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

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THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/
EXPRESSIONS OF FOLKLORE:
TABLE OF WRITTEN COMMENTS ON REVISED OBJECTIVES AND PRINCIPLES

Document prepared by the Secretariat

I. SUMMARY

1. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) is currently considering the protection of traditional cultural expressions (“TCEs”)/ expressions of folklore (“EoF”) through two related and complementary processes:

(i) consideration of an agreed List of Issues concerning the protection of TCEs/EoF; and

(ii) consideration of a draft set of “Revised Objectives and Principles for the Protection of Traditional Cultural Expressions/Expressions of Folklore” (“Objectives and Principles”).

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

(i) WIPO/GRTKF/IC/11/4(a): a collation of the written comments on the List of Issues which were submitted between the tenth and eleventh sessions, in line with a process agreed by the Committee at its tenth session;

(ii) WIPO/GRTKF/IC/11/4(b): the present document, which is a compilation of comments on the draft Objectives and Principles provided between the ninth and tenth sessions, in line with a commentary process agreed by the Committee at its ninth session and a format agreed at the tenth session;

(iii) WIPO/GRTKF/IC/11/4(c): the text of the draft Objectives and Principles, identical to the text that was circulated at the eighth, ninth and tenth sessions, but provided for ease of reference to assist in the reading of the comments contained in WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/4(b).

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

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

II. BACKGROUND

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

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

5. The draft Objectives and Principles are currently circulated as the Annex to WIPO/GRTKF/IC/11/4(c), for ease of reference and in particular to assist understanding the comments contained in the present document. This contains the identical text of the second draft of the Objectives and Principles that was also annexed to WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/9/4, and WIPO/GRTKF/IC/8/4. This revised version, unchanged from the eighth to the current session, was the result of the first round of intersessional stakeholder review established by the Committee after it reviewed the first draft, WIPO/GRTKF/IC/7/3, at its seventh session. Thus the draft remains in the form in which it has been widely consulted upon and extensively reviewed in the Committee, and in many Member States and other policy processes.

6. The Committee again reviewed the draft Objectives and Principles at its ninth session, and initiated a second round of intersessional commentary and review. The written comments received between the ninth and tenth sessions in line with that process were posted on the internet and were circulated as information documents WIPO/GRTKF/IC/10/INF/2, WIPO/GRTKF/IC/10/INF/2 Add., WIPO/GRTKF/IC/10/INF/2 Add.2 and WIPO/GRTKF/IC/10/INF/2 Add.3 (English) and WIPO/GRTKF/IC/10/INF/3 (Spanish). The draft Objectives and Principles are complemented by a further document, an overview of policy options and legal mechanisms used in national laws for implementing the Objectives and Principles (WIPO/GRTKF/IC/9/INF/4 and an earlier draft WIPO/GRTKF/IC/7/4).

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

III. THE COMMITTEE'S TENTH SESSION

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

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

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

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

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

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

IV. DOCUMENTS FOR THE ELEVENTH SESSION

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

(i) WIPO/GRTKF/IC/11/4(a): a collation of the written comments submitted between the tenth and eleventh sessions on “Traditional Cultural Expressions/Expressions of Folklore: List of Issues”, as required in paragraph (iv) of the decision just quoted;

(ii) WIPO/GRTKF/IC/11/4(b): the present document, which is a compilation of comments on the draft Objectives and Principles, written comments provided between the ninth and tenth sessions, in line with the commentary process agreed by the Committee at its ninth session and the format agreed at the tenth session in paragraph (v) of the decision just quoted;

(iii) WIPO/GRTKF/IC/11/4(c): which encloses, for ease of reference, the text of the draft Objectives and Principles as contained in WIPO/GRTKF/IC/9/4, being identical to the text of Objectives and Principles circulated at the eighth, ninth and tenth sessions. This is provided especially to assist in following the table of comments provided in the present document. It is recalled that the tenth session's decision just quoted states that “The existing documents (WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/10/5 and WIPO/GRTKF/IC/10/6) remain on the table in their existing form and existing positions in relation to them are noted”

and that “The discussion on the issues is complementary to and without prejudice to existing positions in relation to the existing documents.”

The preparation of the table

10. The table annexed to this document has been prepared, in line with the decision of the tenth session of the Committee, with two columns, one in which the titles of the provisions in document WIPO/GRTKF/IC/9/4 appear (headed “Issues”), and the other in which comments on those titles appear (headed “Comments”). The first column (“Issues”) makes provision for general comments and comments on specific objectives and principles.

11. The comments have been reproduced directly as received, although, if necessary, some typographical errors have been corrected to facilitate understanding of the comments. Comments that did not refer to any specific provision were treated as “general comments” and where a single comment addressed more than one provision, it is generally repeated where applicable. One very lengthy comment, submitted through the Government of New Zealand, is included as an appendix to the table, and where that comment makes reference to a specific provision, a cross-reference to the appendix is made at the relevant provision.

