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REVIEW OF EXISTING INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL KNOWLEDGE

Prepared by the Secretariat

I. INTRODUCTION

1. During discussions under Agenda Item 5.2 ("Protection of Traditional Knowledge") at the first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (April 30 to May 3, 2001) ("the Intergovernmental Committee" or simply "the Committee"), Members of the Committee expressed support for the following task referred to in document WIPO/GRTKF/IC/1/3:

> "The Member States may wish to compile, compare and assess information on the availability and scope of intellectual property protection for traditional knowledge within the scope of subject matter which was delimited under Task B.1 and identify any elements of the agreed subject matter which require additional protection."[1]

2. This task, as described in paragraphs 72 to 76 of document WIPO/GRKTF/IC/1/3, would cover two lines of enquiry, namely on the use of existing standards of intellectual property for the protection of traditional knowledge, as well as on new legal standards, eventually in the form of *sui generis* mechanisms of protection. During discussions, Members expressed various views on the scope of that enquiry. One Member, for example, expected that task B.2 would provide an evaluation of existing mechanisms of intellectual property as compared to a *sui generis* one, or to a combination of both. Another delegation expressed its support for the establishment of a *sui generis* international system of traditional knowledge protection and suggested that the Secretariat address contractual arrangements relating to genetic resources[2] and the protection of traditional knowledge under a *sui generis* database system. Another delegation stated that the task should not be limited to a thorough examination of means and measures available to protect traditional knowledge, but other approaches should also be taken into account so as to guarantee the rights of those who possessed and gradually improved on that knowledge. In general, Members were supportive that the survey should focus on two major sub-issues: whether existing mechanisms of intellectual property can and/or have been applied to protect traditional knowledge; and what sort of *sui generis* intellectual property measures have been established for the protection of traditional knowledge.[3]

3. Pursuant to the mandate received from the Intergovernmental Committee, the Secretariat issued document WIPO/GRKTF/IC/2/5, in which it invited Members to provide information, including case studies, on existing forms of intellectual property protection for traditional knowledge. That document was addressed to the members of the Intergovernmental Committee,[4] as well as those observers having legislative competence to draft and/or adopt laws or model laws providing for the intellectual property protection of traditional knowledge, such as those observers which are State members of the United Nations, but not of the World Intellectual Property Organization (WIPO), and those regional intergovernmental organizations and associations having the legislative competence referred to.

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1 Paragraph 77. This Task was referred to in document WIPO/GRTKF/IC/1/3 as Task B.2.

2 This task has been addressed in document WIPO/GRKTF/IC/2/3.

3 See Report of the First Session, WIPO/GRTKF/IC/1/13, paragraphs 130 to 155.

4 In accordance with paragraphs 4 to 7 of document WIPO/GRTKF/IC/1/2 ("Rules of Procedure"), the members of the Intergovernmental Committee are the Member States of the World Intellectual Property Organization (WIPO), States which are parties to the Paris Convention for the Protection of Industrial Property but not members of WIPO, and the European Communities.

4. Document WIPO/GRKTF/IC/2/5 contained twenty-seven questions covering four distinct but interrelated topics. Question 1 addressed experiences in the use of existing mechanisms of intellectual property in the protection of traditional knowledge. Questions 2 through 25 covered specific aspects of systems specially devised for the protection of traditional knowledge. Question 26 asked about the availability of assistance to traditional knowledge holders to acquire, exercise, manage and enforce rights in traditional knowledge. The final question asked about the general perception of the adequacy of intellectual property law for the protection of traditional knowledge.

5. Based on responses received from 23 Committee Members (including the European Communities), the Secretariat prepared a document containing a preliminary analysis and conclusions and submitted it to the second session of the Committee.[5] Given the small number of responses, the Committee encouraged other Members to respond and, for this purpose, extended the deadline to do so to February 28, 2002.[6] During the extended period, 24 additional answers were received by the Secretariat. The present document consolidates all the responses received to date.[7]

II. PRELIMINARY ANALYSIS OF RESPONSES RECEIVED

(a) Responses to Question 1

6. Question 1 invited Committee Members to provide information on the use of existing intellectual property mechanisms to protect traditional knowledge. As indicated above, that question reflected one of the major concerns of intervening delegations in the first session of the Intergovernmental Committee. Furthermore, it seems logical that before embarking on a long and complex exercise of setting new norms, both at the national and the international levels, stakeholders would fully assess the possibility of exploring the use of existing mechanisms, whose efficiency in protecting intangible assets (from literary works, to technical creations, to fairness in trade) has already been tested to a large extent in many countries.

7. A number of Committee Members have indicated that existing mechanisms of intellectual property are generally available for the protection of traditional knowledge: Australia, France, Japan, New Zealand, the Russian Federation, Switzerland and the United States. Some Committee Members, such as the European Union, Hungary, the Republic of Korea, Switzerland and Turkey, have identified an extensive list of existing mechanisms,[8] thus implying that eligibility for traditional knowledge protection depends almost exclusively

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5 See WIPO/GRTKF/IC/2/9.

