unacceptable.

Disrespect/denigration

In concert with our proposal on access and benefit sharing regulations we support the inclusion of the following text to this sub-section, “Failure to obtain prior informed consent- unauthorized usage.”

We are steadfast in our stance that any person who without the prior informed consent of the community uses knowledge, an innovation or a practice in a manner inconsistent with our propose access and benefit sharing regulations commits an

In addition we further support that no willful representation of the traditional cultural expression

That no distortion of the expression in a manner prejudicial to honor, dignity or cultural interest of the indigenous and local community

Raipon

Use of traditional knowledge for commercial purposes without the voluntary and conscious consent of its holders.

Switzerland

The purpose of an intellectual property right is to some extent to act as a right of defense. The right owner may prohibit third parties from using the protected property for industrial purposes. Use can be understood as manufacture, storage, supply, circulation, import, export, transit and possession for these purposes. The owner can also forbid third parties from participating in, promoting or facilitating illicit use. That does not mean that the owner may sell his protected property without condition, as there may be additional sale rules relating to the marketing of the product concerned. It may be useful to recall that existing intellectual property rights are territorial rights, in the sense that they are limited geographically by the State which has granted the right of protection.

Tunisia

Traditional knowledge in Tunisia is the subject of sustained political attention and undergoes change in the approach applied to its development.

Today traditional knowledge is perceived as an element with rich potential for human and economic resources that must be exploited as part of an overall approach.

The Ministry of Culture and Heritage Protection in Tunisia is the reference partner in this policy of enhancing ancestral knowledge.

The objectives of the action undertaken to protect intellectual property are as follows:

The safeguarding of the memory of a nation and its identity.

The creation of employment at reduced cost.

Promotion and enhancement.

The preservation and protection of traditional knowledge in order to prevent its exploitation and unlawful commercial and non-commercial use.

The enhancement of regional and local resources.

The sustainable development of such knowledge as an indicator of the specific nature of a nation in the process of globalization.

United States of America

The broadest overall objective of providing intellectual property rights is to promote creativity and innovation. The WIPO Convention provides that the primary objective of WIPO is to “promote the protection of intellectual property.” The 1974 Agreement between the UN and the WIPO recognizes that WIPO is the specialized agency to “promote creative intellectual

activity.” Existing systems of intellectual property protection may be used or adapted to address specific concerns related to TK, including both economic and non-economic concerns to meet the actual needs of communities.

Over the last several sessions, with the strong support of the IB, the IGC has made substantial progress in identifying and articulating a wide range of specific policy objectives for the protection, preservation and promotion of TK. To name just a few of these policy objectives, the IGC has underscored the importance of promoting an environment of respect for TK, contributing to the preservation and safeguarding of TK, and encouraging, rewarding, and protecting authentic tradition-based creativity and innovation.

The United States believes that the framing of these policy objectives is not just a useful technique for facilitating discussion within the Committee. Rather, the IGC’s work on the policy framework for the preservation, promotion and protection of TK is itself an extremely useful tool for policymakers at the national, regional, and international levels. The United States notes that a number of WIPO Member States, informed by the work of the IGC, are taking steps to address specific issues and concerns related to the preservation, promotion and protection of TK.

Nonetheless, more work remains at the international level. In the view of the United States, the IGC should continue to make a positive contribution to the policy dimension of preserving, promoting and protecting TK. As noted earlier, the United States believes that the IGC can make a significant contribution by reaching agreement on policy objectives and general principles at the international level.

More specifically, the IGC may productively focus discussion on the great potential of traditional creativity and innovation to promote economic and cultural development, especially rural development. Regrettably, however, in many nations the policy framework for making decisions about the use (or non-use) of these assets is not in place or fully developed. The IGC may serve an important role in advancing the development of appropriate national policy frameworks for the use of TK by WIPO Member States for economic and cultural development. Consistent with WIPO’s mandate, such work should focus on the IPR-related aspects of economic and cultural development, including both economic and moral rights considerations.

4. WHAT FORMS OF BEHAVIOUR IN RELATION TO THE PROTECTABLE
TRADITIONAL KNOWLEDGE SHOULD BE CONSIDERED
UNACCEPTABLE/ILLEGAL?

Brazil

Any act that impairs the recognition or exercise of the rights held by communities over their knowledge should be deemed illegal.

An international instrument for the protection of TK negotiated in an IP forum such as WIPO should not overlook the need to provide for measures aimed at curbing acts of misappropriation, specifically those acts that take place via the use of IP mechanisms. Among these measures, the requirement for prior informed consent should apply to all TK, registered or not. Registration should not be a condition for the enforcement of rights by the communities in question.

The draft provision put forward in document WIPO/GRTKF/IC/10/5, Article 1, transcribed below, represents adequate basis to discuss the issue:

“PROTECTION AGAINST MISAPPROPRIATION

1. Traditional knowledge shall be protected against misappropriation.

2. Any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.

3. In particular, legal means should be provided to prevent:

(i) acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception, misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means;

(ii) acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent as a condition of access to the knowledge, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent concerning access to that knowledge;

(iii) false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matter when those intellectual property rights are not validly held in the light of that traditional knowledge and any conditions relating to its access;

(iv) if traditional knowledge has been accessed, commercial or industrial use of traditional knowledge without just and appropriate compensation to the recognized holders of the

knowledge, when such use has gainful intent and confers a technological or commercial advantage on its user, and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge; and

(v) willful offensive use of traditional knowledge of particular moral or spiritual value to its holders by third parties outside the customary context, when such use clearly constitutes a mutilation, distortion or derogatory modification of that knowledge and is contrary to order public or morality.

4. Traditional knowledge holders should also be effectively protected against other acts of unfair competition, including acts specified in Article 10bis of the Paris Convention. This includes false or misleading representations that a product or service is produced or provided with the involvement or endorsement of traditional knowledge holders, or that the commercial exploitation of products or services benefits holders of traditional knowledge. It also includes acts of such a nature as to create confusion with a product or service of traditional knowledge holders; and false allegations in the course of trade which discredit the products or services of traditional knowledge holders.

5. The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.”

China

Article 1 of the part III, Substantive Provisions, in the current draft, could be a basis for the discussion on this issue.

And we also consider that people who use TK accessed already shall disclose the origin of the TK in an appropriate way and shall not disguise, distort or tamper the fact.

Colombia

In general we support the definition of acts of misappropriation, contained in Article 1 of the substantive provisions included in documents WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/10/5, and in particular we consider that said acts actually correspond to those acts listed in said Article, although they are not limited thereto, i.e.:

- (i) Acquisition of traditional knowledge by theft, coercion, fraud, breach of confidence or confidentiality, breach of relations of trust, or the provision of misleading information when obtaining prior informed consent for the use of traditional knowledge.
- (ii) Acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent.

- (iii) False claims of ownership over traditional knowledge–related subject matter (claiming intellectual property rights).
 - (iv) Use and commercialization of traditional knowledge without just and appropriate compensation to the holders of the knowledge.
 - (v) Willful offensive use of traditional knowledge of moral or spiritual value.
 - (vi) False or misleading representations that a product or service is related to the community possessing the traditional knowledge (may be dealt with under Article 10bis of the Paris Convention on unfair competition law).
-

Eurasian Patent Office (EPO)

Unacceptable forms of behavior aimed at misappropriation of TK may be theft, bribery, misrepresentation, espionage, coercion, fraud, breach or inducement of breach of contract, acquisition without prior consent and so on. Unfair competition, any forms of products and services discredit relating to TK are not allowed.

European Community

The EC and its Member States believe that, without prejudice to protection already available under current IP law, TK should be protected, against misappropriation which consists of any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means. Article 10bis of the Paris Convention prohibits a certain number of acts which are regarded as acts of unfair competition.

FILAIE

In general, any form of appropriation, in the broad sense of this concept, which can be reflected in specific civil, administrative or criminal provisions.

In general, the looting to which peoples and communities are subject by third parties must be avoided, which logically implies intellectual property protection and knowledge thereof, with relevant registrations designed to produce an inventory/register in relation to third parties.

Ghana

- a. Unauthorized collection of traditional from the right owners.
- b. Non acknowledge of the rights of the owners or holders of the Traditional Knowledge
- c. Exploitation of the protected traditional knowledge without the consent nor authorization of the owner of the traditional knowledge

d. Publishing the protected information without the authorization nor observance of the moral right in the traditional knowledge

e. Unreasonable withholding of information on traditional knowledge by the holders from researchers.

Guatemala

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

Commercialization on a global scale without due respect for the cultural and economic interests of the communities in which they originated and without the peoples who are the authors receiving any share of the benefits of such exploitation.

ICC

This question must be considered alongside the questions of definitions and objectives. Fundamental is that the rights of the holders must be in balance with the rights of the public. Forbidden acts may vary according to the nature and status of the knowledge, the objective of protecting it (moral or economic or both) and (perhaps) the status of the owners and users.

IPA

IPA is concerned by the introduction of the notion of “unacceptability” in the ongoing discussions. “Unacceptability” is not a legal term and means different things to different people. IPA recommends the use of clear and unambiguous terms throughout the ongoing discussions.

IPA could envisage a requirement that the publication or other use of TK should be done only with appropriate acknowledgement of the source.

IPO

All Members and Observers will likely agree that misappropriation or other unauthorized use of protected TK should be considered illegal. However, this must be distinguished from the use of legitimately acquired TK, or the use of publicly known TK. Such authorized or legitimate uses of TK cannot properly be subject to allegations of misappropriation.

Japan

Unacceptable/illegal acts may vary depending on the form of protection for traditional knowledge. As mentioned in the above item 3, there is no clear justifiable reason why

traditional knowledge is eligible for IP right protection. Japan is greatly concerned about extending IP right protection to traditional knowledge. If the protection of traditional knowledge provides incentive for further creation that will lead to industrial development and if traditional knowledge is accorded IP right protection for that reason, as mentioned in the above item 3, the term of IP right for traditional knowledge should be limited in consideration of the balance between the interests of inventors and public interests. In that case, upon the expiration of the term of an IP right, acts prohibited under the above mentioned protection system will no longer be illegal. Moreover, when defining illegal acts, a fact finding survey should be conducted to find out what damage is incurred by what acts.

Latvia

Misappropriation and conversion into commercially successful goods without sharing benefits in cases where the law provides for asking such permission.

Raipon

Use of traditional knowledge for commercial purposes without the voluntary and conscious consent of its holders.

Switzerland

Several options are possible, depending on the aims² and rights attached to traditional knowledge. Use without authorization could be considered unacceptable or illegal. Use is understood as manufacture, storage, supply, circulation, import, export, transit and possession for these purposes.

Tunisia

Piracy, unauthorized use of such knowledge. Copying (counterfeiting).

United States of America

The IGC has made considerable progress in identifying specific forms of behavior regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities relating to TK. Discussion in the IGC has identified a number of specific behaviors that are regarded as unacceptable or illegal, sometimes broadly called “misappropriation.” However, there continues to be significant divergence between members about what types of activity or behavior is included within this term. The draft Policy Objectives contained in document

² Cf. documents WIPO/GRTKF/IC/9/5 and 10/5: “The Protection of Traditional knowledge: Draft Objectives and Principles”.

WIPO/GRTKF/IC/10/5 include the objective to “repress the misappropriation of traditional knowledge and other unfair commercial and non-commercial activities, recognizing the need to adapt approaches for repression of misappropriation of traditional knowledge to national and local needs.” In that light, convergence on the draft Policy Objectives would still appear to be an important first step to addressing the concerns raised in the IGC.

Paragraph 18 of document 7/5 sets forth a number of specific aspects of misappropriation that have been addressed by the Committee in the context of TK, including:

acquiring invalid IP rights over TK;
acquiring TK in violation of prior informed consent; and
acquiring or using TK contrary to honest practices or for inequitable benefit, such as through failing to share benefits equitably.

Further, a number of the concerns raised with respect to TCEs/EoF’s that are noted in that section of our comments would also be applicable in this context. Building on this foundation, the IGC should deepen its understanding of these concerns by examining and discussing in detail the existing mechanisms, including legal (both IPR and non-IPR) and non-legal measures, that are available to address these specific issues or concerns. The IGC would then be able identify gaps, if any, in existing mechanisms at the domestic and/or international levels to address the specific issues or concerns.

For example, discussions in this context have included proposals relating to adoption of national systems that ensure appropriate access mechanisms in the context of TK and Genetic Resources that would also provide for equitable benefit-sharing arising from utilization of TK or GR. Similarly, improved patent databases, such as that proposed in great detail by the delegation of Japan in document WIPO/GRTKF/IC/9/13 should be further considered with respect to the issue of the granting of invalid IPR over TK. While the Japanese proposal was made in the context of genetic resources and related traditional knowledge, it appears that further investigation may be warranted as to whether that proposal would be appropriate, or could be modified to be appropriate, in the broader context of TK generally.

5. SHOULD THERE BE ANY EXCEPTIONS OR LIMITATIONS TO RIGHTS
ATTACHING TO PROTECTABLE TRADITIONAL KNOWLEDGE?

Brazil

A provision on exceptions and limitations could be considered with a view to allow uses of public interest. Also, measures should be adopted to ensure the availability of traditional knowledge to their holders.

It is relevant to note, however, that use of TK by third parties should not entail negative environmental, cultural or economic impacts to the community.

Considering the preceding remarks, the draft provision put forward in document WIPO/GRTKF/IC/10/5, Article 8 (1), transcribed below, represents adequate basis to discuss the issue:

“EXCEPTIONS AND LIMITATIONS

1. The application and implementation of protection of traditional knowledge should not adversely affect:

- (i) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders;
 - (ii) the use of traditional medicine for household purposes; use in government hospitals, especially by traditional knowledge holders attached to such hospitals; or use for other public health purposes.”
-

China

We think that there should be some exceptions and limitations to rights attaching to protectable TK in an effort to permit fair use and reasonable application exemption.

And Article 8 of the part III, Substantive Provisions, in the current draft, could be a basis for the discussion on this issue.

Colombia

We agree with the existence of exceptions or limitations to rights attaching to protectable traditional knowledge, for example the measures for the protection of traditional knowledge may not restrict the use of such knowledge in the habitual and traditional community context.

The recognition of such an exception is therefore one of the fundamental elements characteristic of a protection system applicable to traditional knowledge.

Notwithstanding the above, in the proposed Article 8 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/10/5, the Government of Colombia finds that subparagraph (ii) which grants an exception for “other public health purposes” should be delimited so that it does not end up granting exclusive benefits to individuals making use of public health services. As things stand, the exception justified for reasons of public health or

general interest does not imply that the State is not obliged to retain the faculties and powers granted by intellectual property rights or other standards.

Moreover, the use of medicinal traditional knowledge which is already in the public domain may constitute exceptions to prior informed consent, but not to benefit sharing. In this connection, it would be desirable to prioritize market chains which benefit local communities, before individuals, as a mechanism for benefit sharing and tangible recognition of the origin of said traditional knowledge. With this approach, synergies could be generated between pharmaceutical companies and local communities for better sharing of benefits derived from use of natural resources and associated knowledge.

It should also be taken into consideration that the research which results commercially viable goods or services may not be considered an exception.

Benefit sharing must always be fair and equitable.

Eurasian Patent Office (EPO)

There may be introduced limitations which are not considered as violation of rights similar to patent rights and/or copyright, such as personal use of TK (for household purposes), use in government hospitals and so on.

European Community

The EC and its Member States believe that exceptions and limitations to TK rights can only be determined once it has become clear what kind of protection can be afforded for TK. The application and implementation of protection of TK should not adversely affect the continued availability of TK for the customary practice, exchange, use and transmission of TK by TK holders; the use of traditional medicine for household or experimental purposes; or use for public health purposes.

FILAIE

Yes, in this area consideration should be given to physical handicaps which may affect persons and at times make access to traditional culture impossible; everything related to teaching and education should also be envisaged and, in general, those limitations contained in current international treaties and national legislation relating to copyright, performers and producers, are included in the aforementioned provisions.

Ghana

This instrument shall not affect the following

- i) Traditional systems of access, use or exchange of traditional knowledge.
- ii) Access, use and exchange of knowledge and technologies by and between local communities.

The sharing of benefits based upon customary practices of the concerned local communities, provided that the exception shall not be taken to apply to any person or persons not living in the traditional and customary way of life relevant to the conservation and sustainable use of traditional knowledge.

- iii) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders
 - iv) the use of traditional medicine for household purposes; use in government hospitals, especially by traditional knowledge holders attached to such hospitals; or use for other public health purposes
 - v) Regime of storage categorization of traditional medical practices
 - vi) Any use of the traditional knowledge or TCE for the benefit of the public.
-

Guatemala

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 37. Reproduction of cultural property. Cultural property may be reproduced by all the available technical means. Where this involves direct contact between the object to be reproduced and the means that will be used to reproduce it, the authorization of the Directorate General of the Cultural and Natural Heritage shall be required, subject to the owner or holder's authorization. Any method of reproduction causing harm to or a change in the original cultural property shall be prohibited for use. Any copy or reproduction shall have a visible sign engraved or printed on it and identifying it as such.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

Use for pedagogical activity purposes.

ICC

Yes. This will naturally depend on what those rights are decided to be. One vital objective will be to preserve the public domain. The general rule is that what is publicly known is available for all to use. Many members of ICC feel strongly that any new restrictions on use of public domain information are unacceptable.

IPA

IPA opposes a hasty and premature protection of TK through an IP related framework and therefore does not at this stage want to comment on limitations and exceptions to balance a possible framework of TK protection.

IPO

As noted above, the guiding factor regarding protection of TK should be that publicly known TK cannot be recaptured and accorded protection, as society has legitimate expectations that public information will remain in the public domain. In addition, it is necessary to develop a more detailed description of what is protected TK before it can be determined what exceptions or limitation apply. It is also necessary to have a public notice system to apprise the public of what types of subject matter are considered protected TK.

Japan

As mentioned in the above item 3, any justifiable reasons for IP right protection to be extended to traditional knowledge are not clearly identified and sufficiently explained. In this respect, Japan has a serious concern. Japan is not in a position to enter discussion based on right or protection, but in discussing exceptions and limitations, consideration should be given to the balance between the interests of inventors and public interests although such balance may vary by the form of protection and the scope of illegal acts.

Latvia

The rights should not have retroactive effect. At present we can not name other reasons.

Raipon

Cultural borrowings not pursuing commercial use.

South Africa

To the exhaustive proposal by the chair we submit the inclusion “limitation that should non-commercial activity lead to commercial venture the necessary.”

We have not yet developed a detailed proposal dealing with issues to these provisions, but we would be happy to provide such a proposal to the Committee when completed.

Switzerland

Several options are possible, depending on the aims and rights attached to traditional knowledge. The exceptions that might be envisaged: for example, traditional use by communities, private, non-commercial use or for ethnological research.

In this context, it is more important to prevent misuse by unauthorized third parties.

Tunisia

The rights attaching to protectable traditional knowledge should not be subject either to exceptions or to limitations (an inventory list should be drawn up). Tunisia is now equipped with a body within the Ministry of Culture and Heritage Protection, responsible for producing a list of and devising technical specifications for references in this area.

United States of America

The United States believes that it is premature for the IGC to undertake a focused discussion of “exceptions and limitations attaching to rights to protectable TK.” First, as the issue is currently framed, it appears to tilt in a particular policy direction that is not useful in advancing the work of the Committee at this time. Second, such a discussion may have the unintended consequence of polarizing the discussion, thereby impeding rather than advancing the work of the IGC.

As a general matter, and consistent with comments in response to Issue 7, the IGC should continue its work in identifying the extent of existing mechanisms to address the concerns that have been raised in the Committee and identifying any perceived gaps. In that light, with specific regard to issues of limitations and exceptions, if the IGC provides recommendations that endorse the use of certain existing mechanisms, for example, to protect TK, then the exceptions that apply under that system would presumably apply as well to TK. For example, if certain expressions of traditional knowledge would be eligible for copyright protections, the exceptions and limitations provided for in copyright laws would apply.

6. FOR HOW LONG SHOULD PROTECTION BE ACCORDED?

Brazil

Due to its inter-generational character and to the dynamics of creation of TKs, there should be no limitation in time for the protection of TK. The draft provision put forward in document WIPO/GRTKF/IC/10/5, Article 9 (1), transcribed below, represents adequate basis to discuss the issue:

“DURATION OF PROTECTION

1. Protection of traditional knowledge against misappropriation should last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 4.”

China

We think that the protection shall not be limited to a fixed term. Article 9 of the part III, Substantive Provisions, in the current draft, could be a basis for the discussion on this issue.

Colombia

Protection will last for as long as traditional knowledge satisfies the protection criteria. In this regard, it is important to clarify that the criteria referring to traditional knowledge will be those which possibly define the sui generis protection system for such knowledge and, to that extent, their prescription should not be assimilated to the terms already introduced for existing intellectual property protection mechanisms. Taking into account these considerations, the Government of Colombia supports the proposed Article 9 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/10/5.

Eurasian Patent Office (EPO)

Period of TK protection should correspond to the continued period of creation, development and use. Introduction of a definite period is difficult to determine.

European Community

The EC and its Member States have no objections to protection limited in time. However, the nature of the subject matter suggests that TK protection is not comparable to those IP titles, which grant a time, limited exclusive property right (e.g. a patent or a design). Therefore it has to be discussed whether the duration of protection should last as long as the distinctive association between the beneficiaries of protection and the protected subject matter remains

intact, that is as long as the knowledge is maintained by TK holders and remains integral to their collective identity.

FILAIE

Protection must be granted for an indefinite period owing to the specific nature of the traditional cultural expression, which has been created and/or modified through successive generations. This successive generational path cannot be interrupted since it would affect the very essence of traditional culture, and any provision covering the public domain of traditional cultural expressions, albeit through an underlying payment, should be rejected.

Ghana

Traditional knowledge is to be protected in perpetuity.

However derivatives and extractions from the knowledge or secondary / related rights are to be protected in line with the term of protection of intellectual property rights such as patents copyright, etc.

Guatemala

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

In no case may protection be interpreted so as to obstruct normal use and development.

ICC

Again, this depends on the type of protection accorded, and the objective sought. Certain moral rights, for example attribution, may last indefinitely. Knowledge that is secret may likewise be protected from use by others as long as it remains confidential.

IPA

IPA supports the limitation in time of intellectual property or certain other rights. Any term of protection, with the exception of very important core moral rights, must be limited in time so as to ensure that works can re-enter the creative cycle after a certain period. Otherwise, the public domain as a source of inspiration would be unduly restricted. The same principle should apply to any framework for the protection of TK.

IPO

Trade secrets are generally protected if the information has some commercial value, is maintained as secret, and is subject to reasonable efforts to maintain its secrecy. Such trade secrets are afforded a perpetual term of protection, insofar as each of the three criteria continue to be met. Similarly, TK that has been maintained as secret could also be accorded a perpetual term of protection. IN contrast, however, if the TK is patented, licensed or otherwise transferred, or commercialized, or if it becomes public through any other means, it would be necessary to ensure that such TK would no longer enjoy perpetual protection. Such TK may only be subject to a limited term of continued protection – for example, the agreed confidentiality term in a license agreement relating to use of the TK.

Japan

The term of protection may vary depending on the form of protection for traditional knowledge. If the protection of traditional knowledge gives incentive for further creation that will lead to industrial development and if traditional knowledge is accorded IP right protection for that reason, as mentioned in the above item 3, the term of IP right for traditional knowledge should be limited in consideration of the balance between the interests of inventors and public interests. If IP protection is granted to traditional knowledge for a certain period of time, a problem will arise in that only a certain generation will be able to enjoy the benefits.

Latvia

Hard to answer. One option could be - until profit is made, as some percentage of that profit.

Ogiek

The period under which the TK should be protected demands a long-term approach. This is to ensure that the rights holders benefit for their livelihoods. For instance, when a hunter decides to harvest his honey from a traditional beehive at a particular time, there are various factors to be considered. E.g. temperature, and meter logical conductions among others, the hunger is using empirical knowledge which generates replicable refutable and verifiable results over time.

Raipon

Unlimited. A term may be defined freely only by the actual holders of traditional knowledge.

South Africa

We support the notion that IK/TEC/GR be protected in perpetuity. The need to protect IK, is quite obvious that they mean 'protection' in the sense of safeguarding the continued existence and development of IK. As repeatedly pointed out by SA, this necessarily implies protecting the whole social, economic, cultural and spiritual context of that knowledge, something which simply is not possible to achieve within a confined period of time. Hence, we are proposing for an instrument that protects the holistic, inalienable, collective, and perpetual nature of Indigenous Knowledge Systems for purposes far more expansive than economic benefits.

Switzerland

Several options are possible, depending on the aims and rights attached to traditional knowledge. The duration of protection will depend on the nature of the right of protection, which will be granted to traditional knowledge. In other words, if traditional knowledge is considered rather to be an invention and it could be the subject of a patent, the protection will be rather short (e.g. 20 years). By contrast, if traditional knowledge is considered rather to be a copyright, the protection will be longer (e.g. 70 years after the author's death). Depending on the rights attributed to traditional knowledge, a limited duration could also be envisaged.

Tunisia

The term of protection must be unlimited.

United States of America

For the reasons set forth in our response to Issue five, the United States believes that it is premature for the IGC to undertake a focused discussion of the duration of possible rights with respect to TK. This question appears to presume a particular outcome, which should be avoided at this stage of the Committee's work. There are many mechanisms available for the promotion, preservation and protection of TK. Some mechanisms that may preserve and maintain TK may be indefinite in length of time. On the other hand, many existing forms of intellectual property protection are time-limited.

7. TO WHAT EXTENT TO EXISTING IPRS ALREADY AFFORD PROTECTION?
WHAT GAPS NEED TO BE FILLED?

Brazil

IPR rules have so far proved insufficient to safeguard TK holders against misappropriation. Respect for prior informed consent and for fair and equitable sharing of benefits arising from the use of their traditional knowledge should be incorporated into the IP system. Where traditional knowledge is associated with genetic resources, the sharing of benefits should be consistent with measures established in accordance with the Convention on Biological Diversity, and, in this connection, the draft provision of Article 12, transcribed below, represents adequate basis to discuss the issue:

“1. In case of traditional knowledge which relates to components of biological diversity, access to, and use of, that traditional knowledge shall be consistent with national laws regulating access to those components of biological diversity. Permission to access and/or use traditional knowledge does not imply permission to access and/or use associated genetic resources and vice versa.”

A crucial gap that needs to be filled is the lack of a rule that requires IPR applications to disclose compliance with prior informed consent and benefit-sharing. Draft policy objective number (xiv) – Preclude the grant of improper IP rights to unauthorized parties –, transcribed below, should be turned into a substantive provision:

“Preclude the grant of improper IP rights to unauthorized parties
(xiv) curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources, by requiring, in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit-sharing conditions have been complied with in the country of origin;”

Without prejudice to the decision Members may take to protect TK via “sui generis” systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TK by examining, for example, possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TK.

China

Although the existing IPR system could afford protection for TK to some extent, it is not enough. So it’s necessary to consider the amendment of the existing IPR system to meet the requirements for the protection directly or indirectly, that is, to functionally facilitate protection from other related system. And it’s also valuable to bear in mind establishment and enforcement of a sui generis system given the unique characteristics of TK.

Colombia

Colombia reiterates the difficulties raised by the conventional intellectual property system for the protection of traditional knowledge. This system was devised for the protection of knowledge with an identifiable owner, the characteristics of which differ greatly from those of traditional knowledge which, as pointed out, is holistic, collective and dynamic in nature, is handed down from generation to generation orally, forms part of the collective identity etc. For this reason, it is necessary to devise a special system for the protection of such knowledge. Conventional intellectual property rights do not apply, in the strict sense of the term, to traditional knowledge, since they are not known to communities, but especially because they are not suited to the characteristics of traditional knowledge. They do, however, constitute a valid reference point for the construction of a protection system which is actually applicable to traditional knowledge.

Furthermore, the current intellectual property system should be harmonized in order to promote the protection of traditional knowledge. More and more frequently we encounter patents granted for inventions which do not satisfy patentability requirements in that they are not justly novel since traditional knowledge exists which relates to a patented invention (for example, Ayahuasca, Neem Tree, Enola Bean).

In the case of Colombia, Andean Decision 486 states that the protection granted to industrial property elements shall be granted while safeguarding and respecting their biological and genetic heritage, as well as the traditional knowledge of their indigenous communities. However, no intellectual property standard exists to protect traditional knowledge explicitly.

In addition, neither does any other national law contain a regulation for access to traditional knowledge, or mechanisms either allowing communities to protect their traditional knowledge and obtain ownership of that knowledge, which can be recognized internationally.

In conclusion, no legislation exists to protect said traditional knowledge.

Eurasian Patent Office (EPO)

Some TK subjects may be protected under the existing system of intellectual property protection. For instance, some goods may be identified by trademark registration or patent system protection within certain limits. Some kinds of genetic resources may be protected by patents, plant and animal varieties may be protected by special laws. It is necessary to maintain a reasonable balance between the special system of TK protection and system of IP protection. An important role is played by documenting of traditional knowledge owned by the representatives of nations and communities in the whole world (creation of databases).

European Community

The EC and its Member States believe that virtually all branches of traditional IP law can play a part in the protection of TK (directly or indirectly), as TK is protectable subject matter as long as the application criteria are met.

Under Patent law TK is patentable when the general conditions of novelty, inventive step and industrial applicability are met. While patent law seems more or less capable of appropriately protecting TK-derived inventions, it is normally not applicable to the TK stock itself, because it is limited to inventions adding an inventive step to the state of the art, thus deliberately not protecting the existing state of the art, but only new products. Protection of trade secrets and confidential information can represent both a protection instrument for spiritually valuable TK against any commercial exploitation and a flexible framework for fair contractual know-how licenses in the TK field. It is also (contrary to patent protection) capable of covering the TK stocks itself as long as they are not freely available outside the range of the respective indigenous groups.

The role of copyright law will remain substantially limited to folklore protection rather than in the protection of the remaining "practical" TK. Some concepts of copyright law (the system of collecting societies and the paying public domain concept) could however deliver valuable examples of how to manage collectively held TK stakes effectively. Also, copyright law lately tends to go beyond its classic aesthetic subject matter, and has been extended to modern creations, namely computer programs and databases. The EC Database Directive has established a mechanism to evaluate and protect the continuous updating of databases – a mechanism, which could serve *mutatis mutandis* as a model for the evaluation of continuously developing TK.

Unfair competition (Art 10bis of the Paris Convention) may help to protect TK against unfair exploitation in a way that could create confusion about the origin of the commercialized products.

To a certain extent, trademarks can ensure the protection of TK. Indeed, by protecting through a trademark products manufactured according to traditional methods, one capitalizes on the accumulated know-how. In the case of know-how belonging to a group, the collective trademark can be used. A simple collective trademark is a mark which belongs to a producer group and which makes it possible to members of this group to promote their products under this trademark. The collective mark of certification will be used to indicate and guarantee that the products to which it is applied show certain particular characteristics: the nature, properties or quality of the products in particular.

The protection of the geographical indications also makes it possible to indirectly protect local and traditional knowledge. Indeed, the reputation of a geographical name in connection with given products is generally related to the particular know-how of the manufacturers of the corresponding place. The protection of this geographical name against counterfeits thus contributes to the protection of this know-how. The label of origin gives a reinforced protection to products whose characteristics are related to human elements (know-how) but also natural factors. The protection of indications of source and labels of origin can be a tool for safeguarding cultural inheritance. By developing and protecting geographical names, local traditions and know-how are thereby safeguarded.

The EU and its Member States believe that a deeper analysis of these questions is necessary.

FILAIE

International treaties contain virtually zero protection for traditional cultural expressions and such protection is omitted from national legislation, apart from specific provisions which are to be found in Panamanian, Tunisian, Moroccan, etc. legislation.

A reference to folklore exists only in the international WIPO Performances and Phonograms Treaty (WPPT) of December 20, 1996, where a performer is defined as the person who acts, sings, declaims, etc. literary or artistic works or expressions of folklore.

In order to resolve this extremely important question, it appears appropriate to draw up an international treaty which contains minimal but effective protection and for said treaty, after its entry into force, to be applied to the nations that sign up to it.

Ghana

Ghana currently protects the literary, scientific and artistic aspects of Traditional Cultural Expressions, Adinkra and Kente designs, i.e. traditional motifs are protected under the Copyright Act 2005, Act 690.

The gaps that needed to be filled are the remaining aspects of folklore such as modes and methods of preparation of traditional foods, medicine.

Guatemala

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98, establishes rules for the protection, defense, research, conservation and recovery of the property included in the National Cultural Heritage.

Among the existing legal gaps mention can be made of the absence of a relevant treaty or agreement, promoted by the World Intellectual Property Organization.

ICC

While in many cases a variety of IPRs (patents on improvements, design rights, trademarks, plant breeders' rights, geographical indications, contracts for use of confidential information) may be used to shelter traditional knowledge from exploitation by the general public, nevertheless these rights are not readily used by indigenous people. It needs to be discussed further whether a proper case can be made for a new right to control useful knowledge specific to a given group, and if so under what circumstances.

IPA

Patent, trademarks, copyright and the protections for designs provide ample protection of economic rights. Moreover, other areas of law may equally afford protection (geographic indications; confidentiality/trade secrets). IPA is not aware of any acute gaps in the area of publishing of TK.

IPO

Under the guidelines outlined above, a review of existing IPRs may establish that sufficient protection is already afforded to TK.

As noted in WIPO document WIPO/GRTKF/IC/2/9, very few Member states responded to questionnaires regarding existing forms of IP protection for TK. Therefore, it is difficult to ascertain what gaps need to be filled, or indeed, if gaps in existing forms of IP exist. This should be the subject of further discussion in future IGC meetings, and WIPO should undertake a gap analysis study to determine to what extent existing trade secret laws adequately protect TK.

Japan

To date, there has been no IP system in the world, which extends direct protection to traditional knowledge. In certain limited cases, however, traditional knowledge can be protected under such existing systems as patent law, trademark law, or unfair competition prevention law systems. To seek protection under such systems, traditional knowledge will have to be met certain requirements (similar to other forms of inventions). Still, the following problems will remain.

Protection under patent law

Certain traditional knowledge has already been in the public domain. Thus, such traditional knowledge is not regarded as having novelty. To satisfy the novelty requirement, traditional knowledge, at the very least, should be maintained and passed on by persons who have a duty to keep the traditional knowledge confidential. Basically, inventors have the right to seek a patent. In the case of traditional knowledge, on the other hand, it is often difficult to specify to whom the right to seek a patent belongs because traditional knowledge is maintained/developed over generations in indigenous groups or local communities, etc. As mentioned in the above item 2, similar problems might arise in cases involving two or more communities or countries.

Protection under a trademark law

A trademark right is aimed at protecting signs used for goods and services by entrepreneur but not traditional knowledge or other forms of art. Indirect protection of traditional knowledge under a trademark right might be possible. More specifically, if a trademark right might be able to be granted to a mark of group to which the traditional knowledge belongs, a brand can be established using the mark of the group.

Protection as a trade secret

To seek protection as a trade secret, the information subject to protection must satisfy the requirements of nondisclosure, utility, and maintenance of secrecy. Problems similar to those in the case of protection under a patent law will arise in terms of nondisclosure and the maintenance of secrecy.

As regards the protection of traditional knowledge as a human right, traditional knowledge can be protected under a civil code or other general laws against serious human right infringements.

In conclusion, a fair balance has been kept between the protection of traditional knowledge and the protection of public domain under the IP systems and other laws. At this stage there is no perceivable gap between the current system and the necessary forms/level of protection.

Latvia

In our opinion at present in some cases IPRs can be obtained in the form of patents or trade marks or designs but only to those who are familiar with procedures of acquiring these rights and have finances to do that. As we understand most of TK holders do not belong to this group.

Gaps to be filled are an affordable protection and enforcement mechanisms mainly internationally either through sui generis system or by some specific provisions in existing IP laws and out of court dispute resolution system. Something like the dispute resolution mechanism established for disputes between domain names and trade marks.

Ogiek

The already existing IPR have got no protection locally, nationally and internationally. This calls for urgent measures to identify, recognize in statutes, register and respect the TK from rightful holders. All the stakeholders must develop procedural and flexible understood statutes that shall set penalties against those who are in breach of TK.

Raipon

No response.

South Africa

We believe IPR applications that include or are based on IK should be specifically excluded from existing IPR protection. In IP terms for example patent claims would fail to meet the test of innovation, novelty or inventiveness. But more importantly for local and indigenous communities, such patent claims should be automatically denied because IK is in the community domain; that is, it is already under the jurisdiction of customary practice systems, which protect the IK in perpetuity as the inherent and inalienable cultural property of local and

indigenous communities. Given this cross generation, communal nature of Indigenous Knowledge an international instrument is thus most likely to adequately protect – but will have to include elements that goes beyond traditional IPR.

We support the inclusion of “Protection to individuals” under this sub-section. It is possible for an owner who is an individual to pass on knowledge, etc. to his own group (ie, family, village, community).

In perusing the literature on indigenous knowledge we observe that provisions acknowledge an individual can own knowledge, not merely as trustee on behalf of others, but outright. By extension this would apply to innovations and practices.

Already written and recorded information – does not recognise origin (Community). Under the current provision there are no obligations to the source community, such as obligations to acknowledge the origin of their inspiration, share benefits or respect the cultural and spiritual values and meanings associated with the underlying expression of folklore. The South African Legal Deposit Act, 1997, provides for the protection of the national documentary heritage of the country. As IKS becomes more available in written form and as it stored in electronic databases, provision should be made for the National Library of SA and the other places of legal deposit to receive copies of such documents when published commercially. Provision should also be made for places of legal deposit to gain access to the relevant information stored in such databases (being mindful of the protection of intellectual property rights). The designated places of legal deposit would help preserve published IKS documents and would promote access to heritage information. IKS should therefore be provided for the Legal Deposit Act, 1997, which is now being amended. This holds true for other countries with legal deposit legislation.

Community rights:

Definition of novelty and obviousness (patents) are not recognized: We note the difficulty in meeting these requirements such as novelty or originality, and inventive step or non-obviousness (this may be due at least in part to the fact that IK often dates back prior to the time periods associated with conventional IP systems, or are developed in a more diffuse, cumulative and in a collective manner, making invention or authorship difficult to establish at a fixed time);

We draw attention to the fact that issue of oral history/orature is conspicuously omitted. We propose that any provision must include oral history which is generally unwritten, and is based on oral traditions tracing back to the customs, habits, and usages of local and indigenous communities from generation to generation.

Switzerland

It has always been said that existing intellectual property rights (for example, geographical indications, patents or copyrights) could be used or indeed that their use may be envisaged. By contrast, new protection possibilities should be discussed, where intellectual property does not enter into consideration or where protection based on the intellectual property rights mentioned is not the appropriate instrument.

Tunisia

Traditional knowledge is considered to be a nebulous concept which cannot be protected with a single system of laws, in this case those relating to intellectual property.

The intellectual property system cannot recognize the collective ownership of practices and knowledge handed down from generation to generation.

It may, however, be considered that if intellectual property can help in one way or the other to protect traditional knowledge and to lead to the recognition of its lawful owners, it will already have the merit of recognizing their collective creativity.

Protection must not prevent the sharing and transmission of traditional knowledge, and geographical indications represent an important element in the same way as territorial specificity.

United States of America

Consistent with the mandate of the WIPO to “promote the protection of intellectual property rights,” thereby stimulating innovation and creativity, the IGC has made considerable progress in identifying the role of existing IPRs in addressing specific issues and concerns related to TK, including the role of national copyright, trademark, and trade secret laws, among other laws.

As mentioned with respect to TCEs/EoF, many provisions of existing IPRs already are available for the protection of TK. Principles and doctrines from existing IPRs could be adapted to address specific issues and concerns of indigenous and local communities. For instance, moral rights, which are provided for under the Berne Convention, could be adapted to meet the actual needs of communities by addressing specific, non-economic concerns related to TK. Existing IPR principles and doctrines also may be integrated with customary law approaches.

The IGC should build on the national experiences of WIPO Member States as well as experiences of indigenous peoples in using or adapting existing IPRs to address issues and concerns related to TK. The Secretariat should provide an update on recent efforts to use existing IPRs to address TK. With a new factual baseline, the IGC may wish to consider activities and programs (including regional programs and tool kits) designed to facilitate the exchange of best practices on the use of existing IPRs to address specific local issues and concerns related to TK.

The IGC should not stop with canvassing the use of existing IPRs to address TK issues. Discussion of selected principles and doctrine of unfair competition, contract, cultural heritage, and customary law, where well-suited to address specific issue or concerns, are fully within the mandate of the IGC. For example, the IGC may wish to consider more closely examining the use of unfair competition law by WIPO Member States to address specific issues related to TK. The exchange of information on current national legal and policy developments and identification of successful national practices would advance the work of the IGC.

Some Members may raise concerns or specific examples where intellectual property systems are perceived or considered not to be sufficient to preserve, protect or promote TK in a particular context. Such an exchange would help the IGC to identify gaps, if any, in existing international frameworks. These perceived gaps could then be considered and addressed. For example, concerns may be raised with respect to unauthorized access to and lack of benefits deriving from the use of TK. In this light, access and benefit-sharing systems may need to be analyzed and discussed. Once these gaps are identified, proposals may be considered to redress concerns in a manner leading to convergence among Members. For example, Japan has identified concerns relating to potential granting of erroneous patents with respect to genetic resources and related traditional knowledge and has provided a proposed solution relating to improved databases of prior art in the patent context.

8. WHAT SANCTIONS OR PENALTIES SHOULD APPLY TO
BEHAVIOUR OR ACTS CONSIDERED UNACCEPTABLE/ILLEGAL?

Brazil

Measures should be put in place to ensure that enforcement procedures are available under Members legislation so as to permit effective action against any act of misappropriation, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. In this respect, the Committee might consider possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TKs in the cases where the granting of IPRs has infringed rules on TK protection.

The draft instrument contained in the Annex of document WIPO/GRTKF/IC/10/5 should incorporate a specific provision to this effect, that could draw upon the provision proposed, for example, in the draft instrument regarding protection of TCEs/EoFs (Article 8 (a)), transcribed below:

“(a) Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.”

China

We consider that the issue of sanctions and penalties is not an isolated one but has a very close relationship with protective measures. Behavior and acts considered to be unacceptable/illegal should be applied for sanctions or penalties including but not limited to those IPRs-related, such as rejection of patent application or revocation (invalidation) of patent and civil or criminal penalties, etc. The application of sanctions and penalties should be deterrent enough to illegal behavior and acts, but not be an unreasonable burden for legal acts.

Paragraph 1, Article 2 of the part III, Substantive Provisions, in the current draft, could be a basis for the discussion on this issue.

Colombia

We consider the imposition of civil and criminal sanctions which envisage financial and non-financial compensation in favor of communities and against those engaging in unacceptable or illegal behavior or acts to be in conformity with the rules of each country.

Eurasian Patent Office (EPO)

Prohibition of further use and compensation of damages (penalties) may be envisaged as means of protection from misappropriation of TK. Damages arising from misappropriation include lost profits and unjust enrichment. An important measure may be introduction of legislative norms that would cease monopolistic or exclusive rights in cases of their unjustified granting to patent owners as well as to holders of traditional knowledge.

European Community

The EC and its Member States believe that any acts that contravene the laws could be subject to effective sanctions such as warnings, fines, confiscation of products etc. Existing rules penalising unfair competition could be used (Art. 10bis of the Paris Convention).

FILAIE

In general, criminal protection should be granted against infringers and appropriators of traditional cultural expressions, although reserved for the most serious cases.

We consider that administrative measures and border control, with the imposition of heavy fines for offenders, could give excellent results where infringements affect important elements of different nationalities.

Ghana

We suggest that the following provisions in the African Union model law be considered.

1) Without prejudice to the existing agencies and authorities, the state shall establish appropriate agencies with the power to ensure compliance with the provisions of the instrument.

2) Without prejudice to the exercise of civil and penal actions which may arise from violations of the provisions of the instrument and subsequent regulations, sanctions and penalties to be provided may include:

- i) written warning
- ii) fines
- iii) automatic cancellation / revocation of the permission for access
- iv) confiscation of collected biological specimens recorded information and equipment
- v) permanent ban from access to traditional knowledge such as biological resources / community knowledge and technologies in the country.

3) The violation committed shall be publicized in the national and international media and shall be reported by the national competent authority to the secretariats of relevant international conventions and regional bodies.

4) When the collector innovator conducts his / her operation outside of national jurisdiction, any alleged violations by such a collector may be prosecuted through the co-operation of the government under whose jurisdiction the collector operates based on the guarantee that the latter has provided.

Guatemala

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

Confiscation.

Prohibition of storage, import and export.

Guatemalan Penal Code

Establishes offenses against the public faith and national heritage, as well as the looting of that heritage.

Article 332A, added by Article 23 of Decree No. 33-96, which reads: theft and robbery of national treasures. A prison sentence of two to 10 years shall be imposed in the case of Article 246 and a sentence of four to 15 years in the case of Article 251, where appropriation of the following is undertaken:

- (9) collections and rare specimens of fauna, flora or minerals, or items of palaeontological interest;
- (10) property of scientific, cultural, historical or religious value;
- (11) antiques more than 100 years old, inscriptions, coins, engravings, tax or postal stamps of philatelic value;
- (12) objects of ethnological interest;
- (13) manuscripts, books, documents and old publications with historical or artistic value;
- (14) original artifacts, pictures, paintings and drawings, engravings and lithographs with historical or cultural value;
- (15) sound, photographic or cinematographic archives with historical or cultural value;
- (16) articles or objects of furnishing more than 200 years old and old musical instruments with historical or cultural value.

The penalty will be raised by one third where an offense is committed by public servants or officials or persons who, owing to their position or function, are responsible for guarding and keeping custody of the property protected by this Article.

Article 332B, added by Article 24 of Decree 33-96, reads as follows: theft and robbery of archaeological property. A prison sentence of two to 10 years shall be imposed in the case of Article 246 and a prison sentence of four to 15 years in the case of Article 251, where appropriation of the following is undertaken:

4. products of lawful or unlawful archaeological excavations, or of archaeological discoveries;

5. ornaments or parts of archaeological monuments;
6. items or objects of archaeological interest, although they are scattered or located in abandoned areas.

The penalty will be raised by one third where an offense is committed by public servants or officials or persons who, owing to their position or function, are responsible for guarding and keeping custody of protected property.

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 45. Unlawful export of cultural property. Any person unlawfully exporting property which is part of the National Cultural Heritage shall be sanctioned with a prison sentence of six to 15 years, plus a fine equivalent to twice the value of the cultural property which shall be confiscated. The monetary value of the cultural property shall be determined by the Directorate General of the Cultural and Natural Heritage.

ICC

It is not possible to answer this question in the abstract. The answer will depend on many factors including the definition of protectable traditional knowledge, the objective of its protection and the nature of rights given to those who control the knowledge.

IPA

IPA is concerned by the introduction of the notion of “unacceptability” in the ongoing discussions. “Unacceptability” is not a legal term and means different things to different people. IPA recommends the use of clear and unambiguous terms throughout the ongoing discussions.

IPA opposes a hasty protection of TK and therefore does not at this stage want to comment on the question of sanctions or penalties.

IPO

It is premature to discuss sanctions without a fuller understanding of the metes and bounds of TK to be protected, or even whether a statutory system distinct from existing trade secret laws is necessary to protect TK.

Japan

Sanctions/penalties against unacceptable/illegal acts may vary depending on the level of protection for traditional knowledge or the level of illegality. As mentioned in the above item 3, there is no clear justifiable reason why traditional knowledge is eligible for IP right protection. Japan is greatly concerned about extending IP right protection to traditional

knowledge. A fair balance has been kept between the protection of traditional knowledge and the protection of public domain under the IP systems and other laws. Japan sees no need to introduce any other sanctions/penalties than those that have been already adopted under the existing systems. Japan does not believe that such a discussion is necessary, but when discussing what sanctions/penalties should be introduced, consideration should be given as to the form of protection for traditional knowledge and the scope of illegal acts. Discussion based on factual information about what damage has been caused by what illegal acts is essential.

Latvia

Sanctions could include invalidation of rights obtained, may be some other pecuniary penalties.

Raipon

Unlawful use without the voluntary and conscious consent of holders of traditional knowledge for commercial purposes shall be punishable by the complete removal of profit and circulation of such knowledge for the benefit of authors.

South Africa

Internationally legally binding instrument
Bilateral / MOU's / Cooperation agreements
Domestic law within which the transgression took place
Article on sanctions
Conciliation, Mediation and arbitration – by independent 3rd parties

We are of the view that penalties could be set in order to recognise the particular gravity of the breach, as well as the financial means of the party involved. Civil procedures would be followed, including use of the civil standard of proof. A suitable appeal mechanism would need to be available to review the exercise of the regulator's or issuing officer's discretion. Following evaluation document 10/4, it could potentially be extended to other areas of environmental regulation and other regulatory agencies. Our proposed regulations on access and benefit could be used to benchmark standards.

Switzerland

Several options are possible, depending on the aims and rights attached to traditional knowledge. Illegal behavior could be the subject of civil or criminal sanctions, according to the nature of the act and national legislation. Sanctions could, inter alia, be in the form of a fine or damages paid to the victim.

Tunisia

The same sanctions adopted in the field of archeological heritage (the looting of sites) and the sanctions relating to copyright (piracy).

United States of America

For the reasons set forth in our response to Issue five, the United States believes that a discussion of “sanctions and penalties” will not advance the work of the IGC at this time. As noted in the same response, however, the United States believes that the IGC should undertake a focused discussion of specific behaviors and acts regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities.

Once the IGC reaches a more informed understanding of the specific harms at issue, the IGC will be in a better position to canvas remedies under existing law (including copyright, trademark, patent, unfair competition, trade secret, criminal, and customary law) to determine whether there are gaps in the existing remedial schemes of WIPO member states.

9. WHICH ISSUES SHOULD BE DEALT WITH INTERNATIONALLY AND WHICH
NATIONALLY, OR WHAT DIVISION SHOULD BE MADE BETWEEN
INTERNATIONAL REGULATION AND NATIONAL REGULATION?

Brazil

The international instrument on the protection of TK should set out minimum standards with a view to facilitate enforcement of provisions of national legislations in third countries, in particular those targeted against acts of misappropriation. The international dimension of the work of the Committee lies on determining general rules applicable to the protection of TK, such as (i) the requirement for prior informed consent and, when applicable, benefit-sharing; (ii) reference to cases that constitute acts of misappropriation; (iii) a rule requiring the need to put in place effective enforcement measures.

At the national level, legislation would lay down specific relevant definitions as well as the applicable procedures for the identification of parties eligible to protection, maintenance and exercise of rights over TK.

China

We believe that the issues concerning protection of TK should be taken into account on both international and national dimensions. On the one hand, national legislation could afford experiences for international harmonization. On the other hand, international harmonization would facilitate and guide national legislation, preventing their conflicts, and help to solve those common problems. And it is more important that international harmonization is irreplaceable to solve the problem of access and misappropriation of TK abroad, which is becoming prevalent.

Colombia

Given the complexity of the subject, discussions are required at the regional and national level to identify common issues and differences, in order to establish simple, flexible and applicable measures. Positive actions or differential treatment in such cases are very relevant.

Although the individuals who belong to indigenous peoples and traditional communities are the subject of special rights, it should also be borne in mind that traditional knowledge protection is collective in nature and therefore benefits must also be collective. The rules governing the sharing of benefits must be universal insofar as the scope of and benefit from intellectual property rights transcend national borders. The peoples who go beyond political borders must undoubtedly be treated as nations in their entirety, for which reason the regional management of traditional knowledge must be dealt with as a priority. The most appropriate action at the national level would be the generation of a "sui generis"-type law which does not replace but rather complements the protection applicable to traditional knowledge under other laws or legal measures at the national and international level. The above instrument should be directed more towards preventive protection than towards positive action, or to a combination of the two.

This is true taking into account that since a number of measures in this regard have already been put forward, there is also the urgent need to have interpretations which prevent countries from granting exclusive rights in traditional knowledge which has been misappropriated. The Government of Colombia recommends the promotion of regional discussion and consultation to devise viable proposals on this subject.

Eurasian Patent Office (EPO)

The main principles and legal norms should be defined on the international level. On the basis of norms of the International Law it may be necessary to create supranational bodies (committees) and special groups (commissions) to work with indigenous peoples and communities.

European Community

Even if it is premature at this stage to deal with this question, the EC and its Member States support a flexible approach and consider such an approach essential in order to take account of the diverse measures of TK protection which already exist at national/regional level. We believe that the final decision on the legal protection of TK should be left to national legislators. National authorities should have necessary flexibility in determining the appropriate measures which best reflect the needs of their local/indigenous communities in the domestic context.

At international level the EC has a preference for a non-binding legal outcome, i.e., sui generis models or other non-binding options. TK protection should also be consistent with already existing IP systems and international treaties.

FILAIE

We consider that in order to focus appropriately on the protection under consideration, there is no more effective formula than the drawing-up of an international treaty to which the majority of Member States could sign up. Once this international treaty has been prepared, it would be necessary to complement or establish original legal protection for traditional cultural expressions.

Since there is virtually no national rule on the subject, it is difficult to determine it at the national level.

Ghana

Every issue concerning Traditional Knowledge should be dealt with at both the national and international levels especially where, the issue involves two or more different nationals or nations.

Guatemala

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 11. Exports: the permanent export of cultural property shall be prohibited. However, temporary export, up to a maximum period of three years, may be authorized in the following cases:

- (c) Where exhibits are to be displayed outside the national territory.
 - (d) Where they are the subject of scientific research or conservation and restoration duly supervised by the Directorate General of the Cultural and Natural Heritage.
-

ICC

Rights will have to be administered and enforced nationally. As yet there is no consensus on the need for or contents of an international agreement.

IPA

The principle of subsidiarity requires that only those tasks should be performed at international level which cannot be performed effectively at a more immediate or local level. Respect for the same principle also requires that international harmonisation should be the conclusion, not the precursor of the development of national regulation.

IPO

This question will require further deliberation and more input from Member countries regarding protection of TK under existing IPRs. Therefore, it is premature to delineate what, if any, regulation may be required at the international level. As noted above, WIPO should undertake a gap analysis to determine to what extent existing national trade secret laws adequately protect TK.

Japan

As mentioned in the above item 3, justifiable reasons for IP right protection to be extended to traditional knowledge have not been clearly identified and sufficiently explained. Japan has a serious concern about establishing a new type of intellectual property right or a *sui generis* right for protection of TK as well as about creating a legally binding international instrument that obligates member States to establish such a regime.

Before discussing ways of internationally addressing this issue, discussions must be conducted on what domestic solutions exist and where their limits lie and the extent to which contracts, etc. are incapable of addressing this issue. Discussion based on factual information about what damage has been caused by what illegal acts is essential.

Latvia

Nationally - definition of TK holders, cataloging TK, mechanisms of access to TK;
internationally - acknowledgement of TK rights, facilitation of contesting improperly acquired rights, simple dispute resolution mechanism.

Raipon

At the international level general principles of protection and defense: the right of priority to use traditional knowledge for commercial purposes, granted by representatives of indigenous peoples and encouragement of persons related to indigenous peoples, to make commercial use of traditional knowledge through the provision of essential capital and conditions for such use by persons and organizations of indigenous peoples.

Documentation by specialists of traditional knowledge (including their whole range as listed above) of persons and communities related to indigenous peoples, which they wish to use for commercial purposes, or in cases of the unlawful use of such knowledge by persons not related to indigenous peoples.

At the national level – mechanisms providing protection and defense.

South Africa

As mentioned in earlier our submission, our starting point is that there needs to be coordination and clarification of linkages with the other elements of other international protocols and conventions. We propose that mechanisms for enabling or facilitating notification or registration as the basis for recognizing an IP right under national law and regional policy be taken into consideration. Hence we of the view that OAU Model law be tabled as a possible mechanism. We propose that the model law could be harmonised with the provisions in the IGC, so as to provide a more integrated scheme for recognition and protection of Indigenous and local communities intellectual property. If a system for community decision-making and

financial returns is devised, it could also pave the way for greater economic, as well as cultural self reliance for these communities.

As South Africa is signatory to most of the internationally binding legal treaties, there is no way it can operate without constructively engaging with the big and small windows of opportunity that exist within those legal frameworks. We propose that the following simultaneous challenge of protection “**from**” (i.e. continued unjust exploitation) on the one hand, and protection “**to**”, which entails creating new spaces for what was marginalized or subjugated to begin its self definition, and determine its parameters for its interaction with other knowledge systems. This latter contains the crucial imperatives for the development, promotion as well as integration with their concomitant implications for the way formal institutions operate.

We fully support the insertion of “customary law” under this question given that South African Constitution provides for customary law and that the courts in South Africa apply customary law when the law is applicable.

Switzerland

Minimum standards (terminology, definitions, protection conditions, rights granted, duration, holders,...) could be regulated at the international level. The whole implementation and precise regulation for a territory could be dealt with at the national level and, as we have seen above, an intellectual property right is a right limited in its geographical territory.

Tunisia

Currently no legal framework exists for the protection of traditional knowledge at the national level.

The protection of traditional knowledge at the national level is essential, and the Code of Protection for the Archeological, Historical and Traditional Arts Heritage, enacted under Law No. 94-35 of February 24, 1994, and which relates essentially to sites and monuments, can be broadened to extend to traditional knowledge

Agreements and charters between international organizations and States can be produced for the protection of traditional knowledge, similar to what is applied in the field of the built heritage or the environment.

United States of America

The United States believes that a focused discussion of the promotion, preservation and protection of TK requires a careful consideration of both the national and international aspects of the complex issues before the Committee. Moreover, no outcome should be excluded. The United States further considers that the discussion within the IGC should be informed by, not driven by, any particular possible outcome. At this time, the Committee should concentrate its efforts on engaging in sustained, robust discussions of the substantive issues before it.

However, it should be recognized that all issues raised in the IGC are being dealt with internationally even if the result of the international deliberations would be for agreed actions to be taken at the national level.

10. HOW SHOULD FOREIGN RIGHTS HOLDERS/BENEFICIARIES BE TREATED?

Brazil

Foreigners should be afforded the same treatment as nationals or treatment not less favorable. The draft provision of Article 14 in the Annex to document WIPO/GRTKF/IC/10/5, transcribed below, represents adequate basis to discuss the issue:

“INTERNATIONAL AND REGIONAL PROTECTION

The protection, benefits and advantages available to holders of TK under the national measures or laws that give effect to these international standards should be available to all eligible traditional knowledge holders, who nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign holders of TK should enjoy benefits of protection to at least the same level as traditional knowledge holders who are nationals of the country of protection. Exceptions to this principle should only be allowed for essentially administrative matters such as appointment of a legal representative or address for service, or to maintain reasonable compatibility with domestic programs which concern issues not directly related to the prevention of misappropriation of traditional knowledge.”

China

We think that foreign rights holders/beneficiaries should be treated according to the relevant international conventions or bilateral/multilateral treaties. Before the conventions or treaties come into being, national protection could be afforded on the principles of reciprocity.

Article 14 of the part III, Substantive Provisions, in the current draft, could be a basis for answering this question.

Colombia

The subject is complex and requires regional and national discussions to identify common issues and differences, in order to establish simple, flexible and applicable measures. Positive actions or differential treatment in such cases are very relevant. Although the individuals who belong to indigenous peoples and traditional communities are the subject of special rights, it should also be borne in mind that traditional knowledge protection is collective in nature and therefore benefits must also be collective. The peoples who go beyond political borders must undoubtedly be treated as nations in their entirety, for which reason the regional management of traditional knowledge must be dealt with as a priority. The Government of Colombia recommends the promotion of regional discussion and consultation in order to devise viable proposals.

Eurasian Patent Office (EPO)

Foreign physical and legal persons should enjoy benefits of protection to the same level as traditional knowledge holders who are nationals of the country by virtue of international agreements and reciprocity principle. And, accordingly, all limitations and possible sanctions should apply to foreign physical and legal persons as well.

European Community

The EC and its Member States believe that the principle of national treatment should apply (e.g. the same protection to TK originated in other States as is accorded to TK originating in its own territory).

In exactly the same way as nationals, with the establishment of appropriate systems of reciprocity. In other words, the principle of national treatment should apply.

Ghana

Nothing in this convention may be interpreted as altering the status or diminishing the level of protection under any convention affecting the rights and obligations of states parties deriving from international instruments relating to intellectual property rights or to the use of biological and ecological resources to which they are parties. Foreign right holders / beneficiaries should be given equal treatment.

Guatemala

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 65. Conclusion of agreements. The Government of Guatemala shall conclude with the foreign governments it deems appropriate bilateral and regional agreements in order to avoid the unlawful trafficking of the cultural property of the contracting countries.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

Protection of expressions of foreign folklore:

- (j) subject to the reservation of reciprocity, or
 - (k) on the basis of treaties and other agreements.
-

ICC

In the same way as nationals. There is no reason to discriminate.

IPA

All beneficiaries should be treated equally.

IPO

IPO seeks further clarification on the meaning of the question, and will be happy to offer comments as the meaning of the question is clarified through further discussion in the IGC.

Japan

As mentioned in the above item 3, any justifiable reasons why IP right protection should be extended to traditional knowledge have not been clearly identified and sufficiently explained. Japan has a serious concern about establishing a new type of intellectual property right or a sui-generis right for protection of TK, as well as about creating a legally binding international instrument that obligates member States to establish such a regime. Treatment of foreign right holders and beneficiaries would depend on the type of protection TK would be granted and the corresponding international regulations.

Latvia

Legally acquired rights should be recognized, illegally - invalidated.

Raipon

No response.

South Africa

At International level there is significant level of support for opposing the grant of patents on non-original inventions. For example, more than a dozen organizations from around the world got together to oppose the EPO Neem patent and the entire process took five years. However we take note of the process of opposition is, however, extremely expensive and time consuming. A recent suggestion by USPTO provides a rational approach to solve these problems.

International instrumentations should take into consideration to redress for past abuse and the vulnerability of the communities. This instrument should seek to elevate the rights of communities over the rights of multinational consortiums

In order to illuminate a positive role on the continued working of the IGC both the Interdepartmental Committee on IKS and the IGC sub-committee warmly encourages the following proposals in the likely event of IGC veering towards a stalemate. At the heart of our proposition is the opportunity to deepen connections by lobbying and networking with other likeminded members states. We are convinced that a comprehensive and integral legal international binding convention to promote and protect the rights and dignity of local and indigenous communities in so far as intellectual property rights may not be possible under the current climate of discussions. At the outset it needs to be stated that where the negotiations are to be conducted as a charade as observed in IGC and where some member states have no intention of negotiating in good faith, such negotiations are to be avoided until circumstances for negotiations are ripe. We are of the view that negotiations at the IGC are at the same level/stage since it was first conceived in 2002. Hence we propose that following:

That the South African response to the decisions of the 10th session be integrated in the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA). As a lead country on Policy issues around indigenous Knowledge Systems that South Africa proposes to proceed with the formulation of a possible treaty on the protection of Indigenous Knowledge Systems. As the lead department on IKS it is required on NIKSO to consolidate the South African position. That the African group propose the adoption of the African Model Law; That South Africa conjointly with the African Group proposes a the drafting of framework for the protection IKS/TEC/GR based on the Model Law and South African IKS Policy. That South Africa does not oppose the total collapse the IGC leaving the onus to individual countries to develop its own policies/legislation

Switzerland

Several options are possible, depending on the aims and rights attached to traditional knowledge. It may be useful to recall that existing intellectual property rights are territorial rights, in the sense that they are geographically limited by the State which has granted the right of protection.

Tunisia

The right of ownership of traditional knowledge is linked to the community and the nation, and territoriality is therefore an important element.

Foreign nationals cannot be owners or beneficiaries of rights.

United States of America

For the reasons set forth in our response to Issue five, the United States believes that it is premature for the IGC to undertake a focused discussion of the treatment of foreign rights holders/beneficiaries. However, the United States notes that one of the guiding principles extensively discussed within the IGC is respect for relevant international agreements. The United States understands this principle to include the fundamental principle of national treatment, or nondiscrimination with respect to foreign rights holders. In the view of the United States, this bedrock principle of international intellectual property rights should continue to inform the spirit of discussions within the IGC.

[End of Annex and of document]