12. *The Committee is invited to:*

(i) *review the comments reproduced in the annexed table in relation to the draft provisions annex to WIPO/GRTKF/IC/11/4(c) and the comments on the List of Issues annexed to WIPO/GRTKF/IC/11/4(a),*

(ii) *consider possibilities for advancing its work on the protection of TCEs/EoF, including the substance or content of possible outcomes of this work; the form or legal status of any such outcome, and preferred procedures required to achieve any such outcome; and*

(iii) *continue to review and comment on the draft provisions contained in the Annex to WIPO/GRTKF/IC/11/4(c).*

[Annex follows]

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I. GENERAL COMMENTS	
<i>ISSUES</i>	<i>COMMENTS</i>
AUSTRALIA	<p>Australia welcomes the opportunity to comment on WIPO/GRTKF/IC/9/4 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objective and Principles'. Australia notes that the Secretariat of the World Intellectual Property Organisation Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC) has taken account of Australia's comments on WIPO/GRTKF/7/3 in drafting the revised objectives and principles for the protection of traditional cultural expressions (TCEs)/expressions of folklore (EoF).</p> <p>Australia strongly encourages the development of the draft policy objectives and general guiding principles to enable consensus about these elements in order to guide the Committee's future work.</p> <p>Australia has previously stated that agreement should be reached on the policy objectives and general guiding principles prior to further discussion of the substantive provisions. Australia is concerned that the identification and development of substantive provisions prior to agreement by committee members on the objectives and principles will result in inconsistency.</p> <p>There has been no agreement about the context and legal status of the work of the Committee. Australia is concerned that commenting on the substantive provisions would pre-empt the Committee's decision on this key issue. Australia welcomes discussion of a process to take the Committee's work forward.</p>
BRAZIL	<p>Protection of Traditional Cultural Expressions (TCE) and Expressions of Folklore (EF) must not be confined to the realm of intellectual property alone. Whatever international instrument to result from the activities of the IGC, nonetheless, should restrict itself to the competences of the Organization, without prejudice to using intellectual property rules to confer some kind of protection to the aforementioned expressions.</p> <p>The instrument(s) to be produced as a result of IGC's discussions must address the question of TCE/EF produced by immigrants - thus considering the mobility of the populations. The duty to require compliance with prior informed consent (PIC) from local or indigenous communities shall not be conditioned upon registration. Prior Informed Consent must be sustained as a general principle, irrespective of the status granted on cultural expressions or traditional knowledge.</p> <p>Registration shall not be a condition for enforcement of rights (as seems to be proposed by draft articles 3 (a) and 7), neither as a condition for counting the term of protection (as proposed by draft article 6(i)). In this connection, the draft instrument on TCE/EF should adopt provision similar to the one contained in article 11.1 of the draft on traditional knowledge (TK) ("Eligibility for protection of traditional knowledge against acts of misappropriation should not require any formalities").</p> <p>References to the expression "particular value or significance" should be suppressed from the draft instrument (eg, articles 3 and 7). Traditional expressions should be eligible for protection by the mere fact that they are part of the cultural heritage of indigenous and local communities.</p>
CANADA	<p>First, it is worth reiterating that Canada is of the view that any possible policy approaches that may be developed in the IGC for the protection of intellectual property (IP) rights of TCEs holders must be consistent with both the mandate of the IGC and with Member States' existing obligations with respect to international treaties relating to IP.</p> <p>Second, with respect to the structure of the document itself, Canada notes that a number of objectives are quite similar in spirit and meaning, and we recommend that consideration be given, in these instances, to combining similar objectives. Canada has indicated in this submission where draft policy objectives could be combined. Third, Canada stresses the need for the policy objectives to strike the appropriate balance between the interests of the creators of TCEs and their respective communities and users on the one hand, and the interests of broader society on the other (There are any number of commercial and non-commercial users of TCEs, ranging from private citizens, governments, educational institutions, libraries, museums and archives. It should also not be forgotten that users of TCEs may include individuals belonging to indigenous and local communities and the communities themselves).</p> <p>Finally, Canada recommends, for clarity and consistency, that further consideration be given to the meaning of some terms inserted in Document 9/4 and on their implication for TCEs (footnote: WIPO/GRTKF/IC/9/4, p. 15). For example, we note that some Member States have expressed concerns regarding the term prior informed consent (PIC) being imported into the discussions on TCEs (footnote: For example, see WIPO/GRTKF/IC/8/15, p. 43). We further note the growing number of terms being used in document 9/4 to describe communities without a clear explanation as to whether there are any legal or policy differences associated with the different terms (footnote: For example, in addition to the expression "indigenous and local communities" used in earlier WIPO IGC documents, document 9/4 refers to: communities (objective 11); relevant communities (guiding principle a); peoples and communities (objective 2);</p>

