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TRADITIONAL KNOWLEDGE AND FOLKLORE**

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**ELEMENTS OF A *SUI GENERIS* SYSTEM FOR THE PROTECTION OF
TRADITIONAL KNOWLEDGE**

Document prepared by the Secretariat

I. OVERVIEW

1. This document is an updated version of document WIPO/GRTKF/IC/3/8, a discussion of the elements of a possible *suigeneris* intellectual property (IP) system for the protection of traditional knowledge (TK). It reviews the background to the debate on *suigeneris* protection of TK, and considers some of the factors that may make it difficult at this stage to define precisely a legal regime for TK protection. It discusses the notion of *suigeneris* protection of TK, and points out that this need not entail an entirely new stand-alone legal system, but could also include adapted or extended *suigeneris* elements of the existing IP framework. The document then discusses the nature of IP protection in general, and on this basis, considers the kind of rationale that may be relevant for IP protection of TK. It highlights that legal mechanisms for TK protection are distinct from the TK as such, and may never capture the full holistic nature of the TK – given that their function is essentially to restrain third parties from undertaking unauthorized acts in relation to the subject matter, rather than to express the TK fully and comprehensively. Drawing on a general discussion of the nature of TK subject matter, the document then considers in turn some of the key characteristics of a *suigeneris* system for TK protection, in particular the general legal framework, the policy objectives, the subject matter, and the criteria to define protected subject matter, as well as ownership, nature, acquisition, administration and enforcement of rights. The paper is intended to facilitate debate and discussion, rather than to pre-empt any policy decision on the desirability or otherwise of *suigeneris* approaches to protecting TK.

II. BACKGROUND

2. Prepared at the request of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”),¹ WIPO document WIPO/GRTKF/IC/3/8 discussed the elements that might form part of a distinct *suigeneris* legal system defined specifically to protect TK. The Committee discussed this document extensively at its third session in June 2002,² and decided that it should be updated and revised to form the basis of further discussion. The present paper is the updated version of document WIPO/GRTKF/IC/3/8 requested by the Committee. The discussion remains at an exploratory phase, yet the general approach to the issues taken in the earlier document was received with generally positive reception. A number of delegations indicated that domestic consultations on the earlier document were still underway. To facilitate ongoing discussions and consultations, the revised paper follows the earlier version closely, with updates aimed at taking account of particular issues highlighted in discussion and at making the document more systematic and useful. This document should be read in conjunction with documents WIPO/GRTKF/IC/3/9 and 4/9, which discuss possible approaches to the definition of ‘traditional knowledge.’

¹ For background, see document WIPO/GRTKF/IC/3/8, *Elements Of A Suigeneris System For The Protection Of Traditional Knowledge*, paragraphs 1-3.

² See *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Second Session, Report, adopted by the Committee*, WIPO document WIPO/GRTKF/IC/3/17

III. INTRODUCTION

3. There are several reasons why it may yet be premature to identify in a definitive way the precise characteristics of a legal framework especially adapted to the characteristics of TK, especially if this is to be capable of broad application internationally. Firstly, although the international debate on the need for the development of mechanisms for the protection of TK started more than two decades ago,³ not enough experience has yet been acquired, both at the national and the international levels, to ensure that the full scope of options for a workable and effective system are available. In practice, a 'top-down' or a pre-emptive approach to defining *suigeneris* protection at an international level is less likely to succeed if it is shaped without reference to the experience gained from operational national systems that provide practical models for functioning TK protection, whether through *suigeneris* protection or application of existing IP systems to TK subject matter.⁴

4. Secondly, a number of Committee Members have called for the consideration of how existing mechanisms of IP can be more effectively used to protect TK.⁵ For at least those Members, therefore, there seem to be a need for a fuller articulation of how existing systems can be properly applied to TK subject matter. This may also be a useful guide to defining the specific area of need for any new, *suigeneris* system. It may also be useful in determining how a *suigeneris* system interacts with those elements of other IP systems which are relevant to TK protection. Some concerns have been expressed in this regard about the possibility of double protection of the same underlying TK material through general IP systems and through *suigeneris* TK rights, although in other contexts it is not unusual for overlapping IP rights to co-exist.

5. Thirdly, Members must still decide whether, if a future *suigeneris* system were to be developed, such a system would cover all manifestations and expressions of TK in a broad sense,⁶ or whether they should pursue two different legal tracks: on one track, the efforts would be aimed at developing a system duly adapted to the characteristics of expressions of folklore (through the development of *suigeneris* provisions, possibly using the WIPO/UNESCO Model Provisions as a starting point); on the other track, Members would look into a *suigeneris* system compatible with the particular features of technical TK, in particular of biodiversity-associated TK. The very diversity of conceptions of TK, embracing technical TK and expressions of folklore, might dilute the clarity and effectiveness of any *suigeneris* system; put another way, the more comprehensive the scope of TK (covering all conceptions of technical TK and TK related to biodiversity, as well as expressions of

³ The approval of the WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions, of 1982, by a Committee of Experts, and the establishment of the Convention on Biological Diversity, of 1992, are two major landmarks of the debate on the protection of traditional knowledge.

⁴ See *Review of Existing Intellectual Property Protection of Traditional Knowledge*, document WIPO/GRTKF/IC/3/7, of May 6, 2002.

⁵ *Ibid.*

⁶ At the second session of the Committee the delegation of Egypt "noted that no distinction should be made between expressions of folklore and traditional knowledge; both concepts were interrelated to the extent that any attempt at separating one from the other would be highly difficult." *Report*, note 2 *supra*, at paragraph 167. And the delegation of India "stated it was of the view that expressions of folklore should be given similar treatment like any other form of traditional knowledge." *Id.* at paragraph 171.

traditional culture), the more general and unclear would be the legal system established to protect it, and the more uncertain the purpose and focus of protection afforded.

6. Finally, and related to the preceding point, there is a question of definition and terminology, discussed in document WIPO/GRTKF/IC/3/9: even if no conclusive or exhaustive definition is settled on, some general working consensus on the operational scope of the term 'traditional knowledge' would facilitate discussion on appropriate ways of protecting this subject matter. Moreover, as discussed in the same document, the approach taken to defining the subject matter, particularly protectable subject matter, is necessarily linked to the form and objectives of the desired TK protection.

7. Accordingly, any effort to define a new, *suigeneris* system at the international level prior to clarifying these issues may prove premature and thus ineffectual, or may actually serve to delay the establishment of practically effective systems of TK protection with an international character. Nonetheless, the need for exploration of the possible elements of such a system has been clearly identified during the work of the Committee, and this may help elucidate the issues and define the operational environment for TK protection. The present document accordingly does not seek to pre-empt the debate over the need for a *suigeneris* system for the protection of TK, but rather identifies some elements that might be taken into account should there be consensus on the need for work on the development of a *suigeneris* system.

8. A related question is the manner in which this issue would be dealt with by the Committee, should that consensus be reached. For the present, the Committee can continue to exchange views and practical experience on the relationship between IP and access to genetic resources, TK and expressions of folklore, with a particular focus on tasks that do not require the development of new concepts or legal mechanisms — such as discussion on TK as prior art and the means to make it available for patent examiners; contractual clauses on access to genetic resources; and national experiences and views on the protection of TK and expressions of folklore.

9. But, should a consensus be reached that work should proceed towards the development of a mechanism for the protection of TK, the question remains what form that outcome would take. The Committee could engage in this work with a view to developing soft law, that is, non-binding guidelines and/or recommendations to be adopted or applied at the national level, leading to a *de facto* development of minimum harmonized standards for protection of TK. Suggestions could also be developed with a view to the adoption of international standards that, by undertaking a harmonized approach, could enhance international protection, avoid freeriding and misappropriation, and reduce distortions and impediments to international trade of products and services incorporating TK. Equally, development of, and experience with, non-binding guidelines or recommendations to guide national systems may lead to a greater sharpening of understanding of the essential elements of a successful, workable and effective national system, that may in turn feed into the identification of international standards.

10. Even seeking to identify elements of possible *suigeneris* systems raises the question of whether the system is to be characterized predominantly at the national or international level. The Committee could focus on systems of protection at the national level, with a view subsequently to distilling out more general principles that could be expressed in an international framework; or it could seek directly to express what basic elements or principles

would be sought in an international framework, whether indicative, illustrative or more formal in character.

11. In addition, there is not necessarily a firm division between the elements of existing IP systems that are relevant to TK protection, and distinct *suigeneris* TK systems. This point can be illustrated by the example of *suigeneris* database protection. A compilation of data is partly recognized as a distinct object of protection under copyright law when it constitutes an intellectual creation by reason of the selection or arrangement of its contents.⁷ Yet a database can also partly be viewed as an object of *suigeneris* database protection in some countries' legal systems.⁸ Indeed both legal mechanisms have been canvassed as possibly applying to collections of TK and thus affording a measure of TK protection. The relevance of database protection (whether under copyright or *suigeneris* mechanisms) to the protection of traditional cultural expression is dealt with in document WIPO/GRTKF/IC/4/3.

12. Alongside any distinct *suigeneris* IP systems specifically created for TK as such, there can be *suigeneris* elements of general IP law that may be relevant to TK subject matter. Specific *suigeneris* mechanisms have been developed with general IP law to deal with particular practical needs or policy objectives relating to specific subject matter: these include specific legal provisions and practical or administrative measures. For example, *suigeneris* disclosure obligations, in the form of requirements for the deposit of samples, can apply to patent procedures relating to new microorganisms.⁹ Proposals have been made for specific disclosure obligations in relation to patents for inventions derived from genetic resources and associated TK.¹⁰ In relation to TK as such, the development of distinct classes or sub-classes for TK in the International Patent Classification could be characterized as a *suigeneris* element of an existing system to facilitate defensive protection of TK.¹¹ The extension of performers' rights to those who perform 'expressions of folklore'¹² captures *suigeneris* TK-related subject matter within a broad IP system (the protection of performers' rights and traditional cultural expressions is more fully dealt with in WIPO/GRTKF/IC/4/3). To some extent, therefore, the Committee may need to explore or define the boundary or interaction between relevant *suigeneris* elements of existing IP systems that have the effect of protecting

⁷ In accordance with TRIPS Article 10.2 and the WIPO Copyright Treaty Article 5.

⁸ See, for example, the EU Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p.20)).

⁹ In accordance with the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.

¹⁰ 'Measures to encourage disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights' at paragraph 13(d)(ii) of the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of their Utilization*, adopted by the sixth Conference of Parties to the Convention on Biological Diversity. See Decision VI/24, Part A, Annex. See also *Initial Report on the Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge*, document WIPO/GRTKF/IC/4/11.

¹¹ See paragraphs 39-40, document IPC/CE/31/8, Report of the Committee of Experts, Special Union for the International Patent Classification (IPC Union), Thirty-First Session, Geneva, February 25 to March 1, 2002.

¹² WIPO Performances and Phonograms Treaty, Article 2(a).

TK to some extent, on the one hand; and the elements of distinct *suigeneris* systems specifically for TK protection on the other hand.

IV. WHY IP PROTECTION OF TRADITIONAL KNOWLEDGE?

13. The form of protection of TK, whether through existing IP mechanisms, through adapted or *suigeneris* elements of existing forms of IP, or through a distinct *suigeneris* system, will depend heavily on why the TK is being protected – what objective the protection of TK is intended to serve. Existing IP systems have been used for diverse forms of TK-related goals, for instance,

- to safeguard against third party claims of IP right over TK subject matter,
- to protect TK subject matter against unauthorized disclosure or use, to protect distinctive TK-related commercial products,
- to prevent culturally offensive or inappropriate use of TK material,
- to license and control the use of TK-related cultural expressions, and
- to license aspects of TK for use in third party commercial products.

14. Normally, the aim of protection will be a mix of some of these, with the emphasis varying depending on the specific material to be protected – in particular, defensive and positive protection may both be required. Stand-alone *suigeneris* protection of TK is likely to focus not on defensive protection alone, but to create a positive right over the protected subject matter. Even so, it will still raise the question of what positive rights are intended, and what acts by other parties they are intended to constrain, and whether the protection is linked with other specific policy objectives, such as the active protection of cultural heritage, the suppression of unfair commercial practices, the equitable management of genetic resources, and conservation of biodiversity. The debate about IP protection of TK may be clarified with closer attention to the specific needs and objectives of those seeking to protect their TK. But, at the same time, there are some common aspects of IP systems that are applicable to TK protection, and may help to clarify why in general IP-style protection may be valuable for TK.

15. Possibly because of the diversity of objectives for TK protection that have been raised in debate, there is some uncertainty about whether TK falls into the same general category as other intellectual creations, such as inventions and literary and artistic works, that are protected by specific IP rights. The background question is to what extent is a *suigeneris* system to be considered as an IP system at all, and to what extent does it operate apart from the general IP framework? In turn, this flows into potential unease about the apparent commercial or economic focus of the IP system, which can seem to be in tension with the more diverse and culturally based needs and expectations of holders of TK. In most cases (but not all), TK is not developed with a commercial goal and is not intended to be commercialized in its traditional form. There are accordingly concerns that it should not be commodified as the subject matter of intellectual property, and reduced and simplified to a set of economic rights. To apply IP protection could be seen to diminish the cultural and spiritual value of TK, or even worse, distort its essential nature and transform it into a tradable commodity. From another perspective, there have been suggestions that there is no economic justification for the costs of devising and implementing a new legal regime for the protection of TK. For instance, the incentive argument for IP protection may not apply to TK protection, which almost by definition has been developed by communities on their own initiative as a response to their own needs and interests. However, such analyses may overlook the adaptable nature and full range of IP mechanisms.

16. The definition of ‘intellectual property’ has generally been cast in broad terms: for instance in the 1967 Convention Establishing the World Intellectual Property Organization, it is defined in terms of specific IP rights (such as rights relating to inventions and to trademarks), but also as including “all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”¹³ Yet there is a common quality to the specific rights established under IP systems. Property rights are not indefinite, with their variability and abstract characteristics of human knowledge. Property rights are affirmed against third parties: in essence, they entitle the owner to prohibit trespassing. Given the intangible nature of their subject matter, IP rights are defined by the boundaries that are set around the claimed subject matter, and are asserted by preventing others from using or reproducing the protected subject matter.

17. In most cases, the use IP owners make of the protected material is irrelevant to how the right is defined: for IP what counts is the use others may (or may not) make of those assets, whether they are seen as cultural or commercial assets, or both. It is this specific characteristic of IP rights that makes them important even for those who do not want to make commercial use of their assets, but who want to prevent others from doing so. For example, authors’ moral rights – rights of integrity and of attribution – do not have a commercial nature, and indeed are enjoyed independently of authors’ economic rights.¹⁴ Nonetheless, they function as part of an IP system since exercising these rights (to restrain such acts as distortion, mutilation or other modification of the work or other derogatory action) requires exactly the same enforcement tools (such as injunctions and accounting for damages) as trade-related IP rights. In the same vein, as far as TK is an expression of cultural identity, IP enforcement tools are necessary to protect it against distortion or other derogatory actions, even for those TK holders who do not wish to put it in the channel of commerce.

18. IP protection, therefore, does not ‘commodify’ TK *per se*: to the contrary, one immediate consequence can be to empower TK holders against the distorting use of elements of their identity, or against unauthorized commodification of their TK. TK holders may, if they wish so, not only refrain from giving a commercial dimension to their TK, but they may also prevent others from doing so. On the other hand, an IP regime will be of crucial interest for those TK holders who have the legitimate aspiration of ‘commodifying’ their knowledge or at least certain selected parts of it they choose to commercialize. Hence, the first rationale for IP protection of TK is to enable TK holders to preserve their identity against any use they do not wish their TK to be given.

19. These second reason for using IP to protect TK has a more legal dimension: a clear, transparent and effective system of TK protection increases legal security and predictability to the benefit not only of TK holders, but also of society as a whole, including firms and research institutions who are potential partners of TK holders. These benefits go beyond the

¹³ Article 2 of the WIPO Convention provides that “‘intellectual property’ shall include the rights relating to: literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”

¹⁴ Berne Convention on the Protection of Literary and Artistic Works, Article 6 *bis*.

promotion of innovation as such, give the argument that IP forms of protection of TK are unnecessary since the innovation will have taken place without IP protection. Document WIPO/GRTKF/IC/3/7 discusses this rationale for IP protection of TK:

“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 transaction 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 publicly-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 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.”

20. Some examples of increased transaction costs arising from the lack of a transparent system for the protection of TK can be found in the current uncertainty in the access (or lack thereof) to the biodiversity and related TK within a number of countries which can lead to uncertainty and loss of confidence in dealings with potential commercial and research partners — to the loss not only of foreign entities but also, and in particular, of national institutions, which may lose an opportunity to leverage access to foreign technology, as well as to the TK holders themselves, who may be deprived of possible financial and non-financial benefits. Another example is the current debate on the requirement to disclose prior informed consent in patent applications for inventions that may have derived from or used elements of TK. The relevance of such a requirement would be greatly diminished (as far as TK is concerned) if TK were the subject matter of property rights. Under an IP regime, TK holders would be able to enforce their rights against any misuse of their TK, whether it was in the context of a patent application or direct commercial use.

21. A third potential rationale for IP protection of TK concerns economic development and poverty alleviation: if the communities so wished, the formalization and recording of traditional communities' intangible assets would transform them into capital, thus facilitating the establishment of commercial ventures within the traditional communities.¹⁵ Many traditional communities that live in apparent poverty are actually rich in knowledge — but their knowledge, not being the subject of formal property titles, is prone to commercial

¹⁵ The relationship between the formalization of real estate belonging to poor communities and economic development is discussed in Hernando de Soto, *The Mystery of Capital — Why Capitalism Triumphs in the West and Fails Everywhere Else* (ed. Basic Books, 2000).

misappropriation by others. Furthermore, once recognized through titles, TK could be used as collateral security for giving traditional communities facilitated access to credit. This would apply in those cases where traditional communities actively choose to commercialize selected elements of their TK. For instance, this would be helpful in promoting the development of self-sustaining enterprises based on TK-related handicrafts, where protection of TK may help both to strengthen the enterprises' access to markets, but also to secure access to the capital needed to build up community-based enterprises. While there is little commercial experience in other aspects of TK, there are possibilities in such areas as traditional or complementary medicine, and other useful technologies, as well as distinctive agricultural and food products.

22. The fourth rationale for IP-related protection of TK concerns international trade relations, and was discussed in WIPO document WIPO/RT/LDC/1/14, *Protection of Traditional Knowledge: A Global Intellectual Property Issue*.¹⁶ One general argument for IP protection has been that its absence in foreign countries leads to an unfair advantage of the local manufacturers, since they do not need to recover the costs of research and development. Other factors being equal, foreign IP right owners will be in disadvantage vis-à-vis their local imitators, and therefore the lack of IP protection amounts to a non-tariff barrier to trade. Just as this applies to the pharmaceutical, software and entertainment industries, it would apply to IP-related TK and the commercial interests of traditional communities that make use of their TK in their economic life, especially when they are seeking to trade beyond their community.

23. Each of these rationales could potentially apply equally to the use of existing IP mechanisms to protect TK-related subject matter, to the use of adapted or extended forms of existing IP rights to protect TK, and to the use of *suigeneris* IP mechanisms specifically designed to protect TK.

V. TRADITIONAL KNOWLEDGE: A WORKING CONCEPT

24. In previous work, the Secretariat of WIPO has used the term "traditional knowledge" in an open-ended way to refer to traditional literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols;

¹⁶ Document WIPO/RT/LDC/1/14, of September 29, 1999, presented at the High Level Interregional Roundtable on Intellectual property for the Least Developed Countries (LDCs), Geneva, September 30, 1999:

"As an outcome of the Uruguay Round negotiations, many developing and least developed countries have accepted the obligation to establish high standards of intellectual property protection, as a means of promoting free trade. It may be argued that biodiversity, and the traditional knowledge associated with using it in a sustainable manner, are a comparative advantage of those least developed countries that are biodiversity-rich, enabling them to participate more effectively in global markets and thus rise above the current levels of poverty and deprivation. This is an example of how protection of traditional knowledge at the national and international levels may be seen as a potentially powerful tool for advancing the integration of least developed countries into the global economy."

Id. paragraph 10.

The intrinsically trade-related dimension of TK has led to its inclusion in the work programme of the TRIPS Council (see the Ministerial Declaration adopted at the fourth session of the WTO Ministerial Conference, at Doha, WTO document WT/MIN(01)/DEC/1, of November 20, 2001, at paragraph 19).

undisclosed information; and all other tradition -based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. "Tradition based" refer 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." ¹⁷ This is not a formal definition, but a working concept of TK, which may not be as precise as a scientific or restrictive legal definition, but it provides nonetheless the essential elements for the understanding of the nature and scope of TK as legal subject -matter, and is consonant with the general approach to the definition of subject matter that is taken in the international IP framework.

25. Document WIPO/GRTKF/IC/3/9 seeks to distil some general principles that apply to TK, and suggests that a more focussed definition of 'traditional knowledge,' if required, might include such elements as:

- recognition of the knowledge as originating, preserved and transmitted in a traditional context;
- possible association of the knowledge with the traditional or Indigenous culture or community which undertakes the generation, preservation and transmission of the knowledge;
- some sense of relationship between the knowledge and a traditional or Indigenous community or other group of persons identifying with a traditional culture, such as a sense of obligation to preserve the knowledge, or a sense that misappropriation or demeaning usage would be harmful or offensive;
- from the IP perspective, knowledge that originates from intellectual activity in a wider range of social, cultural, environmental and technological contexts; and
- some sense of the community or other group itself identifying the knowledge as traditional knowledge. ¹⁸

26. A survey of existing international standards in the field of IP would illustrate that a precise definition of TK is not necessarily a crucial requisite for identifying the legal elements of a mechanism for its protection. Most patent laws, for example, do not precisely define the concept of an 'invention'; equally, international harmonization and standard -setting in patent law have proceeded without specific or authoritative international definitions of this fundamental concept - although what constitutes an 'invention' has strong elements of harmony in practice, significant differences continue to apply at the national level after some 120 years of progressive international harmonisation. Likewise, most trademark laws do not define 'signs' ¹⁹ in exhaustive terms and generally leave it to the examining authorities and the courts to decide case -by case whether a specific sign serves as the necessary requirements for protection. The crucial element for the protection of any legal subject -matter is the identification of certain characteristics that it must meet as a condition for protection - such

¹⁷ *Intellectual Property Needs and Expectations of Traditional Knowledge Holders* - WIPO Report on Fact -Finding Mission on Intellectual Property and Traditional Knowledge, WIPO, April 2001, at 25.

¹⁸ Document WIPO/GRTKF/IC/3/9, paragraph 35.

¹⁹ Cf TRIPS Article 15.1: 'Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark.'

as novelty, inventive step and susceptibility of industrial application, for inventions, and distinctiveness, for trademarks. The same approach could be applied to TK as well.²⁰ A fuller discussion along these lines on the possible approach to definition of the subject matter of protection is contained in document WIPO/GRTKF/IC/3/9.

27. The working concept of TK, as adopted for the purpose of this document, puts a particular emphasis on the fact that TK is “tradition-based.” That does not mean, however, that TK is old or that it necessarily lacks a technical character. TK is “traditional” because it is created in a manner that reflects the traditions of the communities. “Traditional”, therefore, does not necessarily relate to the nature of the knowledge but to the way in which the knowledge is created, preserved and disseminated. Two other characteristics stem from that same working concept: TK is a means of cultural identification of its holders, so that its preservation and integrity are linked to concerns about the preservation of distinct cultures *per se*; and, even if it contains information of a practical or technological character, TK has a cultural dimension and a social context that distinguishes it from other forms of scientific or technological information.

28. Because its generation, preservation and transmission is based on cultural traditions, TK is essentially culturally-oriented or culturally-rooted, and it is integral to the cultural identity of the social group in which it operates and is preserved. From the point of view of the culture of the community in which it has originated, every component of TK can help define that community's own identity. This characteristic may sound obvious as far as expressions of folklore and handicrafts are concerned, but it also applies to other areas of TK, such as medicinal and agricultural knowledge. A piece of medicinal knowledge developed from a given combination of plants by a South American community, for example, necessarily differs from knowledge developed by an African community, based on similar plants. The reason is that the origin of medicinal knowledge by traditional communities, in spite of its predominantly technical nature, does not only attend to a certain practical need, but also responds to cultural approaches and beliefs.

29. This contrast sharply with two scientific inventions made separately by two different teams of employed inventors, with the objective of solving the same technical problem: it is not uncommon that the two inventions turn out to be very similar, which, in patent law, may give rise to interference proceedings or similar legal procedures which attribute ownership to one claimant or the other.²¹ Competing patent claims to overlapping subject matter are resolved without reference to the cultural environment which gave rise to the invention. By contrast, the cultural identity dimension of TK may have a dramatic impact on any future legal framework for its protection, because, being a means of cultural identification, the protection of TK, including TK of a technical nature, ceases to be simply a matter of economics or of exclusive rights over technology as such. It acquires a human rights dimension indeed, for it intertwines with the issues concerning the cultural identification and dignity of traditional communities. Analogues could also be drawn with the concept of ‘moral rights’ in copyright law, specifically the rights of integrity and of attribution, in that it

²⁰ See *Information Note on Traditional Knowledge*, prepared by the Secretariat of WIPO for the WIPO International Forum on “Intellectual Property and Traditional Knowledge: Our Identity, Our Future”, held in Muscat, Oman, on January, 21 and 22, 2002.

²¹ The “Act on the Protection and Promotion of Traditional Thai Medicinal Knowledge” admits interference procedures in the context of TK registration. See *infra* Part VIII.

may be considered necessary to protect against culturally offensive use of TK or other non-economic forms of perceived misuse of TK. Specific remedies, such as additional damages, may also be stipulated in case of culturally offensive misuse of protected material.

30. The fact that TK is created in a distinctively cultural context also gives rise to another important characteristic: in essence, to understand the full nature of TK or simply even to record or define it, it may be necessary to understand the cultural influences that shape it. Whether or not TK is produced within a formal or systematic tradition, or in a more informal or ad hoc context, it tends to be developed in a way that is closely related to the immediate environment in which traditional communities dwell, and to respond to the changing situation of that community. In that regard, it can have an empirical or trial-and-error basis. Yet TK may be developed in accordance with systems of knowledge, and be incorporated into systematic concepts and beliefs. Culturally-based rules may apply to the way innovation proceeds. Yet the way TK is created may appear from an external or universal perspective to be non-systematic or unmethodical, partly because the rules or system governing its creation can be passed on in an informal or cultural manner, partly because the systematic element is not explicitly articulated, and partly because the process leading to the creation of TK may not be formally documented in the way that much scientific and technological information is recorded. The apparent non-systematic manner of creation of TK does not diminish its cultural value or its value from the point of view of technical benefit, and raises the question of how to record or define its relationship with the culturally-specific knowledge system, set of rules or guidelines, or set of background beliefs which help shape it. As with the “tradition-based” characteristic, the apparent “non-formal” characteristic leads to particular emphasis on the context in which it is created, and the potential need for elements of this cultural context to be considered along with the knowledge *per se*. This third essential characteristic of TK may have an impact on how it will be described and claimed, if a *sui generis* system of registration of TK were to be developed.

31. The identification of additional characteristics so as to identify more precisely the scope of protectable subject matter is, of course, a question to be addressed by national laws. Limitations will apply depending on the policy objectives of the protection. For example, national laws may afford protection to knowledge that is held by certain communities only. In that vein, the law may limit the protection of TK held by indigenous communities.²² Laws may also identify the technical field to which the protected subject matter pertains, because the laws are aimed at specific policy objectives associated with that particular field of knowledge. For example, protection may be restricted to TK that is associated with genetic (or, more generally, biological) resources²³ or to traditional medicines.²⁴ Or protection may be linked to the susceptibility of commercial utilization of TK²⁵ — putting aside, therefore,

²² See Law No. 27.811, of August 10, 2001, of Peru, Articles 1 and 2(a).

²³ Portugal’s Decree-Law No. 118/2002, of April 20, 2002 protects TK associated to the commercial or industrial use of local varieties and other endogenous material with an actual or potential value for agriculture, agro-forestry and landscape-related activities, including local varieties and spontaneous material (Article 3(1)). Peru’s Law No. 27.811 protects collective knowledge of indigenous peoples associated to biological resources (Article 3).

²⁴ See “Act on the Protection and Promotion of Traditional Thai Medicinal Knowledge.” See *infra* Part VIII.

²⁵ See Law No. 20, of June 26, 2000, of Panama, on the special property regime on collective rights of indigenous communities for the protection of their cultural identity and traditional knowledge, Article 1.

knowledge of a purely religious and cultural nature, such as rituals and sacred resources. The policy objective in this instance would be limited to addressing concerns about commercialization of TK, leaving it to other legal instruments (including customary law, as appropriate) to address knowledge in the religious and cultural framework.

32. It should be noted that any addition of characteristics, such as those three mentioned above, with the aim of better defining the scope of protection will necessarily lead to the reduction of the scope of protection in practice. Nonetheless, it is a characteristic of IP systems that the actual legal protection afforded does not extend to all possible material that may fall within a broad inclusive definition of relevant subject matter; to some extent this is an inevitable feature of internationally agreed systems or standards, which does not rule out a broader approach at the level of domestic law.

33. One final point of clarification²⁶ is that the nature of TK subject matter, in general, should be distinguished from the specific rights that are accorded to it – whether these are existing IP rights, or distinct *suigeneris* rights. In other words, IP rights (*suigeneris* or otherwise) are different from the actual underlying TK that they protect. Indeed, the same underlying TK subject matter will in many cases be eligible for protection by several IP rights. In addition, it may be the expression of the TK, rather than the TK itself, which is effectively the subject of protection. Part of the difficulty in defining both the term TK and the scope and form of its protection is the assumption that these concepts should be merged – that the scope of legal protection should at the same time be a full definition of the TK itself, and that protection accorded to expressions of TK should fully protect the underlying TK and indeed its cultural and social milieu. Equally, some of the criticism of IP -related protection of TK – for example, that it does not fully capture all aspects and the holistic character of TK – is due to the assumption that legal mechanisms for protection, such as IP rights, must completely define a *nd* in effect become identical to the material they protect. Further discussion and debate is therefore required to distinguish underlying TK subject matter from:

- the scope of specific forms of legal protection, and
- the elements or expressions of TK that are specifically protected by distinct legal rights.

VI. *SUIGENERIS* SYSTEMS OF INTELLECTUAL PROPERTY PROTECTION

34. Intellectual property is a set of principles and rules that discipline the acquisition, use and loss of rights and interests in intangible assets susceptible of being used in commerce. Its subject matter is inherently dynamic, and so are the principles and rules that it comprises. Consequently, IP has evolved recently at a very fast pace so as to accommodate the new technologies and methods of doing business generated by the global economy. In some areas, existing legal mechanisms have been adapted to the characteristics of new subject matter: the patents system has been confronted with the challenges of biotechnological invention and new processes of using information technology devices (so-called “business methods”); copyright and related rights have been broadened so as to meet the challenges of computer software, electronic commerce and protection of databases. But in other areas, new systems have been created, where it appeared that a mere effort of adapting existing mechanisms would not respond adequately to the characteristics of new subject matter. Plant varieties have justified the establishment of a *suigeneris* system, whose leading regime is defined by

²⁶ See also the discussion in document WIPO/GRTKF/IC /3/9

the UPOV Convention; ²⁷ layout -designs (topographies) of integrated circuits have also been the subject matter of a special system that combines features of patent, industrial designs and copyright laws. What makes a sui generis system is the modification of some of its features so as to properly accommodate the special characteristics of its subject matter, and the specific policy needs which led to the establishment of a distinct system. As the WTO Secretariat put in connection with the explanation of the sui generis system of plant variety protection, under Article 27.3(b) of the TRIPS Agreement, “Sui generis protection gives Members more flexibility to adapt to particular circumstances arising from the technical characteristics of inventions in the field of plant varieties, such as novelty and disclosure.” 28

35. In this vein, any reference to a sui generis system for the protection of TK does not mean that a legal mechanism must be entirely constructed from scratch. On the contrary, IP has evolved to remain an efficient mechanism to promote technological progress, transfer and dissemination of technology and to serve the rights and interests of creators, as well as of fairness in commerce. The main thrust of IP is that it covers intangible assets and that it provides its holder the right to exclude others from reproducing works and/or fixing performances and reproducing those performances (i.e. copyright and related rights) as well as the right to exclude others from using the protected subject matter (i.e. industrial property rights). The idea to be retained is that IP is the right to say “no” to third parties (and, consequently, the right to say “yes” to a person who requests permission to produce and/or fix and/or use the protected subject matter). Intellectual property, broadly conceived, may be seen as a misnomer, because it does not necessarily cover “intellectual works” as such — it covers intangible assets of diverse origins, which need not entail abstract intellectual work; nor need it be defined and protected through property rights alone (the moral rights of authors and the reputation of merchants are not the subject of property, under a civil law concept).

36. If they develop in appropriate ways, IP systems may therefore have an essential role in the preservation of the cultural identity of traditional communities and, consequently, in the empowerment of TK holders, in the sense that they will be attributed the crucial right of saying “no” to third parties that engage in the unauthorized and/or distorting use of their TK, regardless of its commercial nature. In other words, even those communities that believe their knowledge (or portions of it) should remain outside the commercial channels, may benefit from IP protection, as it will give them the power to prevent their knowledge from being commercialized and/or used in a distorting or culturally insensitive manner.

²⁷ See the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991. UPOV stands for the French acronym *Union pour la Protection des Obtentions Végétales* (International Union for the Protection of New Varieties of Plants).

²⁸ *The Convention on Biological Diversity and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, Note by the Secretariat, WTO document IP/C/W/216, of October 3, 2000, paragraph 33. The TRIPS Agreement constitutes Annex 1 C of the Marrakesh Agreement Establishing the World Trade Organization (the WTO).

VI. A *SUI GENERIS* SYSTEM FOR PROTECTING TRADITIONAL KNOWLEDGE?

37. As already noted, the present document is not intended to preempt the debate on the need for establishing a *sui generis* system for the protection of TK either as a substitute or as a complement for the existing mechanisms of intellectual property. It merely aims, in line with the requests of several Committee Members, to identify some elements that should be taken into account if, and only if, a decision is made to develop such a system. Actually, there is a general understanding that some aspects of TK can be adequately protected by existing mechanisms.

38. A short fable may help illustrate the nature of TK and the availability of existing mechanisms of intellectual property that fit its characteristics. Let us imagine that a member of an Amazon tribe does not feel well and requests the *pajé*'s medical services (*pajé* is the tupi-guarani word for shaman). The shaman, after examining the patient, will go to his garden (many shamans in the Amazon rain forest are plant breeders indeed²⁹) and collect some leaves, seeds and fruits from different plants. Mixing those materials according to a method only he knows, he prepares a potion according to a recipe of which he is the sole holder. While preparing the potion and, afterward, while administering it to the patient (according to a dosage he will likewise prescribe), the *pajé* prays to the gods of the forest and performs a religious dance. He may also inhale the smoke of the leaves of a magical plant (the "vine of the soul"³⁰). The potion will be served and saved in a vase with symbolic designs and the *pajé* will wear his ceremonial garments for the healing. In certain cultures, the *pajé* is not seen as the healer, but as the instrument that conveys the healing from the gods to the patient.

39. The TK of the Amazon shaman is a combination of all those elements. If taken separately, existing IP mechanisms could protect most of, if not all, those elements. For example:

- the different plants from which the shaman has made the potion may be protected under a plant variety protection system, provided the plants are new, stable, distinct and uniform;
- the potion (or the formula thereof) can be the subject matter of a patent, provided it is new, inventive and susceptible of industrial application, or as undisclosed information;
- the use and the dosage of the potion can also be protected by a patent, under the law of a few Committee Members which make patents available for new uses of substances as well as for new and inventive therapeutic methods;

²⁹ See Mark J. Plotkin, *Tales of a Shaman's Apprentice — An Ethnobotanist Searches for New Medicines in the Amazon Rain Forest*, ed. Penguin Books, 1993.

³⁰ See Richard Evans Schultes and Robert F. Raffaut, *Vine of the Soul — Medicine Men, Their Plants and Rituals in the Colombian Amazonia*, ed. Synergetic Press and Conservation Int'l, 1992.

- the prayer, once fixed, could enjoy copyright protection, and under many countries' laws may also enjoy copyright protection in the absence of fixation;³¹
- the performance, once fixed, can be protected by copyright -related rights, and the shaman -as performer - can be accorded the right to authorise the fixation of the performance;³²
- the vase containing the potion can be patented or protected under a utility model certificate if it has new and inventive functional features; if not, it can be protected under an industrial design system;
- the designs on the vase and on the garments can be protected either by the copyright or by the industrial design systems.

40. As a matter of course, the availability of the existing mechanisms for the protection of these separate elements of TK would depend on their meeting the legal requirements for protection. As document WIPO/GRTKF/IC/3/7 indicates, existing mechanisms of IP are not necessarily incompatible with separate elements of TK. Actually, in response to Question 1 of a survey on existing forms of IP protection for TK, some Members provided pertinent information on that issue:

“A number of Committee Members have indicated that existing mechanisms of intellectual property are generally available for the protection of traditional knowledge. Some Committee Members, such as the European Union, Hungary, Switzerland and Turkey, have identified an extensive list of existing mechanisms, [footnote omitted] thus implying that eligibility for traditional knowledge protection depends almost exclusively 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: Indonesia has emphasized the relevance of copyright, distinctive signs (including geographical indications) and trade secret law; Norway has made special mention of trade secret protection for traditional knowledge that is not in the public domain, [footnote omitted] as well as, indirectly, trademark law. Samoa also has emphasized the importance of moral rights under copyright and related rights law.

“Australia, Canada, Kazakhstan and the Russian Federation have provided actual examples of how existing intellectual property mechanisms have already been used in order to protect traditional knowledge. [footnote omitted] 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, *Milpurrruv Indofurn Pty Ltd* (1995) 30 IPR 209, *Bulun Bulun & Milpurrruv R & T Textiles Pty Ltd* (1998) 41 IPR 513 and *Bulun Bulun v Flash Screen Printers* (discussed in (1989) EIPR Vol 2, pp. 346 - 355). [citations omitted] From these cases it results that protection under the Australian Copyright Act can be as valuable to Aboriginal and

³¹ The Berne Convention, Article 15(4)(a), also provides for the protection of unpublished works of unknown authorship.

³² And the shaman would have a right of consent to the fixation of the performance, under the provisions of the WIPO Performances and Phonograms Treaty, Article 6(2)

Torres Strait Islander artists as it is to other artists. [footnote omitted] Furthermore, other intellectual property rights are available for traditional knowledge protection, namely certification marks, the trademarks system as a whole, and the design system.

“In Canada, copyright protection under the Copyright Act has been widely used by Aboriginal artists, composers and writers of traditional-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 wider 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 design 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

“Both Kazakhstan and the Russian Federation have identified examples of protection of technical traditional knowledge through the grant of patents. Furthermore, in Kazakhstan, the external appearance of national outer clothes, headdresses (*saykele*), carpets (*tuskiiiz*), decorations of saddles, national dwellings (*yurta*) and their structural elements, as well as women’s apparel accessories, like bracelets (*blezik*), national children’s cribs, cradles and tablewares (*piala, torcyk*) are protected as industrial designs. The designations containing elements of Kazakh ornamentation are registered and protected as trademarks.”³³

41. In the same document WIPO/GRTKF/IC/3/7, the WIPO Secretariat drew attention to some of the misconceptions about the perceived limitations of existing intellectual property mechanisms as an effective system for the protection of TK:

“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

³³ See *supra* note 12, paragraphs 7 to 10.

driven. But traditional knowledge is being produced, and will continue to be produced every day by communities, as a response to changes in 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.³⁴ 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 of *suigeneris* plant variety protection³⁵ and layout -designs (topographies) of integrated circuits.”^{36 37}

42. Another commonly perceived limitation is that TK is generally created and held collectively, while copyright and patent laws require the identification of individual creators. Document WIPO/GRTKF/IC/2/9 proposes a different approach to the issue of ownership:

“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 groups 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.”³⁸

³⁴ In the few countries that follow the first -to-invent rule, the date on which the invention was realized is none the less of relevance in the context of examination as well as of interference proceedings.

³⁵ See UPOV 1991, Article 6.1.

³⁶ See TRIPS Agreement, Article 38.2.

³⁷ See *supra* note 12, at paragraph 33.

³⁸ *Id.* at paragraph 34.

43. However, the possibility of protecting separately the elements of TK does not necessarily cover the need for protection of TK. Traditional knowledge is not the mere sum of its separated components: it is the consistent and coherent combination of those elements into an indivisible piece of knowledge and culture. For the *pajé*, needless to say, the merit of the healing resides in the combination of the extract with the religious rituals, and not on the potion individually. The features of these several IP mechanisms mentioned above do not accept such a combination of elements of knowledge as a subject matter. It may be necessary, therefore, to design a system that responds to the holistic nature of TK and takes a comprehensive approach to it. Patents, trademarks, designs, etc., may be very effective in providing protection for the individual elements of TK; but they do not attend to its holistic nature.

44. Traditional knowledge, in that holistic concept, has four unique characteristics: the spiritual and practical elements of TK are intertwined and thus are inseparable (it is in this sense that every element of TK serves as an inherent factor of cultural identification of its holders); since traditional communities generate knowledge as a response to a changing environment, TK is in constant evolution and incrementally improving; TK covers different fields, in areas of cultural expressions and in technical domains; finally, because its creation is not necessarily undertaken through a formal, expressly systematic procedure, TK may appear less than formal in character, and its full character and systematic nature may only be apparent with a greater understanding of the cultural contexts and rules that govern its creation.

45. The need for a new legal approach that adequately reflects the holistic nature of TK, however, is not incompatible with measures enforcing rights in specific elements of TK. If a third party uses the formulation of the potion invented by the shaman, enforcement measures should be available to address such an act of infringement regardless of the lack of the reproduction of the prayer or the performance by the infringer. This “minimalist” approach has an example in patent law: an infringer does not need to “trespass” on all the claims of a patent to be liable as such. Infringement of one characterization of the claimed inventive concept may be enough, as a matter of law. Similarly, it is possible to infringe copyright in a musical work by different acts (reproduction, broadcasting, making available to the public, etc.) without necessarily carrying out the full. The “holistic” notion of TK calls for a simplistic mechanism for its recording and registering, but should not stand in the way of the enforcement of rights in each of its individual elements.

VII. ELEMENTS OF A *SUI GENERIS* SYSTEM FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

(a) *general legal framework of a sui generis system*

46. Those four characteristics of TK must be somehow reflected in the general framework of any *sui generis* system to be considered at the international level, should a consensus on the development of such a system be reached. Given its holistic nature and the need to respond to the cultural context, the *sui generis* system should not require the separation and isolation of the different elements of TK, but rather take a systematic and comprehensive approach. Actually, suggestions have already been tabled to reflect (and respect) the holistic nature of TK in a way that permits its description and fixation in general inventories of

knowledge belonging to a certain community (or group of communities). The inventory, or compilation, or database would describe in detail the knowledge of traditional communities, without separating its components.

47. In international discussions on a *suigeneris* database regime for the protection of TK the word “database” has been misunderstood as necessarily suggesting sophisticated electronic tools for electronically collecting and retrieving pieces of TK, and for delivering TK into the public domain, potentially without the prior informed consent of the TK holders. That is perhaps due to the particular forms of databases which can be used for “defensive protection” of TK and in particular to ensure that patent examiners take account of TK when searching prior art.³⁹ In this context, the emphasis naturally lies on enhanced access to the TK, rather than the legal protection of it. In fact, there are serious concerns that collection of TK in such a database, where there is no clarification or confirmation of rights attached to the TK, may undermine claim-storights in the TK as such. This is discussed more fully in document WIPO/GRTKF/IC/4/5 (“Draft Outline of an Intellectual Property Management Toolkit for Documentation of Traditional Knowledge”). This form of database would normally only be advisable for TK which is unquestionably already in the public domain, or those elements of their TK which TK holders concerned clearly wished to have placed in the public domain, fully conscious of the implications of doing so (this may not include, for instance, those elements of their TK that are considered sacred, valuable, secret, technologically or commercially significant, or otherwise inappropriate for entry into the public domain). Document WIPO/GRTKF/IC/4/3 discusses the parallel situation for expressions of traditional cultures or of folklore, in cases where archives, libraries and similar repositories may have the effect of making available for public access expressions of traditional cultures, in situations where the performers or custodians of the traditional cultures may not have had an opportunity effectively to exercise rights to the archived or collected materials.

48. For the purposes of “positive protection”, a different conception of “database” may apply, where the database is used in the context of defining and asserting specific rights to the covered material, where enforceable rights can be secured. Such a database may be more of the character of an “inventory”, “collection” or “compilation”, and implies that different pieces of TK may be collected in a single repository without the obligation of maintaining a unity of creation. A common denominator, of course, will run through all pieces of TK included in the same inventory and claimed by one single community: that will be the cultural identification of the claiming community. But TK of a different nature may coexist in the same inventory and still be the subject of a coherent legal approach. The holistic composition of databases permits, therefore, that the different elements of the *pajé*'s knowledge be collected in a single title. To that extent, the words “database”, “inventory”, “registry” or “compilation” simply illustrate that the formal protection of TK, where adopted, need not require unity of creation — as opposed to the unity of invention, under patent law.

49. A system based on an inventory of knowledge would also have the advantage of permitting the updating and modification of its contents, as well as the adding of new contents, without the need for complex and costly formalities, such as a new registration procedure. The fact that the TK would be described in its entirety would attend to the

³⁹ See, e.g., *Inventory of Existing Online Databases Containing Traditional Knowledge Documentation Data*, WIPO/GRTKF/IC/3/6, of May 10, 2002.

complementary nature of its (inseparable) elements. The knowledge of that shaman could therefore be fixed into a database and protected under different (and likewise complementary) sets of rights: the right to prevent the reproduction and/or fixation of the literary and artistic elements of his knowledge; and the right to prevent the use of the technical elements of the database contents.⁴⁰

50. Because of the intrinsically practical nature of TK, its description and fixation into an inventory would necessarily be extremely flexible, in the sense that the only requirement — particularly as far as technical elements are concerned — would be that the descriptions should be comprehensible by a person skilled in that particular field of the art. No one should expect, for example, that the shaman provided the formula or the composition of the formula or molecule of a particular chemical component, but simply a description of the material she uses, in a manner that another person could reproduce it. The importance of a fairly complete and reasonable description underscores the general principle that the scope of the rights that can be enforced is directly linked to the nature of the information that forms the basis of the right — the concept of sufficiency of disclosure, or fair basis, in patent law. In this sense, a reasonably clear description of protected TK would facilitate the enforcement of TK holders' rights against trespassers. In other words, a better comprehension of the “borderlines” of TK would help clarify whether a legal infringer has in fact “trespassed” across those lines.⁴¹

51. Finally, it should be noted that the holistic nature of TK is not a legal concept in itself, but rather results from the complementary nature of certain elements of that knowledge, some of which remain only of a cultural and spiritual sort, while others are essentially practical, as the *pajé*'s fable illustrates. But some communities have been able to separate their knowledge into different forms of cultural and economic uses, namely in the fields of expressions of folklore and handicrafts. That may lead to a recommendation to pursue different (and complementary) legal tracks that better fit the characteristics of those pieces of knowledge no longer intrinsically associated to the whole system of culture of communities but which fit better within compartments of that system. The “holism” of TK, therefore, should not be carved in stone and a flexible approach should be preferred. A protection system may only be aimed at serving specific policy needs, rather than protection of all aspects of the TK. In this vein, the elements that are identified below, and which are based on a possible mechanism for the protection of inventories or compilations of TK, should not be seen as exclusive. For example, expressions of folklore that have been dissociated from the physical environment where communities dwell and that, therefore, have acquired an independent standing in the cultural universe of certain communities, are probably better addressed under an approach along the general lines of the WIPO/UNESCO Model Provisions, as discussed in document WIPO/GRTKF/IC/3/10. Document WIPO/GRTKF/IC/4/3 further analyses the legal

⁴⁰ See *infra* Section VII(b)(v).

⁴¹ Article 3 of the Portuguese Decree-Law No. 118/2002 reads:

“[...]”

2– Such knowledge shall be protected against its commercial or industrial reproduction and/or use, provided the following conditions of protection are met:

a) Traditional knowledge shall be identified, described and registered in the Registry of Plant Genetic Resources (RPGR);

b) The description referred to in the previous subparagraph shall be made in a manner that allows for the person to reproduce or use the traditional knowledge and obtain results that are identical to those obtained by the knowledge holder.”

protection of expressions of folklore. Protection of handicrafts also may be eventually addressed under a registration system that recognizes its unique style that unequivocally materializes the soul and spirit of certain traditional communities. It is possible, then, that the work on the protection of TK leads to the design in a “menu” of *suigeneris* mechanisms that represent the different aspects of TK and that, like the existing mechanisms, can be used complementarily by TK creators and holders as they see fit.

(b) *Elements of a suigeneris system*

52. One issue is to identify the general features of an adequate *suigeneris* system for the protection of TK, and another to identify the elements that system must contain in order to be effective. In order to identify those elements, one has to provide responses to several essential questions to which any effective legal system for the protection of property rights must be able to respond satisfactorily:

- (i) what is the policy objective of the protection?
- (ii) what is the subject matter?
- (iii) what criteria should this subject matter meet to be protected?
- (iv) who owns the rights?
- (v) what are the rights?
- (vi) how are the rights acquired?
- (vi) how to administer and enforce the rights?; and
- (vii) how are the rights lost or how do they expire?

(i) What policy objective?

53. How a *suigeneris* system is shaped and defined will depend to a large extent on the policy objectives it is intended to serve. Is it essentially defensive, in that it seeks to prohibit the misappropriation or culturally offensive use of TK, or is it analogous to laws for the protection of cultural heritage? Does it have a broader policy goal, such as a system established in response to Article 8(j) of the Convention on Biological Diversity, with the overall goal of conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources? Is it focussed on promoting the appropriate commercialization of TK, or in preserving it within a specific cultural context?

54. Regardless of the answer to the important question, it should be stressed that a common denominator links all IP rights: the right to exclude others from reproducing, or fixing, or using. Therefore, no matter what the ultimate purpose of the adopted system is, its basic features should be similar — or, at least, consistent — across national borders. Such a consistency would allow for the international articulation of national systems of TK protection, so as to avoid international misappropriation and to facilitate TK-related benefit

sharing. If these common mechanisms are not desired in TK protection, then it is likely not to fall within the broad scope of an IP system, and the actual protection may be close to cultural preservation or the protection of other rights, such as economic and social rights.

(ii) What is the subject matter?

55. Committee Members would need to consider what subject matter would potentially benefit from protection, and how this corresponds with the policy objectives of a protection system. By analogy with copyright law, this could be similar to the open-ended, illustrative list of works eligible for protection under the Berne Convention; or, by analogy with patent law, this could refer to a general concept to be interpreted and applied at the practical level through the regular operation of domestic law. An option, of course, is to include all TK, without any restriction or limitation as to subject matter, thus including cultural expressions, such as artistic, musical and scientific works, performances, technical creations, inventions, designs, etc. Simple inclusion within a general definition need not trigger enforceable rights, and this approach would leave open the possibility of defining more precisely the restrictions on what specific criteria the subject matter would have to meet in order to be eligible for protection.

56. Another option, mentioned above, is to confine protection to technical biodiversity associated TK, leaving handicrafts and expressions of folklore to be covered by separate provisions — bearing in mind that the decision of breaking holistic TK into separate components (in other words, the choice as to the most adequate mechanism in the “menu” above mentioned) should belong to TK holders. This approach could take account of the fact that some policy objectives may be addressed by existing IP systems (including possible *sui generis* elements of those systems), and a separate, *sui generis* system may only be required or be suitable to serve other policy objectives.

(iii) What additional criteria for protection?

57. It may be necessary to clarify that even if some TK fits within a broad definition, it may need to meet distinct criteria to be protected under a *sui generis* system. This may apply, for instance, to TK which has already entered the public domain. TK holders should be aware that TK that is in the public domain cannot be recaptured without affecting legitimate expectations and vested rights of third parties. Therefore, there is the need for defining public domain in connection with TK. If, under a broad approach, information that has been disclosed is deemed to be automatically in the public domain, a vast area of TK has been effectively lost, for the purposes of IP protection, and it will be difficult, if not impossible, to recapture it. On the other hand, the preparation of databases or inventories with the purpose of documenting TK for the purposes of barring its misappropriation by third parties' patent applications could contribute to aggravating the problem. Committee Members can, however, resort to the concept of commercial novelty and establish that all elements (within the predetermined scope of subject matter) of TK which have not been commercially exploited prior to the date of the filing of the database are protected. The concept of commercial novelty, actually, is not foreign to existing IP mechanisms, such as UPOV's plant variety

protection,⁴² the protection for layout -designs (topographies) of integrated circuits,⁴³ and the pipeline patent protection.⁴⁴

58. Two different solutions in this regard can be found in the *suigeneris* TK protection laws of Peru and Portugal.⁴⁵ The law of Peru, in Article 13, establishes that TK that has been made accessible to persons outside the indigenous peoples, through mass media, integrates the public domain. In this sense, the law of Peru has adopted a criterion of technical novelty. However, the use of TK that has fallen into the public domain within the last twenty years will be subject to the payment of a fee (Article 13.2). TK made available to the public prior to that 20 year term cannot, therefore, be protected retrospectively. In contrast, the Portuguese law permits the registration (for the purposes of legal protection) of TK “which, by the date of the filing of the application, has not been the subject of utilization in industrial activities or has not become publicly known beyond the people or the local community in which it has been developed.” (Article 3(4)). The Portuguese law, therefore, combines the criteria of technical and commercial novelty so as to broaden the scope of protection. The law of Peru combines the notion of paid public domain (generally associated with lapsed copyright protection) with technical novelty.

59. Two additional elements, which have been adopted by the Law No. 20 of Panama, that could help confine protected subject matter within a better defined scope are: (a) the expression of the cultural identity of a given community; and (b) the susceptibility of commercial exploitation. First, only elements of TK that remain “traditional,” in the sense that they remain intrinsically linked to the community that has originated them, would be protected under the *suigeneris* system. In contrast, elements of TK which have lost that link, through a process of industrialization, for example, are not to be protected under the *sui generis* system.⁴⁶ Second, lawmakers may decide that TK that is not susceptible of commercial applications shall not be covered by the *suigeneris* system. In fact, it is not probable that third parties engage in the unauthorized or distorting use of TK that has no commercial or industrial utility. By limiting the scope of TK, the law would reduce the costs of inscribing it in registries or inventories. However, it should be noted that the classification of TK into two categories (one that has commercial utility, either potential or actual, and another that has not) may run counter to the very holistic nature of TK, according to which its spiritual and practical components are entangled in a manner that makes them more often than not indistinguishable.

60. Finally, the law may establish that the subject matter of protection must be contained in inventories, collections, compilations or, simply, databases of TK. The legal implications of this provision are examined below. What is relevant at this juncture is that Committee

⁴² UPOV, 1991, Article 6.

⁴³ Treaty on Intellectual Property in Respect of Integrated Circuits, of 1989, Article 7, incorporated into the TRIPS Agreement, Article 35.

⁴⁴ See WIPO document WIPO/GRTKF/IC/2/9.

⁴⁵ See Law No. 27.811, of August 10, 2001, of Peru, and Portugal’s Decree -Law No. 118/2002, of April 20, 2002

⁴⁶ They can nevertheless be protected under other forms of intellectual property. Some forms of handicrafts, for example, have been subject to intensive industrialization and modernization, thereby losing their traditional characteristics and consequently ceasing to function as elements of cultural identification. Those handicrafts may be protected under the industrial design system, because they have become essentially consumption products.

members that decide to establish a national *kuigeneris* system may very well end up by acknowledging that TK, in order to be protected, must be documented and fixed. Documentation is of the essence for the process of preservation of TK. At the same time, description of TK has the advantage of giving public notice of the intention of the communities to appropriate the knowledge in question — documentation and fixation, therefore, operate as “not trespassing” signs, exactly like the claims of inventions in patent letters.

(iv) Who owns the rights ?

61. Intellectual property rights are originally vested in the originators (authors, inventors, designers, creators, etc.), who then can transfer their rights through contractor legal arrangements. But TK is generally understood as being the result of creation and innovation by a collective originator: the community.⁴⁷ The same rationale, therefore, suggests that rights in TK should be vested in communities, rather than in individuals.⁴⁸ Obviously, it may become then necessary to establish a system of geographical and administrative definition of communities.⁴⁹

62. Although TK protection is generally perceived as a matter of collective rights, it may nonetheless be vested in individuals. The solution for that must be found in accordance with customary law. Actually, the importance of customary law is crucial for the attribution of rights and benefits within the community. Any legal solution concerning the protection, both at the national and international levels, of TK must recognize the importance of communities' customs and traditions involving the permission for individualstouse elements of TK, within or outside the community concerned, as well as issues concerning ownership, entitlement to benefits, etc. Those customs and traditions should be described and recorded together with the elements of TK, so that legal security could be created not only as regards the appropriated elements of TK themselves, but also in connection with their sharing within the communities. An example of how customary law can be integrated into a *suigeneris* system of TK protection is found in Panama's Law No. 20, which, in Article 15, states:

“The rights of use and commercialization of the art, crafts and other cultural expressions based on the tradition of the indigenous community, must be governed by the regulation

⁴⁷ The delegation of the Ukraine pointed to the need for further study on the issue of collective ownership during the Committee's third session: see document WIPO/GRTKF/IC/3/17, paragraph 279.

⁴⁸ The laws of Panama (Article 1) and Peru (Article 1) address collective rights only. The Portuguese statute vests rights in both individual and collective entities (Article 9). The Thai statute adopts a similar approach, but the registration system depends on the collective or individual nature of the knowledge (Section 16).

⁴⁹ Panama, for example, has passed a series of laws defining the territory of indigenous communities and establishing their own administrative bodies, according to their respective customs and traditions. See Aresio Valiente López (Compilador), *Derechos de los Pueblos Indígenas de Panamá, Serie Normativa y Jurisprudencia Indígena*, OIT y CEALP, Costa Rica, 2002.

of each indigenous communities, approved and registered in DIGERPI in the National Copyright Office of the Ministry of Education, according to the case.”⁵⁰

63. Regional TK can be held by a community that extends across national borders. It can also be held by two or more neighboring communities that share the same environment, the same genetic resources and the same traditions. In the first case, IP being territorial, the community would need to obtain the recognition of its rights in the different countries in whose territories it traditionally dwells. In the second case, lawmakers have a choice: they can establish co-ownership of rights, or they can leave for the communities to separately apply for and obtain rights in jointly held TK. In either case, however, it is for national law to decide whether communities would be allowed to collude so as to avoid competition among themselves as regards the assignment and transfer of their rights to third parties. Given that collusion between competitors, particularly in connection with price fixing, where they have a relevant market share, is deemed an antitrust violation in several Committee Members, national laws might be needed to establish corresponding antitrust exemptions. On the other hand, competition between traditional communities for assigning or transferring knowledge susceptible of industrial application would lead to a reduction of prices and benefits to be paid for such knowledge, hence to the ultimate benefit of consumers, and thus could be preferred by some Committee Members. This should promote competition between owners of IP assets, for their mutual benefit and for that of society, rather than generating conflicts.

64. An alternative to the attribution of rights to communities is the designation of the State as the custodian of the interests and rights of TK holders.

(v) What are the rights?

65. The various elements that compose TK in an intertwined manner belong both to the artistic/cultural and the technical/commercial/industrial fields. The rights to be acquired in those components must therefore be relevant in order to protect the legitimate interests of TK holders. When an authorized or distorting use is made of TK elements of an artistic and literary nature, right holders should be entitled to prevent others from reproducing and/or fixing and reproducing the product of the fixation. But when the unauthorized use is made of technical components of TK, right holders should be capable of preventing their use (use meaning the acts of making, using, offering for sale, selling, or importing for these purposes the protected traditional product, or, where the subject matter of protection is a process, the acts of using the process as well as the acts of using, offering for sale, selling, or importing for these purposes at least the product obtained directly by the traditional process). A *suigen eris* system of IP protection of TK should therefore combine the features of copyright and related rights with the features of industrial property. The availability of differentiated enforcement measures should be independent of the holistic nature of the protected knowledge, thus allowing right holders to enforce their rights in specific elements of infringed TK.⁵¹

⁵⁰ An unofficial English version of Law No. 20 of Panama can be found in the WIPO document OMPI/CRTK/SLZ/02/INF/3, of March 5, 2002 (submitted by Mr. Atencio López to the WIPO International Seminar on the Preservation, Promotion and Protection of Folklore and Traditional Knowledge, held in São Luiz of Maranhão, Brazil, on March 11 to 13, 2002). Article 85 of the Biodiversity Law of Costa Rica, Law No. 7.788, of 1998, contains similar provisions.

⁵¹ Article 3(4) of the Portuguese law states:

66. Analogous to copyright, TK rights should also comprise material and moral rights. Strong moral rights in TK may be indeed a crucial component of future *suigeneris* systems because of their particular role on the protection and preservation of the cultural identity of traditional communities, including those elements of TK that are not to be commercially used.

67. The rights in TK could also comprise the right to assign, transfer and license those contents of TK databases with a commercial/industrial nature. If the possibility of transferring rights or licensing is not included in the law, any attempt to address the issue of benefit sharing under the Convention on Biological Diversity would necessarily fail. ⁵²

68. The fact that TK rights are essentially of a collective sort does not impair their private nature — unless the law opts for electing the State as a custodian of community rights. Private rights must therefore interact with the public interest of society as a whole. Like all other IP rights (as well as all other private property rights), rights in TK may not be owned and enforced in a way as to prejudice the legitimate interests of society as a whole. TK rights conferred, therefore, must be subject to exceptions, such as the use by third parties for academic or purely private purposes, or compulsory licenses on grounds of public interest, including circumstances of public health emergencies. ⁵³

69. As noted above, the elements previously mentioned refer to the IP protection of the contents of inventories of TK data. Those elements differ from the provisions of Article 2(5) of the Berne Convention, ⁵⁴ of Article 10(2) of the TRIPS Agreement ⁵⁵ and Article 5 of the

[Footnote continued from previous page]

“4 – The registration of traditional knowledge which, by the date of the filing of the application, have not been the subject of utilization in industrial activities or have not become publicly known beyond the people ⁵¹ or the local community in which they have been developed, shall confer on the respective holder the right:

i) To prevent unauthorized third parties from reproducing, imitating and/or using, directly or indirectly, for commercial purposes;

ii) To assign, transfer or license the rights in traditional knowledge, including transfer by succession.

[...].”

⁵² See *supra* note 51. Additionally, the law of Peru not only permits the licensing of TK, but also establishes minimum royalty rates: a minimum fee of 10% of the sales value, before taxes, resulting from the commercialization of the products derived from the licensed TK (fee which will be collected by the Fund for the Development of Indigenous Peoples); plus a minimum fee of 5% of the sales value, before taxes, resulting from the commercialization of products developed directly or indirectly from the licensed TK (fee which will be collected by the licensors). Law No. 27.811, Articles 8 and 13.

⁵³ Law No. 20 of Panama contains two exceptions to rights conferred: “small non-indigenous artisans” who dedicate to the manufacture, production and sale of the reproduction of crafts belonging to indigenous Ngobes and Buglés, and who reside in certain districts, are exempt of the provisions of the Law (Article 23); moreover, as to “prior user” exception applied to “small non-indigenous artisans” who were registered with the General Office of National Craftsmanship on the date of the entry of the Law into force (Article 24).

⁵⁴ Article 2(5) of the Berne Convention for the Protection of Literary and Artistic Works (1971) states:

“Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall

[Footnote continued on next page]

WIPO Copyright Treaty, of 1996,⁵⁶ in the sense that protection is not to be provided merely on the creative or original selection or arrangement of the contents, but also on the contents themselves. Moreover, they also differ from the provisions of Chapter III of Directive 96/9/EC of the European Parliament and of the Council of March 11, 1996, on the legal protection of databases, to the extent that it is suggested that the rights be vested in TK holders, not in the makers of the databases; the protection should be afforded against the reproduction and/or the use of the contents of the databases, and not simply against their extraction or “re-utilization” in the sense of making them available to the public; and finally, rights would be enforceable against any sort of unauthorized reproduction and/or use of any content of the database, and not only against data obtained, verification or presentation of which has required “qualitatively and/or quantitatively a substantial investment.”⁵⁷

70. The idea of protecting the contents of TK databases is therefore close to the exclusive nature of test data protection under Article 39.3 of the TRIPS Agreement,⁵⁸ as the data must be protected against unfair commercial use even if the government itself makes the data publicly available.⁵⁹ This might enable TK databases to function as a practical mechanism for sui generis systems of TK protection.⁶⁰ The protection of the contents of TK databases should be without prejudice to the complementary use of other IP mechanisms, such as copyright, patents, plant variety certificates and geographical indications.

71. As noted above, a *sui generis* system could also be developed so as to comprises specific features applying to specific elements of TK, such as handicrafts. Handicrafts of a certain community obey technical and artistic standards, which have been developed along generations, such as the particular choice of raw materials, methods of manufacture, colors, decorative motives, etc. Those standard elements could be the subject of a general

[Footnote continued from previous page]

beprotected as such, without prejudice to the copyright in each of the works forming part of such collections.”

55 Article 10.2 of the TRIPS Agreement reads:

“Compilation of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.”

56 Article 5 of the WIPO Copyright Treaty (1996) provides:

“Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.”

57 See Directive 96/9/EC, Article 7, Official Journal L077, 27/03/1996.

58 The first part of Article 39.3 of the TRIPS Agreement reads:

“Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use.”

59 Thesecond sentence of Article 39.3 reads:

“Members shall protect such data against disclosure [...] unless steps are taken that the data are protected against unfair commercial use.”

60 For a detailed discussion of existing experiences with traditional knowledge databases, see document WIPO/GRTKF/IC/3/6 (“Inventory of Online Databases Containing Traditional Knowledge Documentation Data”).

registration (or description in the database), which would grant exclusive rights in the style of a certain line of products handmade by the community in accordance with the described standards. Individual pieces deriving from that style could then be individually registered if the community so wished, in order to facilitate protection. Such a system would secure community rights in their handicrafts, thus avoiding their distorting reproduction by unauthorized third parties. Legal protection of expressions of traditional culture, as applied to handicrafts, is more fully discussed in WIPO/GRTKF/IC/4/3

(vi) How are the rights acquired?

72. One option could be total lack of legal formalities, that is, protection is available as of the date the element of TK in question was created, irrespective of any formality.⁶¹ That option, however, may give rise to problems of practicality, such as the need for giving evidence of the very existence of the piece of knowledge — a problem which is solved by means of an obligation of fixation — and the eventual need for proving plagiarism or infringement — a hurdle that is overcome by documentation/description and presumption of public availability of that information, as with patents and trademarks.

73. The second option would be to establish the right upon the filing of the compilation of TK data with a governmental agency. The elements of TK may be automatically registered, upon a formal examination as to documentation, legal representation, etc, or may be subject to a substantive examination. A merely formal examination seems to be the solution adopted by Portugal (Decree-Law No. 118, Article 3) and Peru (Law No. 27.811, Article 21). In both cases, the registration is subject to invalidation if the substantive conditions (such as novelty) have not been met. In contrast, Law No. 20 of Panama has adopted a technical examination, including the creation of the post of indigenous rights examiner in the industrial property office (DIGERPI), who works as a sort of examiner and auditor for all matters involving IP rights and interests of indigenous peoples (including, but not limited to, the filing of indigenous knowledge based applications in the area of patents by third parties).⁶² The

⁶¹ See Law on Biodiversity of Costa Rica No 7788, of 1998, Article 82.

⁶² Law No. 20, Article 9. This point brings up the matter of costs of making and registering traditional knowledge databases or inventories. Society must decide: those costs shall be borne either by the communities which will obtain property rights in the contents of inventories (in the form of fees), or by society. Panama has decided that society should subsidize communities' acquisition and maintenance of intellectual property rights in their knowledge (Law No. 20, Article 7: "[...] The procedure before DIGERPI will not require the service of a lawyer and it is exempt of any payment. [...]"). That decision is ultimately related to a concept of distribution of wealth and the need for providing assistance for the empowerment of indigenous persons and traditional communities. On the other hand, the adoption of a transparent and effective system of traditional knowledge protection shall reduce transaction costs because it will eliminate the uncertainty that presently involves all matters of access to genetic resources, biopiracy and the distorting use of other traditional expressions of culture. Furthermore, once intellectual property protection of traditional knowledge is inserted into international trade agreements, distortions and impediments to trade in goods and services incorporating traditional knowledge will be reduced, to the benefit of exporters of legitimate handicrafts and traditional agriculture products. Incidentally, subsidies to individual inventors and small enterprises are available in the patent laws of several Committee Members — subsidizing traditional communities would not, therefore, run against the very concept of formal intellectual property rights.

prosecution of medicinal TK registration under the Thai statute, which has also established a technical examination, has drawn inspiration from the patents system —it contains provisions, among others, on the first-to-filer rule (Section 26), on interference procedures (Sections 25 and 26) and opposition (Section 29).

74. Formal protection entails the issue of preventive control of the registrability of TK, in order to avoid the unwarranted claiming of subject matter. Moreover, both formal and informal systems of protection require the establishment of subsequent mechanisms of control over the legitimacy of claims. For example, if the law adopts the commercial novelty requirement as a condition for protection, elements that have been previously commercialized and, therefore, fallen into public domain, would be subject to be either previously rejected or subsequently invalidated. Additionally, administrative opposition and appeals could also be made available to third parties eventually harmed by undue claims.

75. The law may require that all TK elements submitted to registration and which have, potentially or actually, an industrial/commercial application be disclosed. Conversely, all other data of a purely spiritual and sacred nature could be kept confidential, if the community concerned so wished.

76. A formal registration system may be limited to having merely declaratory effect, rather than creating a strong presumption of validity of the claimed right. Proof of registration would therefore be needed with the single purpose of substantiating any ownership claim —it would not, thus, constitute rights. The difference between a declaratory registration and a constitutive one is that, under some circumstances, declaratory registration could be sought by traditional communities to strengthen their claims against acts of infringement which might have occurred prior to obtaining the formal title (and taking into consideration any applicable statute of limitation).

(vii) How to administer and enforce the rights ?

77. Intellectual property rights are useless if they cannot be enforced. TK protection would not be effective without the availability of effective and expeditious remedies against their unauthorized reproduction and/or use (thus combining the features of copyright and related rights, on one hand, and of industrial property, on the other, for those elements of TK contained in inventories without a separation as to their spiritual or technical nature), such as injunctions and adequate compensation. The provisions of IP rights enforcement might be applicable in a subsidiary and *mutatis mutandis* manner.⁶³ In addition, there may be practical difficulties for holders of TK to enforce their rights, which raises the possibility of administration of rights through a distinct mechanism, possibly a collective or reciprocal system of administration, or a specific role for governmental agencies in monitoring and pursuing infringements of rights.⁶⁴

⁶³ See Law No. 20 of Panama, Article 21.

⁶⁴ See Law No. 27.811 of Peru, Articles 47 *et seq.* The Peruvian statute establishes that actions for infringement of rights in TK shall be dealt with by an administrative body (the INDECOPI, “Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual”, the Peruvian agency that deals with competition and intellectual property law).

(viii) How are the rights lost or how do they expire _____?

78. Two approaches to this last issue are possible. One approach, which is generally preferred by the national laws which have so far dealt with protection of TK, is to establish protection for an indefinite period.⁶⁵ This approach speaks to the intergenerational and incremental nature of TK and recognizes that its commercial application, once the protection is secured, may take a nextremely long time.⁶⁶ But if the protection of TK is to be established upon an initial act of commercial exploitation (for example, a period of fifty years counted from the first commercial act involving the protected element of TK, which could be renewable for a certain number of successive periods), then it might make sense to establish a predefined expiration, provided it would apply exclusively to those elements of TK with a commercial/industrial application and which could be isolated from the whole of the contents of the database without prejudice to its integrity.⁶⁷ Actually, as TK evolves, some of its elements necessarily become obsolete.

VI. CONCLUSION

79. These elements of a *suigeneris* system of TK protection have been identified for the purpose of attending to a request of a number of Committee Members and do not reflect a consensus of the Committee. The basic thrust of the present document is to show that there are already elements available in existing mechanisms of IP protection, both in a TK context and outside it, that could be transposed into a *suigeneris* system for the protection of TK. Using available elements has the advantage of avoiding uncharted waters. Moreover, concerns with biopiracy and transaction costs in the areas of expressions of folklore and biodiversity-associated TK are better (if not only) overcome by resorting to the adaptation of tested systems, and the legal principles that they contain.

⁶⁵ See the laws of Panama, Article 7, and Peru, Article 12.

⁶⁶ Traditional knowledge protection would thus perform a prospecting function, such as purported by Edmund Kitch in connection with patents (see Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & Econ. (1977)). Only a few patents perform such a function because most inventions are developed as a response to actual market needs. But traditional knowledge in general is not created for a primarily commercial purpose. Its commercial applicability, therefore, unlike most patented inventions, requires market prospecting.

⁶⁷ See the law of Portugal, which provides for a 50-year term of protection, renewable for one identical period (Article 3(6)). Under the Thai statute, the term of protection of traditional medicinal knowledge is the life of the rightholder plus 50 years after his/her death (Section 33).

80. *The Intergovernmental Committee is invited to not e
the contents of this document and to comment on, with a
view to the preparation of a composite technical study
based on existing documents prepared by the Secretariat
and input from Member States and other stakeholders, the
study to comprise:*

- *an analysis of definitions of TK subject matter;*
- *a review of national approaches to protection of TK;*
- and,*
- *an analysis of the elements of sui generis protection
of TK.*

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