6 See Report of the Second Session, WIPO/GRTKF/IC/2/16, at paragraph 114.

7 Annex 1 contains two synoptic tables reflecting the substance of all 48 responses received. Annex 2, which will be distributed in due course, contains the full text of answers provided.

8 Such as trademarks, particularly collective and certification trademarks, geographical indications, patents, copyright and related rights, trade secrets. Turkey also has mentioned several international "treaties and processes", such as the Berne Convention for the Protection of Literary and Artistic Works, the International Labour Organization, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, among others. Switzerland has clarified that, as long as the applicable criteria are met, all forms of intellectual property rights available under Swiss law are also available for the protection of traditional knowledge.

on meeting previously established legal conditions. Other Members' responses seem to identify some specific mechanisms as being more adequate to protect traditional knowledge than others: Australia and Canada have mentioned copyright, certification marks and designs; Togo has mentioned copyright law, both at the national and regional levels; France, Portugal and Romania have given particular relevance to collective trademarks and geographical indications; Indonesia has emphasized the relevance of copyright, distinctive signs (including geographical indications) and trade secret law; Japan has mentioned patent law; Norway has made special mention of trade secret protection for traditional knowledge that is not in the public domain,[9] as well as, indirectly, to trademark law; the United States has drawn attention to the applicability of patent law and trade secret law standards; Samoa also has emphasized the importance of moral rights under copyright and related rights law.

8. Australia, Canada, Colombia, Kazakhstan, New Zealand, the Russian Federation, Venezuela and Viet Nam have provided actual examples of how existing intellectual property mechanisms have already been used in order to protect traditional knowledge.

9. Australia has identified four cases which, in its view, demonstrate the ability of the Australian intellectual property regime to protect traditional knowledge: *Foster v Mountford (1976) 29 FLR 233*,[10] *Milpurrurru v Indofurn Pty Ltd (1995) 30 IPR 209*,[11] *Bulun Bulun & Milpurrurru v R & T Textiles Pty Ltd (1998) 41 IPR 513*[12] and *Bulun Bulun v Flash Screenprinters* (discussed in (1989) EIPR Vol 2, pp. 346-355).[13] From these cases it results that protection under the Australian Copyright Act can be as valuable to Aboriginal and Torres Strait Islander artists as it is to other artists.[14] Furthermore, other intellectual property

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9 See, below, in paragraphs 33 and 34, a brief discussion on the concept of public domain.

10 In this case the Court used common law doctrine of confidential information to prevent the publication of a book containing culturally sensitive information.

11 This case involved the importation into Australia of carpets manufactured in Viet Nam which reproduced (without permission) either all or parts of well-known works, based on creation stories, created by Indigenous artists. The artists successfully claimed infringement of copyright as well as unfair trade practices, for the labels attached to the carpets claimed that the carpets had been designed by Aboriginal artists and that royalties were paid to the artists on every carpet sold. In awarding damages to the plaintiffs, the judgement recognized the concepts of "cultural harm" and "aggregated damages".

12 This case arose out of the importation and sale in Australia of printed clothing fabric which infringed the copyright of the Aboriginal artist, Mr. John Bulun Bulun. A parallel issue was whether the community of the Ganalbingu people, to which Mr. Bulun Bulun and his co-applicant Mr. Milpurrurru belong, had equitable ownership of the copyright. The court said that, given that relief had been granted to Mr. Bulun Bulun, through a permanent injunction, there was no need to address the issue of community's ownership. The assertion by the Ganalbingu of rights in equity depended upon there being a trust impressed upon expressions of ritual knowledge, such as the art work in question . The court considered there to be no evidence of an express or implied trust created in respect of Mr. Bulun Bulun's art. Nonetheless, in a *dictum*, the court recognized that the artist, as an Indigenous person, had a fiduciary duty to his community. Therefore, there were two instances in which equitable relief in favour of a tribal community might be granted in a court's discretion, where copyright is infringed in a work embodying ritual knowledge: first, if the copyright owner fails or refuses to take appropriate action to enforce the copyright; and second, if the copyright owner cannot be identified or found.

13 Mr. Bulun Bulun brought a copyright infringement action in relation to the unauthorized reproduction of his artistic works on t-shirts by the defendant. In its response to Question 1, the government of Australia informed that this was a clear-cut case of copyright infringement and that the case was settled out of court.

14 The government of Australia has informed that further information regarding these and other cases can be located at <www.austlii.edu.au>.

rights are available for traditional knowledge protection, namely certification marks, the trademark system as a whole, and the designs system.