	<p>indigenous peoples and by traditional and other cultural communities (objective 3); indigenous peoples and traditional and other cultural communities (objective 5); and indigenous peoples and other traditional communities (guiding principle g)).</p> <p><u>Document 7/3: Complement Protection of Traditional Knowledge</u></p> <p><i>(xiv) “operate consistently with protection of traditional knowledge, respecting that for many communities knowledge and expressions of culture form an indivisible part of their holistic cultural identity.”</i></p> <p><u>Commentary</u></p> <p>We note that this objective has been deleted from the list of draft objectives in document 9/4. Canada understands from its discussions with Canadian Aboriginal groups that some traditional knowledge holders consider TK, TCEs and folklore to emanate from the same source and, that taken together, they form part of a larger holistic view. In light of this, Canada respectfully submits that the objective be re-inserted into document 9/4. In addition, it is important that the draft policy objectives relating to TCEs complement the draft policy objectives on TK found in document WIPO/GRTKF/IC/9/5 (see draft policy objective xvi) (footnote: WIPO/GRTKF/IC/9/5, Annex, p. 1).</p>
GUATEMALA	<p>Regarding the commentary on page 23, in Guatemala, the 1998 Copyright Law and its reforms of 2000 stipulate the expressions of folklore belong to the country’s cultural heritage and shall be subject to specific legislation.</p> <p>The Regulations under said Law state that, in accordance with the definition contained in the Law, the term performer also designates the narrator, declaimer and any other person who performs a literary or artistic work, or also an expression of folklore, although no previous text exists to regulate its development.</p> <p>Regarding page 42, in Guatemala, Government Agreement 778-2003 and Agreement 379-2005 of the Ministry of Culture and Sport state that, through the Finance Department of said Institution, it is the body that will be responsible for the handling and supervision and administration of the funds collected as payments for image royalties and the marketing thereof, as well as the reproduction of cultural assets, and other fees established; said funds will be intended for specific conservation, restoration, protection, recovery and disclosure projects for the nation’s cultural assets, and shall constitute private funds for the Directorate General of the Cultural and National Heritage.</p> <p>Regarding page 50, in Guatemala, the law for the protection of the national cultural heritage states that the infringement of the measures for protection of cultural assets will lead to a fine being imposed on the infringing party, corresponding to 20 times the minimum monthly salary for commercial activity, without prejudice to the corresponding criminal action. A person destroying, altering, degrading or not using, either partially or fully, the assets which are part of the national cultural heritage, will be punished with a prison sentence of six to nine years, plus a fine equivalent to double the price if the cultural asset affected. A person who unlawfully exports property that is part of the national cultural heritage will be punished with a prison sentence of six to 15 years, plus a fine equivalent to double the value of the cultural asset, which will be confiscated. The monetary value of the cultural asset will be determined by the Directorate General of the Cultural and National Heritage.</p> <p>In the criminal sphere, the crimes and offences committed against the cultural heritage are established by Article 255bis concerning sacrilegious acts.</p> <p>Article 332 “A” Theft and Robbery of National Treasures, Article 332 “B” Theft and Robbery of Archaeological Property, Article 332 “C” Trafficking of National Treasures, Article 332 “D” Lapse of an Action or Penalty.</p> <p>OTHER EXPERIENCES WITH LEGISLATION RELATING TO THE PROTECTION OF EXPRESSIONS OF FOLKLORE, TRADITIONAL KNOWLEDGE AND INDIGENOUS COMMUNITIES</p> <p>In Guatemala, other laws exist which provide some form of protection for national cultural property, including mainly:</p> <p>Government Agreement 778-2003 and Agreement 379-2005 of the Ministry of Culture and Sport regulate aspects concerning the supervision, purpose and approval of the fees established for reproductions of textiles, image royalties, replicas and copies of cultural property. Article 5 establishes a specific fee of 5,000 quetzales, for reproductions of Maya textiles, in full or in part, or of their designs or motifs, said article referring in particular to respect for the moral right of authorship or intellectual property of the respective communities within the original credit of the textiles and other data concerning the place where they are used by their inhabitants.</p> <p>Article 7 of Decree Law 426 on the Protection of Indigenous Textile Products, on indigenous or authentic textiles, that each committee will register with the marks and patents office the drawings or embroidery of the textiles of a municipality or community, thereby acquiring exclusive ownership to use them. Both the National Indigenous Institute and the marks and patents office will keep a special register for making this class of registrations. All the management proceedings relating to procedures for obtaining registration shall be completed free of charge.</p> <p>Decree Law 141-96 on the Protection and Development of Crafts establishes the Advisory Council, which includes representatives of each of the Ministries of Education, Culture and Sport, Finance and the Economy.</p> <p>Decree Law 6069 of the National Congress on the Protection of Ancient Guatemala. Law on the Creation of the Academy of Maya Languages, Decree 65-90 of the National Congress and the reforms thereof contained in</p>

	<p>Decree 24-2003.</p> <p>Framework Law on Peace Agreements contains the rules of the Agreement on Identity and Law of Indigenous Peoples, which regulates aspects of the common culture based on principles and structures.</p> <p>As regards Maya thought, there is a legacy of scientific and technical knowledge, as well as the specific artistic and aesthetic design, and the plurality of expressions of the Maya people.</p> <p>Decree Law No. 11-2002 on Urban and Rural Development Councils regulates aspects of the participation of the Maya, Xinca, