

# WIPO



WIPO/GRTKF/IC/5/7

ORIGINAL:English

DATE:April4,2003

WORLD INTELLECTUAL PROPERTY ORGANIZATION

GENEVA

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

Fifth Session

Geneva, July 7 to 15, 2003

CONSOLIDATED SURVEY OF INTELLECTUAL PROPERTY PROTECTION OF  
TRADITIONAL KNOWLEDGE

*Document prepared by the Secretariat*

### I. OVERVIEW

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the "Committee") has surveyed the intellectual property (IP) protection of traditional knowledge (TK) under national IP laws. This document updates and consolidates the information received through this survey. It covers the protection of TK both through conventional IP laws, such as patents, designs, trademarks and geographical indications, and through *sui generis* laws, such as laws for the protection of TK associated with genetic resources.

2. Diverse forms of IP protection are reported, including protection of the TK as such, protection of signs, symbols and indications associated with TK, and protection of certain expressions of TK. Several *sui generis* protection systems focus on particular categories of TK, such as TK associated with genetic resources. The document also summarizes comments made on the limitations of conventional IP systems in the use of TK protection. A supplementary information document, WIPO/GRTKF/IC/5/INF/2, provides more detailed reference material relevant both to the present survey and to the consolidated study of *sui generis* TK protection in document WIPO/GRTKF/IC/5/8.

## II. BACKGROUND

3. At its second session, the Committee approved a survey of national experience with the use of IP mechanisms for the protection of TK, on the basis of a questionnaire (document WIPO/GRTKF/IC/2/5); the initial round of responses to this survey were reported in document WIPO/GRTKF/IC/3/7 (“Review of Existing Intellectual Property Protection of Traditional Knowledge,” considered by the Committee at its third session). This covered national experiences on the protection and preservation of TK using existing IP laws, including *suigeneris* mechanisms, tailor-made to meet the special characteristics of TK.<sup>1</sup> At the Committee’s request, the survey was kept open, and a revised and simplified version of the questionnaire was circulated in July 2003 (WIPO/GRTKF/IC/Q.1). This meant that Committee Members which had not yet provided a response could still do so, thus creating a better picture of how IP systems are currently being used to protect TK. In addition, those Members which had already provided answers could update their responses, for instance by providing copies of any new laws and regulations, and any relevant final judicial decisions and administrative rulings. In this way, a mechanism would be established whereby the Committee could be continuously kept informed of any new, additional measures or practices aimed at protecting TK.

4. At its fourth session, the Committee considered an update of the survey (document WIPO/GRTKF/IC/4/7), and invited its Members to continue to provide information to the Secretariat about new developments in this area, with a view to considering updates of the information addition to that reported in documents WIPO/GRTKF/IC/3/7 and WIPO/GRTKF/IC/4/7.<sup>2</sup>

## III. INTRODUCTION: THE SCOPE OF IP PROTECTION OF TK

5. The present document provides an overview of the range of experiences reported to the Secretariat and thus the range of options employed under IP law to protect TK. To facilitate its use as a point of reference, all the material provided in response to the two questionnaires has been collated in the supplementary information document WIPO/GRTKF/IC/5/INF/2.

6. One specific clarification has been introduced. Earlier surveys described the subject matter as “existing forms of IP protection” of TK, and this led to some misunderstandings. In particular, some readers assumed that this referred only to IP standards that already formed part of conventional IP regimes, such as patents, trademarks and designs, and did not refer to *suigeneris* systems, since these differed from conventional IP laws and were perhaps not understood as belonging to the cluster of IP laws. No such distinction was intended. In fact, the survey covers both conventional and *sui generis* IP laws, on the understanding that *sui generis* protection of TK can indeed function as an IP regime. If ‘intellectual property’ is

<sup>1</sup> See Report of the third session of the Committee, document WIPO/GRTKF/IC/3/17, paragraphs 164 to 211. The information contained in WIPO/GRTKF/IC/3/7 was compiled by the WIPO Secretariat based on responses received to questionnaire WIPO/GRTKF/IC/2/5. The full text of responses to that questionnaire can be found on WIPO’s website, at <<http://www.wipo.int/globalissues/questionnaires/ic-2-5/index.html>>.

<sup>2</sup> See Report of the fourth session of the Committee, document WIPO/GRTKF/IC/4/15, paragraphs 126 to 130 and 175.

viewed in a broad sense, <sup>3</sup> what characterizes an IP regime is the general manner in which it protects its subject matter, not the specific standards of protection it provides for. Document WIPO/GRTKF/IC/3/8 comments that “[i]ntellectual 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.” <sup>4</sup> Whatever its special legal features, a *sui generis* regime that protects TK has intangible assets as its subject matter. It is, for that simple reason, an IP legal discipline. For instance, the *sui generis* laws reported in this survey (such as those of Panama and Portugal) that register and protect different components of TK function in effect as IP laws. <sup>5</sup>

7. This survey has highlighted another distinction that has emerged in general during the work of the Committee: the distinction between ‘traditional knowledge’ as such and expressions of TK (and the related terms ‘traditional cultural expressions’ (TCEs) and ‘expressions of folklore’). As discussed in document WIPO/GRTKF/IC/5/12, some forms of IP protection cover the content of knowledge (notably patents and trade secrets), others protect a specific form of expression (such as copyright, performers’ rights and design rights), while others yet again protect distinctive signs, symbols or indications (such as trademarks, geographical indications and certification and collective marks). For instance, a longstanding doctrine holds that copyright protection extends to expressions, not ideas; patents, by contrast, protect against the use of the inventive concept disclosed in the patent document, and this protection is not limited to a particular mode of carrying out the invention. Trademark law does not protect knowledge as such, but can protect the distinctive reputation of products or services prepared using TK.

8. Each of these forms of protection has been used in diverse ways by traditional communities to protect elements of their intellectual, cultural and social heritage. These forms of protection have generally been referred to descriptively as ‘TK protection’ (using the term ‘traditional knowledge’ *latosensu* or in the broader sense). In the more detailed work of the Committee, however, a distinction has been drawn between protection of traditional knowledge *strictosensu* (in the strict sense) and protection of expressions of TK (or TCEs and expressions of folklore), <sup>6</sup> corresponding to the different general modes of IP protection. TK *strictosensu* can be understood as ideas developed by traditional communities and Indigenous peoples, in a traditional and informal way, as a response to the needs imposed by their physical and cultural environments and that serve as means for their cultural identification; the technical scope of those ideas is therefore vast, and comprises all fields of technical application; those ideas contrast with their respective expressions, such as folktales, poetry, and riddles, folksongs and instrumental music, dances, plays, etc.

9. It is not unusual for different forms of IP right to overlap and intersect in relation to the same physical creation, for instance when the same object has a technical characteristic as well as an aesthetic quality. This applies in the TK domain as well, so that distinct forms of

<sup>3</sup> Article 2(viii) of the Convention Establishing the World Intellectual Property Organization defines intellectual property as including ‘all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.’

<sup>4</sup> See *Elements of a Sui Generis System for the Protection of Traditional Knowledge*, document WIPO/GRTKF/IC/3/8, at paragraph 18, and document WIPO/GRTKF/IC/4/8, at paragraph 34.

<sup>5</sup> See a brief description of these statutes in Annex II of document WIPO/GRTKF/IC/5/INF/2. Their full text can be found on the WIPO website at <www.wipo.int/globalissues>.

<sup>6</sup> For a discussion on the meaning, scope and nature of “traditional cultural expressions,” see document WIPO/GRTKF/IC/4/3, paragraphs 23 *et seq.*

IP protection may be applied variously to elements of the same underlying cultural and intellectual tradition. For instance, many handicrafts have a utilitarian function, having been developed with a utilitarian purpose and giving effect to a technical idea, but may acquire an additional aesthetic quality. Either because of their use in religious services and other spiritual events, or because of their general association with a culture and a community, handicrafts may become more important as a cultural expression than simply as the product of a technical idea. In this vein, handicrafts may embody TK *stricto sensu* or may be viewed as expressions of TK or TCEs. This lack of a clear distinction about the application of different legal regimes to the same underlying subject matter is not new in IP law. Indeed, industrial designs may be protected under the law of industrial property,<sup>7</sup> the law of copyright,<sup>8</sup> or both,<sup>9</sup> and each of these options has been applied to TCEs (i.e. for TK protection *latosensu*).

10. The responses of Committee Members to the questionnaires WIPO/GRTKF/IC/2/5 and WIPO/GRTKF/IC/Q.1 focused, in general, on TK *stricto sensu*. Several responses referred to protection of cultural expressions and of cultural heritage, including through copyright,<sup>10</sup> and one cited a law that covered both TK as such and cultural expressions.<sup>11</sup> A number of responses also referred to the protection of distinctive signs and symbols, including words associated with traditional knowledge and traditional culture.<sup>12</sup> Overall, therefore, the responses illustrated the clear distinction between protection of knowledge as such, protection of cultural expressions, and protection of distinctive signs. This document concentrates on protection of TK in its strict sense (knowledge as such, and excluding its expressions), but in view of the diversity of approaches reported on in this survey, there will also be some reference to protection of TK in the broader sense (comprising TK as well as its expressions). This document should therefore be read in conjunction with the overview of the Committee's work provided in document WIPO/GRTKF/IC/5/12, the specific surveys and analysis of the IP protection of TCEs in documents WIPO/GRTKF/IC/3/10, WIPO/GRTKF/IC/4/3 and WIPO/GRTKF/IC/5/3, and the detailed analysis of *sui generis* protection of TK in document WIPO/GRTKF/IC/5/8.

<sup>7</sup> Paris Convention, Articles 1(2) and 5 *quinquies*.

<sup>8</sup> Berne Convention, Article 2(1).

<sup>9</sup> TRIPS Agreement, Article 25.2.

<sup>10</sup> See for example the responses to questionnaire WIPO/GRTKF/IC/2/5 by Guatemala, which focused on the protection of "cultural heritage," and by Australia, which cited several copyright cases that dealt essentially with expressions of traditional culture.

<sup>11</sup> Law no. 20, of 2000, of Panama (see Annex III of document WIPO/GRTKF/IC/5/INF/2) has established a regime for the protection of "the collective rights of intellectual property and traditional knowledge of the indigenous communities upon their creations such as inventions, models, drawings and designs, innovations contained in the pictures, figures, symbols, illustrations, old carved stones and others; likewise, the cultural elements of their history, music, art and traditional artistic expressions, capable of commercial use, through a special registration system, promotion, commercialization of their rights." Hence this law covers all areas of TK *latosensu*, that is both TK *stricto sensu* and TCEs.

<sup>12</sup> See paragraph 15 below.

#### IV. FORMAT OF THE SURVEY

11. This document follows the systematic survey structure of document WIPO/GRTKF/IC/4/7 so as to allow more direct assessment of reported experiences (in contrast to other more analytical documents). This will enable the Committee to be kept informed about legislative developments in the field of TK, in particular those developments that contain *suigeneris* elements tailored for TK protection. This series of documents may operate as a clearinghouse mechanism that to provide a reliable, up-to-date source of information. To preserve the information submitted in response to the original questionnaire these replies have been transposed, as much as possible, to this document. Some of the original information has not been preserved either because it was incompatible with the new format or because it was superseded by later legislative developments. This highlights the value of continuing use of the questionnaire WIPO/GRTKF/IC/Q.1 to provide updates to the Committee.

12. Section V of this document contains a brief presentation of the reports on national experiences derived from the use of traditional IP regimes for the protection of TK. Because such reports have focused both on defensive and positive uses, that distinction will be taken into account. In addition, several Members have noted the limitation that, in their view, impairs the ability of traditional IP law to adequately protect TK; those limitations are noted in a subsection. Subsequently, section IV reports on *suigeneris* legislation eventually adopted by responding Committee Members; and the Annex presents, in a synoptic manner, the replies provided to questions (a), (b), (d), (e) and (g) by sixty Committee Members received by February 28, 2003:<sup>14</sup> Document WIPO/GRTKF/IC/5/INF/2 provides more detailed reference material gathered in the survey, in particular:

- actual examples of the use of conventional IP regimes for TK protection;
- information on features of enacted or planned *suigeneris* regimes; and
- texts of enacted legislation for *suigeneris* TK protection communicated to the Secretariat.

#### V. NATIONAL EXPERIENCES IN THE USE OF CONVENTIONAL IP REGIMES TO PROTECT TRADITIONAL KNOWLEDGE

13. Several survey responses on TK protection noted the distinction between positive and defensive IP protection. The work of the Committee has highlighted this distinction in general, which is discussed in detail at WIPO/GRTKF/IC/5/12. Positive protection entails the active assertion of IP rights in protected subject matter, with a view to excluding others from making specific forms of use of the protected material. Defensive protection does not entail the assertion of IP rights, but rather aims at preventing third parties from claiming rights in misappropriated subject matter.<sup>15</sup> In both cases, there is an element of exclusion – under

<sup>13</sup> As mentioned above, responses to the original questionnaire (WIPO/GRTKF/IC/2/5) have been transposed as much as it was possible to adapt them to the new, revised format.

<sup>14</sup> See Report of the Fourth Session, document WIPO/CGRTKF/IC/4/15, at paragraph 176.

<sup>15</sup> Such a distinction has been noted in documents WIPO/GRTKF/IC/4/8 (at paragraph 14) and WIPO/GRTKF/IC/4/3 (at paragraph 42(ii)). In discussions at the fourth session of the Committee, several Members acknowledged such a distinction: India (document WIPO/GRTKF/IC/4/15, paragraph 74), Venezuela (*id.*, paragraph 94), Peru (*id.*, paragraphs 96 and 141), Brazil (*id.*, paragraph 103) and Norway (*id.*, paragraph 133). In previous discussions,

positive protection, the exclusion of unauthorized use of the TK, and under defensive protection, the exclusion of another person's claim to IP rights covering the TK. The distinction is important in clarifying the intention of stakeholders in making the use of the system. In some cases, TK holders have been more concerned about the offensive use of their cultural assets by third parties than with the possibility of commercially exploiting the assets themselves – this may entail defensive protection against adverse claims to IP rights concerning TK, as well as positive protection to stop unauthorized use of TK. Those local communities and Indigenous peoples who wish to commercialize and disseminate elements of their TK may have a stronger interest in the positive acquisition of rights, but may also have need of defensive strategies.

#### V.1 Experiences with positive protection of TK through traditional IP mechanisms.

14. A number of Committee Members, such as Sweden and Switzerland, has indicated that IP mechanisms are, in principle, available for the protection of TK, provided the general conditions under IP law are met. Other Committee Members have identified the conventional IP mechanisms that can be (or have actually been) resorted to in order to protect TK. For example:

##### (a) *copyright and related rights*

Australia, Canada, Costa Rica, Indonesia, New Zealand, Qatar, Samoa, Uruguay and the European Community;<sup>16</sup>

##### (b) *patent law*

Costa Rica, Kazakhstan, Hungary, Japan, Republic of Korea, Republic of Moldova, New Zealand, Romania, the Russian Federation, Uruguay, and Viet Nam;<sup>17</sup>

##### (c) *plant variety protection*

New Zealand and Turkey;

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the defensive approach was referred to as “negative protection” (see the Report of the second session, document WIPO/GRTKF/IC/2/16, paragraph 122, statement by the delegation of Venezuela).

<sup>16</sup> See actual examples provided by Australia and Canada in Annex I of document WIPO/GRTKF/IC/5/INF/2. The delegation of Hungary, responding to WIPO/GRTKF/IC/2/5, informed that “The Hungarian Copyright Act (Law No. LXXVI of 1999) excludes expressions of folklore from protection under copyright law. Under Article 1, para. (7) of the Act: “The expressions of folklore may not enjoy copyright protection. However, this may not prejudice copyright protection due to the author of a folk-art-inspired work of individual and original nature.”

<sup>17</sup> See examples provided by Kazakhstan, Viet Nam and the Russian Federation in Annex I of document WIPO/GRTKF/IC/5/INF/2.

(d) *trademark law (including collective and certification marks)*

Australia, Canada, France, Hungary, Indonesia, Mexico, Republic of Moldova, New Zealand, Portugal, Uruguay, Viet Nam and the European Community;<sup>18</sup>

(e) *geographical indications*

France, Italy, Hungary, Indonesia, Republic of Korea, Mexico, Republic of Moldova, Portugal, the Russian Federation, Tonga, Turkey, Viet Nam, Venezuela, and European Community;<sup>19</sup>

(f) *industrial designs*

Australia, Costa Rica, Kazakhstan, New Zealand, the Russian Federation, Tonga, and Uruguay;<sup>20</sup> and

(g) *trade secret law (unfair competition)*

Canada, Hungary, Indonesia and the United States of America.

## V.2 *Experiences with the use of traditional IP mechanisms for the defensive protection of TK.*

15. Several Committee Members have put a special emphasis on two traditional IP mechanisms (patents and trademarks), which might (or have actually been) used to prevent others from misappropriating technical creations, signs and symbols that identify traditional communities and Indigenous peoples.

(a) *defensive use of the patents system*

Colombia, New Zealand, the United States of America and the European Community noted that appropriate measures, such as the identification in patent applications of the origin of genetic resources and licensed TK used in the development of claimed inventions, could help prevent unwarranted claims by unauthorized third parties. Colombia and the European Community stated that those measures could be established as a requirement (mandatory or not) in the prosecution of patents.<sup>21</sup> New Zealand and the United States of America stated that the identification of disclosed TK (through the establishment of databases, as the U.S. delegation noted) could help patent examiners become aware of TK which constitutes prior

<sup>18</sup> See examples provided by Canada, Mexico and Viet Nam in Annex I of document WIPO/GRTKF/IC/5/INF/2. See examples of collective marks provided by New Zealand and Portugal.

<sup>19</sup> The delegations of France, Italy, Mexico, Portugal, Viet Nam, Venezuela and the Russian Federation have provided actual examples. See Annex I of document WIPO/GRTKF/IC/5/INF/2.

<sup>20</sup> See examples provided by the delegations of Kazakhstan and the Russian Federation.

<sup>21</sup> This disclosure requirement is discussed in documents WIPO/GRTKF/IC/4/11 (*Initial Report on the Technical Study on Disclosure Requirement s Related to Genetic Resources and Traditional Knowledge*) and WIPO/GRTKF/IC/5/11.

art.<sup>22</sup> The delegation of Japan also mentioned the defensive use of the patents system in the sense that where TK holders resort to “existing IP standards like patent law” they will be able to prevent “any exclusiverights on the traditional knowledge from being obtained by others.”<sup>23</sup>

(b) *defensive use of trademark law*

Portugal has indicated that in most cases, resorting to trademark law would not seek to distinguish products (or services) *per se* but rather accord “indirect protection of the subject matter which for the most part seek to avoid or prevent the registration of marks, or other distinctive signs, that relate to the designation of the traditional knowledge concerned.”<sup>24</sup>

Canada has provided a practical example of such an approach (the registration of a petroglyph with special religious significance by the Snuneymuxw First Nation in order to stop the sale of commercial items, such as T-shirts, jewelry and postcards).<sup>25</sup> New Zealand has informed that a new Trade Marks Bill, currently being considered by Parliament, will if enacted allow the Commissioner of Trade Marks to refuse to register a trademark where its use or registration would be likely to offend a significant section of the community, including Maori. This provision would provide additional protection to some expressions of traditional knowledge by preventing the inappropriate registration of marks based on Maori text or imagery.<sup>26</sup> A concrete example of a similar defensive approach was described by Colombia (the “Tairona Culture case”).<sup>27</sup>

<sup>22</sup> Such defensive use of the patents system might contribute to reduce concerns usually designated by the word “biopiracy” as well as to monitor compliance with contract of access and benefit sharing.

<sup>23</sup> The delegation of Japan refers to the practice (which is relatively common in Japan) of applying for patents for inventions that the applicant does not intend to use, but which he or she does not want to fall in the hands of competitors whom may independently reinvent them. A practical solution is to file a patent application, to wait for it to be published (or “laid open for public inspection”) and not to request the subsequent examination. Such application thereby falls into public domain and as such it will necessarily be taken into account by patent examiners when assessing the patentability of claims filed by competitors. See Robert J. Girouard, *U.S. Trade Policy and the Japanese Patent System*, Working Paper 89, August 1996, The Berkely Roundtable on the International Economy, available at <[www.ciaonet.org/wps/gir01/#txt115](http://www.ciaonet.org/wps/gir01/#txt115)> (last visited on January 3, 2003).

<sup>24</sup> See Annex I of document WIPO/GRTKF/IC/5/INF/2.

<sup>25</sup> See Annex I of document WIPO/GRTKF/IC/5/INF/2. That defensive use of trademarks may require an amendment to the legislation of those Committee Members in which the commercial use of trademarks is mandatory. Furthermore, in a few Committee Members, national legislation further requires that only legitimate businesses may file for trademark registration. Such a requirement would also impose an amendment, if the Canadian approach were to be followed.

<sup>26</sup> See Annex I of document WIPO/GRTKF/IC/5/INF/2.

<sup>27</sup> See Annex I of document WIPO/GRTKF/IC/5/INF/2. At the second session of the Committee, which took place on December 10 to 14, 2001 the delegation of the United States of America informed that, “on August 31, 2001 the USPTO began accepting requests for registration in the Database of Official Insignia of Native American Tribes. The Database would be included, for informational purposes, within the USPTO’s database of material that was not registered but was searched to make determinations regarding the registrability of trademarks. To [that] date, the USPTO had received only one request for inclusion in the Database of the official insignia of the Redding Rancheria Wintu Yana Pit River tribe in Redding, California. Notwithstanding this new Database, all trademark applications containing tribal names, recognizable likenesses of Native Americans, symbols perceived as being Native American in origin, and any other



V.3. *Elements or standards of traditional IP law perceived by Committee Members perceived as limitations in the application of IP laws and procedures to the protection of TK*

16. Another point that the two questionnaires sought to clarify was the reason (or reasons) that had, or might have led some Committee Members to conclude that traditional IP mechanisms were not suitable for protecting TK. In the original questionnaire the question was asked in a general manner. Answer to that question disclosed some common observations, and in its revised form the questionnaire spelled these out. These responses are presented synoptically in the Annex. When Members identified “other” reasons, those are specified in footnotes.

17. The concept that TK is “old” and that, therefore, cannot meet the standards of novelty and/or originality seem to be the major obstacle for using traditional IP regimes. Twenty-eight respondents answered in that sense. The second major limitation of traditional IP standards seem to be the need for identifying the inventor or the author of the protected subject matter. Twenty-one respondents expressed their view in that direction. Those two major limitations were closely followed by two other perceived deficiencies: the need for meeting the inventive step or non-obviousness requirement and the need for providing a substantive scientific basis for any claim (eighteen responses, each).<sup>28</sup>

18. The limited term of protection of traditional IP systems was also a frequently noted limitation: fifteen responses.

19. A small number of respondents noted that the requirement of fixation (which, in a broad sense, does not only apply to copyright but also to other IP systems that impose the description or documentation of the claimed subject matter, for instance as part of a registration process) could also be seen as a limitation that might make TK unfit for protection under traditional IP mechanisms: seven responses.

20. Thirteen responses identified limitations, other than those specified above. Those limitations are of a very broad range, and include the incapacity of IP systems to address the

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application that the USPTO believed suggested an association with Native Americans, were examined by one attorney who had developed expertise and familiarity with this area. Of course, this new Database of Official Insignia did not supersede or otherwise affect the Indian Arts and Crafts Act, of 1935, administered by the Department of the Interior’s Bureau of Indian Affairs. In brief, the Indian Arts and Crafts Board promoted the economic welfare of American Indians and Alaska Natives through the development of Indian-produced arts and crafts. It was intended to protect Indian cultural heritage and to assist the efforts of Indian tribes and their members to achieve self-reliance. To achieve these goals, the top priority of the Board was the enforcement and implementation of the Indian Arts and Crafts Act of 1990 which expanded the powers of the Board to respond to growing sales of arts and crafts products misrepresented as being made by Indians. The Act also provided for severe civil and criminal remedies.” See document WIPO/GRTKF/IC/2/16, paragraph 27.

<sup>28</sup> This deficiency relates to the fact that traditional knowledge holders are not generally in possession of scientific information that might permit them to obtain protection under existing systems, such as the patents system. For example, holders of traditional medicinal knowledge know how to prepare extracts and potions in a consistent and repetitive manner, but do not know their chemical formulae or can they isolate the active molecules.

principles of national sovereignty over genetic resources, concern that IP rights would alienate communities from their TK, difficulties with the same TK owned by several communities in different countries, and lack of familiarity of TK holders with the intricacies of IP law.

21. The responses regarding those perceived limitations are summarized in the Annex. Documents WIPO/GRTKF/IC/3/7 and WIPO/GRTKF/IC/4/8 have set out various comments relevant to these limitations, based on experience obtained from the application of IP law. For instance, not all TK is 'old' or lacking in novelty or originality: TK refers to knowledge that has been developed in accordance with the traditions of the community in question, but does not require that it be old. Traditional communities continue to develop knowledge, which is traditional and new. Even TK that is "old" but remains undisclosed may be a patentable subject matter taking into account the generally accepted definition of novelty for the purposes of patent law. Even TK that has been already disclosed may still be captured by *sui generis* IP protection that applies a conception of commercial novelty. Other discussion has addressed the concern that individual authorship must be necessarily attributed as a condition of protection.<sup>29</sup>

## VI. NATIONAL EXPERIENCES IN THE USE OF *SUI GENERIS* IP REGIMES FOR THE PROTECTION OF TK

22. By February 28, 2003 four Committee Members had informed about the enactment of legislation establishing a *sui generis* IP regime for the protection of TK *stricto sensu*: Brazil, Panama, Portugal and Peru. Descriptions and complete texts of these laws are provided in document WIPO/GRTKF/IC/5/INF/2.

23. Considering that the discussions on protection of TK *stricto sensu* (i.e., as opposed to the expressions of TK) have gained inconsistency along the various sessions of the Committee, and that it was possible in the last two sessions to engage in a constructive and exploratory exercise of identifying the most appropriate elements of a *sui generis* regime,<sup>30</sup> it is suggested that, as a future task, the Secretariat could prepare a comparative study of the enacted national legislation establishing *sui generis* protection of TK, as notified by Committee Members under the mechanism established by the Committee. In doing so, the Secretariat would highlight those common aspects that could be detected in the notified legislation and which not only seem more consistent with international standards of traditional IP protection but also appear to best fit the special characteristics of *stricto sensu* TK.

24. Additionally, the Philippines has provided information on a bill for the establishment of "Community Intellectual Rights Protection" that is pending before the Philippine Senate. A description of the features of that bill can also be found in Annex II of document WIPO/GRTKF/IC/5/INF/2.<sup>31</sup>

<sup>29</sup> See document WIPO/GRTKF/IC/2/9, paragraph 34.

<sup>30</sup> See Report of the third session, document WIPO/GRTKF/IC/3/17, paragraphs 212 -248, and Report of the fourth session, document WIPO/GRTKF/IC/4/15, paragraphs 131 -163.

<sup>31</sup> Pakistan has also notified pending legislation. As noted in document WIPO/GRTKF/IC/3/7, Costa Rica has provided the text of a draft Central American Protocol on Access to Genetic and Biochemical Resources and to Associated Traditional Knowledge, which has been approved by the Ministers of Environment of Central America and which soon will be submitted for parliamentary approval.

## VII. CONCLUSION

25. As decided by the Committee at its fourth session, the review of existing intellectual property protection of TK should stay "open," so that Committee Members can provide complete, updated and accurate information about current forms of intellectual property protection for TK, either through existing intellectual property regimes, or through new, specially adapted, *sui generis* regimes. For the present purpose, Committee Members were invited to do so by February 28, 2003, but the Committee may wish to consider keeping this process open in the future to ensure that the information available remains comprehensive and up to date.

26. The sixty-one (61) responses obtained so far illustrate a broad range of perspectives on how to promote IP protection of TK. Even so, there is a clear consensus on the importance of such protection. Many Members perceive limitations in conventional IP standards, creating a strong interest in exploring new and creative solutions in order to overcome them. Those new solutions may consist of adapted conventional IP standards (such as the defensive approach to IP), *sui generis* elements of existing IP systems, or of *sui generis* regimes.

27. In order to obtain a clear review of the trends in national practices, it is important, however, to continue gathering relevant data, in particular information concerning the practical and concrete experiences in the protection of TK through traditional mechanisms. In parallel, it may be beneficial to study the new *sui generis* mechanisms that have been implemented set forth by Committee Members, so that their adequacy and effectiveness may be assessed as well as, in particular, their advantages and shortcomings, if any, when compared to the traditional mechanisms.

28. *The Committee is invited to take note of this document; to encourage its Members to continue to provide new or updated information to the Secretariat, including relevant examples of the use of IP systems to protect TK and copies of any relevant draft or enacted legislative text to protect TK; and to approve the preparation of a comparative study of national sui generis TK protection regimes, as proposed in paragraph 26, supra.*

[Annex follows]



## ANNEX

Revised questionnaire (WIPO/GRTKF/IC/Q.1)	Argentina	Australia*	Bhutan*	Bosnia & Herzegovina	Botswana*	Brazil*	Canada
(a) Is protection for traditional knowledge available under the current standards of your intellectual property law?	No	Yes					Yes
(b) Has your country already provided for protection of elements of traditional knowledge by means of the currently available standards of intellectual property?	No	Yes			No	No	Yes
(d) Which of the following elements or standards of currently existing intellectual property law do you perceive as limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge:							
(i) novelty or originality;	X		X				X
(ii) inventive step or non-obviousness;	X						
(iii) fixation;							
(iv) informal nature of TK;	X						X
(v) individual v. collective creation;	X	X	X				
(vi) term of protection;	X		X				X
(vii) other;	X					X <sup>32</sup>	
(viii) no limitations.							
(e) Have you enacted any law or regulation or administrative ruling of general application establishing a system of traditional knowledge intellectual property protection specially adapted to its characteristics (that is, a <i>suigeneris</i> system)?	No			No	No	Yes	No
(g) If your answer to question (e) is no, is your country planning to establish a system of traditional knowledge protection specially adapted to its characteristics (a <i>suigeneris</i> system)?	No						No

\* The data referring to this Committee Member have been transferred from its response to questionnaire WIPO/GRTKF/IC/2/5.

<sup>32</sup> IP laws do not address issues such as national sovereignty, implementation of the Convention on Biological Diversity, protection and conservation of genetic resources, as well as recognition of local communities' customary law.

Revised questionnaire (WIPO/GRTKF/IC/Q.1)	Colombia*	Costa Rica	Cuba	Czech Republic	Ecuador*	Egypt*	Ethiopia*
(a) Is protection for traditional knowledge available under the current standards of your intellectual property law?	Yes	Yes	No	No			
(b) Has your country already provided for protection of elements of traditional knowledge by means of the currently available standards of intellectual property?	Yes	Yes			No	No	No
(d) Which of the following elements or standards of currently existing intellectual property law do you perceive as limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge:							
(i) novelty or originality;			X	X			
(ii) inventiveness or non-obviousness;			X	X			
(iii) fixation;							
(iv) informal nature of TK;		X	X				
(v) individual v. collective creation;			X	X			
(vi) term of protection;			X	X			
(vii) other;	X <sup>33</sup>	X <sup>34</sup>					
(viii) no limitations.							
(e) Have you enacted any law or regulation or administrative ruling of general application establishing a system of traditional knowledge intellectual property protection especially adapted to its characteristics (that is, a <i>sui generis</i> system)?		No	No	No	No	No	No
(g) If your answer to question (e) is no, is your country planning to establish a system of traditional knowledge protection especially adapted to its characteristics (a <i>sui generis</i> system)?			No	No			

<sup>33</sup> The main limitation of patent law is the lack of requirements safeguarding the biological and genetic heritage as well as TK, such as the disclosure of the origin of the genetic resources used in inventions as well as of the prior informed consent of TK holders.

<sup>34</sup> The lack of knowledge of IP law by TK holders is a major limitation that prevents them to resort to that mechanism of protection.

Revised questionnaire (WIPO/GRTKF/IC/Q.1)	France*	Gambia*	Germany	Guatemala	Hungary*	Indonesia*	Italy
(a) Is protection for traditional knowledge available under the current standards of your intellectual property law?	Yes		No		Yes	Yes	Yes
(b) Has your country already provided for protection of elements of traditional knowledge by means of the currently available standards of intellectual property?	Yes	No		No			Yes
(d) Which of the following elements or standards of currently existing intellectual property law do you perceive as limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge:							
(i) novelty or originality;	X		X	X	X	X	X
(ii) inventive step or non-obviousness;			X	X			X
(iii) fixation;							
(iv) informal nature of TK;	X						
(v) individual v. collective creation;		X	X		X		X
(vi) term of protection;		X	X				
(vii) other;		X <sup>35</sup>					
(viii) no limitations.							
(e) Have you enacted any law or regulation or administrative ruling of general application establishing a system of traditional knowledge intellectual property protection especially adapted to its characteristics (that is, a <i>sui generis</i> system)?	No	No	No	No	No		No
(g) If your answer to question (e) is no, is your country planning to establish a system of traditional knowledge protection especially adapted to its characteristics (a <i>sui generis</i> system)?			No				No

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There is a problem concerning the attribution of capacity or responsibility to act in terms of registration, protection, collection and distribution of fees. The concepts of *droit desuite* and/or of *domaine public payant* or variants of them should be used to enhance the bond of attachment of communities to these rights.

Revised questionnaire (WIPO/GRTKF/IC/Q.1)	Japan*	Kazakhstan*	Kenya	Korea, Rep. Of	Kyrgyzstan*	Latvia*	Malawi
(a) Is protection for traditional knowledge available under the current standards of your intellectual property law?	Yes	Yes	Yes <sup>36</sup>	Yes			No
(b) Has your country already provided for protection of elements of traditional knowledge by means of the currently available standards of intellectual property?		Yes			No	No	
(d) Which of the following elements or standards of currently existing intellectual property law do you perceive as limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge:							
(i) novelty or originality;	X		X	X			X
(ii) inventive step or non-obviousness;	X		X				X
(iii) fixation;			X				X
(iv) informal nature of TK;			X				X
(v) individual v. collective creation;	X			X			X
(vi) term of protection;			X				
(vii) other;							
(viii) no limitations.		X				X <sup>37</sup>	
(e) Have you enacted any law or regulation or administrative ruling of general application establishing a system of traditional knowledge intellectual property protection especially adapted to its characteristics (that is, a <i>suigeneris</i> system)?	No		No	No	No	No	No
(g) If your answer to question (e) is no, is your country planning to establish a system of traditional knowledge protection especially adapted to its characteristics (a <i>suigeneris</i> system)?			Yes	No			

<sup>36</sup> Though not comprehensively adequate.

<sup>37</sup> There is, however, a limitation, which is of a financial nature. TK should be converted into electronic databases and made searchable in examinations of patent, trademark and design applications.



Revised questionnaire (WIPO/GRTKF/IC/Q.1)	Malaysia*	Mexico	Moldova, Rep. Of	New Zealand*	Niger	Norway*	Pakistan*
(a) Is protection for traditional knowledge available under the current standards of your intellectual property law?		Yes	Yes	Yes	No	Yes	
(b) Has your country already provided for protection of elements of traditional knowledge by means of the currently available standards of intellectual property?	No	Yes	Yes	Yes			
(d) Which of the following elements or standards of currently existing intellectual property law do you perceive as limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge:							
(i) novelty or originality;		X	X	X		X	
(ii) inventiveness or non-obviousness;		X	X			X	
(iii) fixation;		X					
(iv) informal nature of TK;		X	X	X	X		
(v) individual v. collective creation;		X	X	X	X		
(vi) term of protection;		X	X	X			
(vii) other;			X <sup>10</sup>		X <sup>38</sup>		
(viii) no limitations.							
(e) Have you enacted any law or regulation or administrative ruling of general application establishing a system of traditional knowledge intellectual property protection especially adapted to its characteristics (that is, a <i>suigeneris</i> system)?	No	No	No	No	No	No	No
(g) If you answer to question (e) is no, is your country planning to establish a system of traditional knowledge protection especially adapted to its characteristics (a <i>suigeneris</i> system)		No	No	<sup>39</sup>			Yes <sup>40</sup>

<sup>38</sup> An additional limitation is the management of TK which is shared by several countries.

<sup>39</sup> In a case involving an indigenous plant (and a process for the extraction of its oil) with traditional healing properties, for which neither patent nor plant variety protection was available, the applicant, a Maori business, noted that, because both the ethical and cultural sensitivities as well as financial reasons made it impossible to seek alternatives, the ideal solution would be the development of legislation to prohibit ownership (by third parties) of the indigenous plant concerned and the associated traditional medicinal knowledge.

<sup>40</sup> A copy of draft "Legislation on Access to Biological Resources and Community Rights" is available on WIPO's website, at the IGC document center.

Revised questionnaire (WIPO/GRTKF/IC/Q.1)	Panama*	Papua New Guinea	Peru	Philippines	Portugal	Qatar*	Romania
(a) Is protection for traditional knowledge available under the current standards of your intellectual property law?			No		Yes	Yes	Yes
(b) Has your country already provided for protection of element of traditional knowledge by means of the currently available standards of intellectual property?	No	No		No	Yes		
(d) Which of the following elements or standards of currently existing intellectual property law do you perceive as limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge:							
(i) novelty or originality;	X		X	X	X		
(ii) inventive step or non-obviousness;				X			
(iii) fixation;				X			X
(iv) informal nature of TK;			X	X			X
(v) individual v. collective creation;	X		X	X			
(vi) term of protection;			X	X			
(vii) other;			X				
(viii) no limitations.							
(e) Have you enacted any law or regulation or administrative ruling of general application establishing a system of traditional knowledge intellectual property protection especially adapted to its characteristics (that is, a <i>sui generis</i> system)?	Yes	No	Yes	No	Yes		No
(g) If your answer to question (e) is no, is your country planning to establish a system of traditional knowledge protection especially adapted to its characteristics (a <i>sui generis</i> system)?				Yes			

Revised questionnaire (WIPO/GRTKF/IC/Q.1)	Russian Federation	Samoa*	Singapore*	Solomon Islands*	Spain	Sweden*	Switzerland
(a) Is protection for traditional knowledge available under the current standards of your intellectual property law?	Yes	Yes			No	Yes	Yes
(b) Has your country already provided for protection of elements of traditional knowledge by means of the currently available standards of intellectual property?	Yes	Yes					
(d) Which of the following elements or standards of currently existing intellectual property law do you perceive as limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge:							
(i) novelty or originality;	X		X		X		X
(ii) inventiveness or non-obviousness;	X				X		X
(iii) fixation;	X						
(iv) informal nature of TK;	X	X			X		X
(v) individual v. collective creation;			X				
(vi) term of protection;	X		X				
(vii) other;		X <sup>41</sup>	X <sup>42</sup>				X
(viii) no limitations.							
(e) Have you enacted any law or regulation or administrative ruling of general application establishing a system of traditional knowledge intellectual property protection especially adapted to its characteristics (that is, a <i>suigeneris</i> system)?		No	No		No	<sup>43</sup>	No
(g) If your answer to question (e) is no, is your country planning to establish a system of traditional knowledge protection especially adapted to its characteristics (a <i>suigeneris</i> system)?	<sup>44</sup>			<sup>45</sup>			No

<sup>41</sup> IP rights would divest Samoan people from their traditional practices and lifestyles.

<sup>42</sup> TK is, in itself, difficult to quantify or define. Additionally, it would be difficult and expensive to prevent the misappropriation of TK by third parties.

<sup>43</sup> In Annex II of document WIPO/GRTKF/IC/5/INF/2, there is a short description of those rulings which have not a specific IP nature.

<sup>44</sup> The question of the appropriateness of creating a *suigeneris* system for protecting traditional knowledge and its specific features (aim, criteria, holders and soon) is being studied.

<sup>45</sup> Just like most of the other Pacific Island States, Solomon Islands is still waiting for the finalization of the model law to be adopted by all interested Pacific Island States.

Revised questionnaire (WIPO/GRTKF/IC/Q.1)	Tanzania (United Republic of)*	Togo	Tonga*	Trinidad & Tobago*	Turkey*	Tuvalu*	Ukraine
(a) Is protection for traditional knowledge available under the current standards of your intellectual property law?		No	Yes		Yes		No
(b) Has your country already provided for protection of elements of traditional knowledge by means of the currently available standards of intellectual property?						No	
(d) Which of the following elements or standards of currently existing intellectual property law do you perceive as limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge:							
(i) novelty or originality;							
(ii) inventive step or non-obviousness;							
(iii) fixation;		X					
(iv) informal nature of TK;							
(v) individual v. collective creation;							
(vi) term of protection;							X
(vii) other;						X <sup>11</sup>	X <sup>46</sup>
(viii) no limitations.							
(e) Have you enacted any law or regulation or administrative ruling of general application establishing a system of traditional knowledge intellectual property protection especially adapted to its characteristics (that is, a <i>sui generis</i> system)?	No	No				No	No
(g) If your answer to question (e) is no, is your country planning to establish a system of traditional knowledge protection especially adapted to its characteristics (a <i>sui generis</i> system)?	Yes	Yes		Yes <sup>47</sup>			<sup>48</sup>

<sup>46</sup> The lack of criteria for the identification of objects and subjects of TK.

<sup>47</sup> When the Copyright Act, 1997 was drafted several provisions were included to protect TK and folklore. A decision was then made to remove all the said provisions and work with the International Community to create an International Instrument to protect Traditional Knowledge and Folklore, upon which legislation will then be developed.

<sup>48</sup> Both the internal needs of the country and international experience must be taken into account. Ukraine is examining whether it is appropriate to establish such a system.

Revised questionnaire (WIPO/GRTKF/IC/Q.1)	U.S.A.*	Uruguay	Venezuela*	Viet Nam	EC*		
(a) Is protection for traditional knowledge available under the current standards of your intellectual property law?	Yes	Yes	Yes	Yes	Yes		
(b) Has your country already provided for protection of elements of traditional knowledge by means of the currently available standards of intellectual property?			Yes	Yes			
(d) Which of the following elements or standards of currently existing intellectual property law do you perceive as limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge:							
(i) novelty or originality;	X	X		X			
(ii) inventive step or non-obviousness;	X	X		X			
(iii) fixation;		X					
(iv) informal nature of TK;		X		X			
(v) individual v. collective creation;		X		X			
(vi) term of protection;		X					
(vii) other;	X <sup>49</sup>						
(viii) no limitations.							
(e) Have you enacted any law or regulation or administrative ruling of general application establishing a system of traditional knowledge intellectual property protection especially adapted to its characteristics (that is, a <i>suigeneris</i> system)?	No	No		No			
(g) If your answer to question (e) is no, is your country planning to establish a system of traditional knowledge protection especially adapted to its characteristics (a <i>suigeneris</i> system)?	No	No		No			

[End of Annex and of document]

<sup>49</sup> IP, whether or an existing or *suigeneris* nature, serves as an incentive for future creative endeavors; by definition, TK needs no incentive for development.