10. In Canada, copyright protection under the Copyright Act has been widely used by Aboriginal artists, composers and writers of tradition-based creations such as wood carvings of Pacific coast artists, including masks and totem poles, the silver jewelry of Haida artists, songs and sound recordings of Aboriginal artists and Inuit sculptures. Trademarks, including certification marks, are used by Aboriginal people to identify a wide range of goods and services, ranging from traditional art and artwork to food products, clothing, tourist services and enterprises run by First Nations. Many Aboriginal businesses and organizations have registered trademarks relating to traditional symbols and names. In contrast, industrial designs protection under the Industrial Design Act has not been widely used by Aboriginal persons or communities. The West Baffin Eskimo Cooperative Ltd. filed over 50 designs in the late 1960s for fabrics using traditional images of animals and Inuit people. It is becoming increasingly common for Aboriginal communities in Canada to sign confidentiality agreements with governments and non-Aboriginal businesses when sharing their traditional knowledge. For example, the Unaaq Fisheries, owned by the Inuit people of Northern Quebec and Baffin Island is involved in fisheries management. The company regularly transfers proprietary technologies to other communities using its own experience in the commercial fishing industry. The techniques it develops are protected as trade secrets.

11. Colombia and New Zealand have provided examples of how existing trademark and patent law provisions have incorporated safeguards against the abuse and misappropriation of traditional communities' intangible assets. In Colombia, in the light of a specific provision of Decision 486 of the Andean Community,[15] the registration of the trademark "TAIRONA" has been rejected on the grounds that "TAIRONA" is the name of an indigenous community that inhabited pre-Hispanic Colombia. New Zealand has informed that a new Trade Marks Bill, currently being considered by Parliament, contains provisions that prevent the registration of trademarks where their use or registration would be likely to offend a significant section of the community, including the Maori.[16] Under the current law of New Zealand, nevertheless, there is already a provision (Article 19) under which where it is determined that a trademark is of significance to a Maori group, it is appropriate to require an applicant to seek consent from the relevant Maori authority. Colombia has also noted that, in accordance with Decisions 486, the validity of patents for inventions derived from genetic and biological material or from traditional knowledge depends upon the conformity of the means used to obtain that material or knowledge with national, regional and international law. Under Decision 391, patent applications must include a copy of the contract of access where the products or processes for which the patent is applied for have been obtained or developed from genetic resources or from products derived therefrom and of which any of the Contracting Parties is the country of origin.

12. Both Kazakhstan and the Russian Federation have identified examples of protection of technical traditional knowledge through the grant of patents. Furthermore, in Kazakhstan, the

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[15] Article 136(g) of Decision 486 provides that signs consisting of names of indigenous and Afro-American communities, and which constitute an expression of their culture, may not be registered without the explicit authorization of the communities in question or unless the request is filed by the communities themselves.

[16] New Zealand has noted that, for the purpose of its responses, "Maori" is used to refer to the indigenous people of New Zealand.

external appearance of national outer clothes, head dresses (*saykele*), carpets (*tuskiiz*), decorations of saddles, national dwellings (*yurta*) and their structural elements, as well as women's apparel accessories, like bracelets (*blezik*), national children's cots-crib-cradles and table wares (*piala*, *torcyk*) are protected as industrial designs. The designations containing elements of Kazakh ornament are registered and protected as trademarks.

13. Venezuela and Viet Nam have referred to the mechanism of geographical indications to protect traditional knowledge ("Cocuy the Pecaya", a liquor made from the agave, in Venezuela, and "Phu Quoc", fish soya sauce, and "Shan Tuyet Moc Chau", a variety of tea, in Viet Nam). In addition, Viet Nam has mentioned a patent for a traditional preparation of medicinal plants used in assistance in stopping drug-addiction, and a trademark registered for a traditional balm made of medicinal plants ("Truong Son").

(b) Responses to Questions 2 through 25

14. Question 2 invited Committee Members to provide information on existing specific intellectual property laws protecting traditional knowledge. As phrased, that question clarified that Members were supposed to inform the Committee about laws specially adopted with the aim at protecting traditional knowledge under a new, special regime created for the explicit purpose of protecting traditional knowledge. The focus of the question, therefore, was the specificity of the regime created, and not of the piece of legislation adopted.[17]

15. Eight Committee Members have provided information about *sui generis* systems of protection of traditional knowledge: Brazil, Costa Rica, Guatemala, Panama, the Philippines, Samoa, Sweden[18] and Venezuela. Ten Members informed about their plans to adopt a *sui generis* system in the future: Ecuador, New Zealand, Papua New Guinea, Peru, the Philippines, Solomon Islands, Tanzania, Tonga, Trinidad and Tobago and Viet Nam. Moreover, although it has not indicated the intention of pursuing a *sui generis* route, France has noted that "intellectual property, relating to the protection of concrete means of operating, needs formalization and cannot apply to pure knowledge. Therefore, protection of traditional knowledge requires a *sui generis* system which will need the establishment of inventories in which they will be compiled."

16. The Brazilian *sui generis* system was established by Provisional Measure 2.186-16, of August 23, 2001 and covers traditional knowledge associated to biodiversity. Protection is obtained mainly by a bilateral approach, that is, through contracts of access, the purpose of which is to ensure the sharing of benefits arising from the use of genetic resources and associated traditional knowledge. Article 9 of the law, however, seems to establish a

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[17] In fact, a country might have passed a piece of legislation amending its intellectual property laws in order to clarify that, say, subject to special provisions on collective ownership of indigenous and local communities, traditional knowledge would be the subject of the same legal discipline as other intellectual property rights, provided the respective conditions are met. This would be a special (or specific) law, yet without establishing a new intellectual property regime, specifically tailored to the technical characteristics of its subject matter — in other words, this would not be a *sui generis* system. Information on that sort of legislation would relate more appropriately to the first question.

[18] Sweden has mentioned a Constitutional provision that provides for certain legislation regarding the right of the Sami to reindeer husbandry. Legislation enacted in that context (the Reindeer Husbandry Act, of 1971) deals with the Sami's right to reindeer husbandry within certain geographical areas. That law, however, as Sweden has noted, covers the economic aspects of reindeer husbandry and, in that sense, is not intellectual property-related.

proprietary regime of traditional knowledge rights, because it recognizes indigenous and local communities' right to prevent unauthorized third parties from using, exploiting, experimenting, disclosing, transmitting and re-transmitting data and information that integrate or constitute associated traditional knowledge. The law has also provisions on benefit sharing, including compensation, access to and transfer of technology, licensing and capacity building. Traditional knowledge is not the subject of a predetermined term of protection. The grant of industrial property rights in processes or products obtained from national genetic resources depends upon compliance with the provisions of the Provisional Measure (that is, industrial property registration applicants must provide information on the origins of genetic resources and of associated traditional knowledge, whenever applicable). The Brazilian law provides for sanctions, which comprise fines, the seizure of illegal material and products embodying unlawful material, prohibition of distribution, invalidation of patents or registrations, loss of governmental incentives, etc.

17. The Law on Biodiversity of Costa Rica does not deal specifically with a *sui generis* system of protection, but establishes certain general criteria concerning community rights in traditional knowledge and calls for local and indigenous communities, through a participatory process, to establish the mechanism for the protection and registration of biodiversity-associated traditional knowledge.

18. Guatemalan law (Cultural Heritage Protection National Law (No. 26-97, as amended in 1998) provides for protection of traditional knowledge from a national cultural heritage approach. This means that expressions of national culture (which comprise all intangible expressions of cultural heritage, including traditions, medicinal knowledge, music, performances, culinary) included in the "Culture Goods registry" are under the protection of the State and thus cannot be disposed of by means of contractual arrangements: they cannot be sold and there is no right for remuneration, as the government of Guatemala informed in its responses to Questions 10 and 11. The system, which is managed by the Ministry of Cultural Affairs, seems to follow a public good approach, in the sense that traditional knowledge is to be identified, recorded and preserved by the State for the benefit of the entire society.

19. Panama has given a detailed explanation of its "Special intellectual property regime on collective rights of indigenous peoples for the protection and defense of their cultural identity as their traditional knowledge", established by Law no. 20, of June 26, 2000 and regulated by Executive Decree No. 12, of March 20, 2001. Panama's *sui generis* regime covers indigenous peoples' creations, such as inventions, designs and innovations, cultural historical elements, music, art and traditional artistic expressions. Two additional criteria are designated to identify the subject matter of protection: traditional knowledge is protected to the extent it provides for the cultural identification of indigenous peoples and is susceptible to commercial use. Collective exclusive rights are accorded to registered elements of traditional knowledge. The authority to attribute rights is vested upon the Congress(es) or the Traditional Indigenous Authority(ies). Some elements of knowledge may be co-owned by various communities, in which case benefits will be jointly shared. The Law also provides for exceptions to rights conferred as well as measures of enforcement (available provisions to enforce intellectual property rights may be applied as subsidiary mechanisms). Collective indigenous rights may

also be a basis for opposing against unauthorized third party claims of intellectual property rights, such as copyright, trademarks, geographical indications, and others.[19]

20. The Philippines has enacted the Indigenous Peoples' Rights Act, of 1997 and its regulation, which protects indigenous communities' rights in general, including their rights in traditional knowledge, including the rights to limit the access of researchers into their ancestral domains/lands or territories, to be designated as sources of information in whatever writings and publications resulting from research, and to receive royalties from the income derived from any of the researches conducted and resulting publications. The enforcement of those rights will follow procedures established by customary laws of indigenous peoples.

21. Samoa has reported about the Village Fono Act 1990 which provides for an institutional structure within the village communities "Village Fono" (Village Council) and which, although indirectly, effectively protects Samoa's traditional form of governance.

22. Venezuela has indicated that the Constitution of the Bolivarian Republic secures and protects the intellectual property of indigenous peoples in their knowledge, technology and innovations.

23. As indicated above, ten responding countries have said that they have the intent of developing a *sui generis* system in the future. Only one country (Peru), however, has provided information about the elements that may be integrated in that future system.

24. Peru's draft law was published in the Official Journal on October 21, 1999 and, after being amended, in the Official Journal on August 31, 2000. A detailed description of the proposed Peruvian *sui generis* system can be found in other WIPO documents.[20] Its purpose is to protect knowledge developed by indigenous peoples about properties, uses and characteristics of components of the biological diversity. Holders have the right to give consent to the access (and use) of their knowledge. Where the intended use is of a commercial or industrial nature, a license agreement must be entered into. The license shall provide for an equitable share of the benefits. The draft law provides for enforcement measures, including injunctions, seizures and criminal sanctions, such as fines. It also provides that where an application for a utility patent or a plant variety breeder's certificate is related to products or processes obtained or developed from collective knowledge, the applicant must present a copy of the licensing agreement as a prerequisite for the concession of the respective right, unless the collective knowledge is in the public domain. The breach of this obligation will cause the denial or, eventually, the revocation of the utility patent or the plant variety breeder's certificate in question. Unlike Panama, protection in Peru will be

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[19] The *sui generis* system of Panama actually constitutes the first comprehensive system of protection of traditional knowledge ever adopted in the world, particularly having in view that the Executive Decree no. 12, of 2001, has clarified that the regime also covers biodiversity-associated traditional knowledge, thus lending a practical expression, as far as the territory of Panama is concerned, to the provisions of Article 8(j) of the Convention on Biological Diversity.

[20] See "Efforts at Protecting Traditional Knowledge: The Experience of Peru", document presented at the WIPO Roundtable on Intellectual Property and Traditional Knowledge, Geneva, November 1 and 2, 1999. See also "Intellectual Property Needs and Expectations of Traditional Knowledge Holders – WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)", WIPO, Geneva. April 2001, at 174-175.

informal, but, in order to facilitate protection and conservation, a voluntary registry will be created.

(c) Responses to Question 26

25. Question 26 asked whether Committee Members' legislation provided for special measures to assist traditional knowledge holders to acquire, exercise, manage and enforce their rights.

26. Responses have taken three different approaches. It appears that the laws of some countries accord to traditional knowledge holders some sort of institutional assistance aimed at facilitating their understanding and managing of intellectual property rights in the fields that are most important to them (see responses given by Australia, the Philippines and Tanzania[21]). Some countries have put special emphasis on capacity building, targeting either traditional knowledge creators and holders (see the answers from Brazil, Peru, the Philippines and Viet Nam[22]) or individual inventors in general (see the responses from the United States[23]). New Zealand, although not providing traditional knowledge creators with specialized management and enforcement assistance, has nonetheless funded the development of the "Maori Made Mark," which operates as a certification mark. To this extent, one could say that in those countries traditional knowledge holders enjoy special assistance very much in line as assistance provided in many countries to small and medium enterprises, for example. Traditional knowledge holders' rights are not, therefore, accrued or otherwise positively discriminated.

27. Other Committee Members have explained that traditional knowledge holders are entitled to have recourse to their customary law in matters regarding decision-making and attribution of benefits (Peru[24]). Similar information can be found in the responses submitted by Panama (response to Question 27[25]), the Philippines (response to Question 21[26]) and Samoa (response to Question 1[27]). The Russian Federation has listed a number of laws that are relevant in the context of Question 26.[28]

28. But the vast majority of answers analyzed hereby have stated that there are no special measures in place to assist traditional knowledge holders handling their intellectual property matters. Norway has acknowledged the possibility of introducing those measures in the future, depending upon the evolution of international discussions.

(d) Responses to Question 27

29. Question 27 involved matters of legal policy. In fact, in asking whether Committee Members perceive limitations in the application of intellectual property laws and procedures

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21 See note 7, *supra*.
22 See note 7, *supra*.
23 See note 7, *supra*.
24 See note 7, *supra*.
25 See note 7, *supra*.
26 See note 7, *supra*.
27 See note 7, *supra*.
28 See note 7, *supra*.

to the protection of traditional knowledge, it invited them to unveil current plans to develop (or not) new legislative standards.[29] Three types of responses have been provided.

30. Kazakhstan and Latvia have informed that they perceive no limitations in the application of intellectual property law to the protection of traditional knowledge.[30]

31. Australia, Canada,[31] Japan, Norway and the United States have expressed a dual, supplementary approach: although it is understood that traditional knowledge has already some (or most) of its main aspects covered by existing intellectual property mechanisms (*sui generis*, standard mechanisms or a combination thereof), other measures may be necessary (or not) to complement the existing legal system. Guatemala has stated the view that the combination of existing standard intellectual property mechanisms with cultural heritage legislation provides for the necessary and effective legal framework.

32. A third group of responses has indicated that, in principle, existing intellectual property standards shall always have limitations as regards protection of traditional knowledge. Those perceived limitations could be listed as follow:

- traditional knowledge does not meet the criteria [of novelty and originality], as established by internationally adopted standards (Bhutan, Costa Rica, France, Guatemala, Indonesia, Japan, the Republic of Korea, New Zealand,[32] Norway, Panama, Peru, the Russian Federation, Singapore[33]);

- it is difficult (if not impossible or inconvenient) to identify the individual creators/inventors of traditional knowledge (Australia, Bhutan, Gambia, Japan, the Republic of Korea, New Zealand, Panama, the Philippines,[34] Samoa, Singapore, Solomon Islands[35]), thus removing any possibility of communal benefit (Samoa);

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29 An identical enquiry can be found in Question 5. However, Questions 5 and 27 are not redundant because Question 5 is supposed to be answered by those Committee Members which have already special legislation to protect traditional knowledge in place, while Question 27 is addressed to all responders.

30 Latvia has explained that it has no such groups of people which could be designated as "indigenous peoples", thus there are no problems of misappropriation of traditional knowledge. Protection of traditional knowledge in this sense becomes a matter of making it publicly available for the purpose of using it as relevant data for the purposes of examining patent, trademark and design applications (please see document WIPO/GRTKF/IC/2/6). This response raises an additional issue that the survey did not address: national protection of traditional knowledge originated in other countries.

31 An overview of Aboriginal perspectives on traditional knowledge as well as of areas of Canadian intellectual property law of most relevance to Aboriginal people is available at <www.ainc-inac.gc.ca/pr/ra/intpro/intpro>. The government of Canada is currently seeking the views of national Aboriginal organizations and specifically soliciting examples where existing intellectual property mechanisms have not provided protection for traditional knowledge but arguably should have.

32 As an example of the deficiencies of the current intellectual property system, New Zealand has reported on a Maori businessman who has failed to obtain protection for a method of common knowledge and for a naturally grown plant.

33 Information provided by Guatemala, Panama and Peru on this topic can be found in their answers to Question 5 (see footnote 17, above).

34 The Philippines has reported on the difficulties concerning the registration of the Ifugao epic "Hudhud" with UNESCO because of the absence of an identifiable competent authority to certify the work: "As no competent authority was identified, a political authority (local executive) endorsed the entry."

35 Information provided by the Solomon Islands in its response to Question 5.

- the limited duration of protection may pose problems for traditional/cultural aspects of property rights [that should be protected indefinitely] (Bhutan, Gambia, New Zealand, the Russian Federation, Singapore and Viet Nam);

- other perceived limitations were the difficulty in quantifying traditional knowledge; moreover, being, by its very nature, knowledge in the public domain, traditional knowledge it is virtually beyond any possibility of being privately appropriated (Singapore); the need for identifying the origin of genetic resources and traditional knowledge eventually employed in the development of new inventions (Colombia); the concepts of "droit de suite" and "paid public domain" should be extended to all forms of traditional knowledge (Gambia); lack of awareness of the benefits that may arise from intellectual property protection (Panama and Tuvalu); the "holistic" nature of traditional knowledge that touches upon all aspects of everyday lives of indigenous peoples, and which are interwoven so as to become an integral factor of identity (Samoa); intellectual property mechanisms are standardized in contrast with cultural practices and customs, which differ from place to place (Solomon Islands); the purpose of intellectual property is to serve as an incentive for future creative endeavors, while, by definition, traditional knowledge needs no such incentive for development (United States); and the reluctance of traditional knowledge holders in disclosing secret knowledge for fear of having it misappropriated (Viet Nam).

33. It should be noted, however, that almost all legal concepts involved in the above list of perceived limitations could be reassessed based upon the experience obtained from the application of intellectual property law. For example, the idea behind the perceived limitation that traditional knowledge is inherently in the public domain results from the concept that traditional knowledge, being traditional, is "old," and thus it cannot be recaptured. Actually, as the WIPO Secretariat has already emphasized on different occasions, traditional knowledge, just because it is "traditional," is not necessarily old. Tradition, in the context of traditional knowledge, refers to the manner of producing such knowledge, and not to the date on which the knowledge was produced. Traditional knowledge is knowledge that has been developed based on the traditions of a certain community or nation. Traditional knowledge is, for that simple reason, culturally driven. But traditional knowledge is being produced, and will continue to be produced everyday by communities as a response to their own environmental demands and needs. Besides, even traditional knowledge that is "old" — in the sense that it has been produced yesterday or, eventually, many generations ago — can be novel for the purposes of several areas of intellectual property. Novelty, in general, has been defined by laws according to more or less precise criteria according to which the specific piece of technical knowledge has been made available to the public. In the field of patents, for example, it is disclosure (or the lack thereof) that establishes whether the condition of novelty (and of inventiveness) has been met. The date on which the invention was realized is not necessarily taken into account for that purpose.[36] However, this is not an absolute concept even in the field of patents. It is a well known fact that a few WIPO Member States have accepted to extend pipeline patent protection for certain inventions that have already been patented in other countries, provided those inventions have not yet been subject to commercial utilization. A similar notion of "commercial novelty" can be found in the fields

[36] In the few countries that follow the first-to-invent rule, the date on which the invention was realized is nonetheless of relevance in the context of examination as well as of interference proceedings.

of *sui generis* plant variety protection[37] and layout-designs (topographies) of integrated circuits.[38]

34. Therefore, it seems that the concept of "public domain" is not a horizontal one and should not discourage Committee Members from seeking assistance in existing intellectual property mechanisms to protect traditional knowledge. Actually, the answers referred to in paragraph 22 above seem to express a strong necessity for deepening the analysis of whether the eventual need for developing a new, *sui generis* intellectual property regime for traditional knowledge arises from the very intrinsic characteristics of such knowledge, rather than from limitations arising from the conditions and terms of protection provided for by existing mechanisms. For example, it appears, as discussed above, that existing standards could already contain the answer for concerns about novelty and originality of traditional knowledge. Moreover, the fact that the creators/inventors of traditional knowledge are not easily identifiable does not necessarily prevent the applicability of existing intellectual property standards. Most intellectual property assets are owned by collective entities, which in many cases represent large and diffuse group of individuals (General Motors owns intellectual property rights on behalf of a community of shareholders that is much larger and more diffuse than most identified traditional communities). On the other hand, patent law is not necessarily about protecting *inventors*, but about appropriating *inventions*. Likewise, copyright, especially in a TRIPS-context, is not about protecting *authors*, but rather about appropriating *works*. In other words, the protection of individual rights of authors and inventors in the field of intellectual property has developed in the direction of the adoption and operation of national standards, particularly through contractual arrangements and labour standards, rather than through the establishment of international standards. For example, many national patent laws have exceptionally acknowledged that where the inventor cannot be identified or he/she does not want to be identified as such, national patent offices should not be prevented from issuing the patent letter, in spite of the provisions of Article 4*ter* of the Paris Convention. Short terms of protection, which are said to be characteristic of intellectual property law, should not be a matter of concern either. Intellectual property and long term, if not indefinite, protection may not be incompatible. The law of trademarks and geographical indications could provide extremely useful insights in that regard.

35. On the other hand, it is true that traditional knowledge has been developed without the need for a formal system of intellectual property protection. In this sense, it can be said that intellectual property is not necessary to promote its development any further. However, the purpose of intellectual property, and in particular of patents, plant variety certificates and trade secrets, is not exclusively the promotion of inventive activities. If it were, intellectual property would have no purpose whatsoever in countries of centrally planned economies or in those fields where the basic inventive activities are carried out by the government or by private institutions with public funding (biotechnology, for example). Transparent and secure property rights in knowledge have an extremely important role in reducing transactions costs as far as the transfer of technology is concerned. Patents, for example, have a crucial role to play in the biotechnology area, where the governments or the institutions that have promoted the inventions need to transfer public-funded inventions to the market. For that to happen in a transparent and secure way, rights and obligations must be clearly defined and attributed. For that to happen, a private mechanism of appropriation is of the essence. The same concept

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[37] See UPOV 1991, Article 6.1.

[38] See TRIPS Agreement, Article 38.2.

applies to traditional knowledge. Intellectual property protection of traditional knowledge, would establish clear rules on the private appropriation by traditional communities of their own expressions of culture (including technical knowledge), thus reducing the enormous uncertainty that today involves all activities of bioprospection by businesses and research institutions.

36. The importance of deepening (or revisiting) the understanding of the perceived limitations listed by Committee Members would therefore help clarify whether governments should embark on a coordinated effort to promote the protection of traditional knowledge through available intellectual property mechanisms — either in anticipation of or in addition to a future exercise of developing a new, *sui generis* system for the protection of traditional knowledge, or as its substitute.

III. CONCLUSION

37. The adoption of *sui generis* mechanisms for the protection of traditional knowledge by a few Committee Members is too recent for permitting conclusions on their adequate and effective operation. On the other hand, the use of well established and known existing mechanisms for the protection of traditional knowledge, which seems to be the preference of a number of Committee Members, has not been thoroughly analyzed and therefore its effectiveness is unknown.

38. There is a clear divide between those Committee Members that understand that the existing mechanisms are available to protect those elements of traditional knowledge that are worth of protection, and those that see in the deficiencies of the existing mechanisms an unavoidable demand for the establishment of a *sui generis* system.

39. At some point in the future, therefore, the Intergovernmental Committee may wish to undertake additional work with the aim of deepening the understanding of how existing intellectual property mechanisms, with their current standards concerning availability, acquisition, scope, maintenance and enforcement of rights, may be used as effective mechanisms for the protection of traditional knowledge.

40. For example, it was noted above that some Committee Members seem to understand that a few intellectual property mechanisms are more suitable for the protection of traditional knowledge than others. Geographical indications seem to be one of those mechanisms. Venezuela and Viet Nam have provided concrete examples of the use of geographical indications with that purpose. Geographical indications, as defined by Article 22.1 of the TRIPS Agreement, and appellations of origin, as defined by Article 2 of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, of October 31, 1958, rely not only on their geographical connotation but also, essentially, on human and/or natural factors (which may have generated a given quality, reputation or other characteristic of the good). In practice, human and/or natural factors are the result of traditional, standard techniques which local communities have developed and incorporated into production. Goods designated and differentiated by geographical indications, be they wines, spirits, cheese, handicrafts, watches, silverware, and others, are as much expressions of local cultural and community identification as other elements of traditional knowledge can be. Additionally, the geographical reference of a geographical indication or appellation of origin is an indirect means of appropriation of traditional techniques that otherwise might be in the

public domain. This second element is clearly predominant in certifications marks, under which, unlike geographical indications, the technical content of the knowledge is the most visible part of the equation, irrespectively of any geographical link. For examples of certifications and collective marks used in the context of traditional knowledge, see the example provided by New Zealand ("Maori Made Mark", a mark of authenticity and quality) and Portugal ("tapestry of Arraiolos").

41. *The Intergovernmental Committee is invited to take note of the information contained in this document and determine a future course of action.*

[Annex I follows]

Responding Members	***Existing IP standards are available for the protection of TK***		***A sui generis system has been/will be designed for the protection of TK***	
	In general	***In specific areas***	***A system is already available***	***A system is under consideration***
Australia	X	X		
Bhutan				
Bosnia & Herzegovina				
Botswana				
Brazil			X	
Canada		X		
Colombia		X		
Costa Rica			X	X[39]
Ecuador				X
Egypt				
Ethiopia				
France	X	X		
Gambia				
Guatemala			X	
Hungary		X		
Indonesia		X		
Japan	X	X		
Kazakhstan		X		
Republic of Korea		X		
Kyrgyzstan				
Latvia				
Malaysia				
New Zealand	X	X		X
Norway		X		
Pakistan				
Panama			X	
Papua New Guinea				X
Peru				X
Philippines			X	X
Portugal		X		
Qatar				
Romania		X		
Russian Federation	X	X		
Samoa		X	X	
Singapore				

[39] Costa Rica has submitted a draft Centroamerican Protocol on Access to Genetic and Biochemical Resources and to Associated Traditional Knowledge, which has been approved by the Ministers of Environment of Centroamerica and which soon will be submitted for parliament approval.

TABLE 1

Responding countries	***Existing IP standards are available for the protection of TK***		***A sui generis system has been/will be designed for the protection of TK***	
	In general	***In specific areas***	***A system is already available***	***A system is under consideration***
Solomon Islands				X
Sweden			X[40]	
Switzerland	X			
United Republic of Tanzania				X
Togo	X			
Tonga				X
Trinidad & Tobago				X
Turkey		X		
Tuvalu				
United States of America	X	X		
Venezuela		X	X	
Viet Nam		X		X
European Community		X		

[40] Sweden has noted, however, that its law is not intellectual property-related.

Responding Members	***Perceived limitations in the application of existing intellectual property laws to the protection of traditional knowledge***						
	No limitations	***Novelty or originality***	***Inventive step***	***Informal nature***[41]	***Individual v. Collective creation***	***Term of protection***	***Other***
Australia	X				X		
Bhutan		X			X	X	
Bosnia & Herzegovina							
Botswana							
Brazil							
Canada	X						
Colombia							X
Costa Rica		X					
Ecuador							
Egypt							
Ethiopia							
France		X		X			
Gambia					X	X	X
Guatemala			X				
Hungary							
Indonesia		X					
Japan	X	X	X		X		
Kazakhstan	X						
Republic of Korea		X			X		
Kyrgyzstan							
Latvia	X						
Malaysia							
New Zealand		X		X	X	X	
Norway		X	X				
Pakistan							
Panama		X			X		X
Papua New Guinea							
Peru		X	X				
Philippines					X		
Portugal							
Qatar							
Romania							
Russian Federation		X	X			X	

[41] This deficiency, as perceived by France, New Zealand and Viet Nam, relates to the fact that traditional knowledge holders are not in possession of scientific information that might permit them to obtain protection under existing systems, such as the patent system. For example, holders of traditional medicinal knowledge know how to prepare extracts and potions in a consistent and repetitive manner, but do not know their chemical formulae nor can they isolate the active molecules.

Samoa					X		X
Responding countries	***Perceived limitations in the application of existing intellectual property laws to the protection of traditional knowledge***						
	No limitations	***Novelty or originality***	***Inventive step***	***Informal nature***[42]	***Individual v. Collective creation***	***Term of protection***	***Other***
Singapore		X			X	X	X
Solomon Islands					X		X
Sweden							
Switzerland							
United Republic of Tanzania							
Togo							
Tonga							
Trinidad & Tobago							
Turkey							
Tuvalu							X
United States of America	X	X	X				X
Venezuela							
Viet Nam				X		X	X
European Community							

[End of document. Annex II, containing the responses provided, will be circulated in due course]

[End of Annex I and of document]

[42] This deficiency, as perceived by France, New Zealand and Viet Nam, relates to the fact that traditional knowledge holders are not in possession of scientific information that might permit them to obtain protection under existing systems, such as the patent system. For example, holders of traditional medicinal knowledge know how to prepare extracts and potions in a consistent and repetitive manner, but do not know their chemical formulae nor can they isolate the active molecules.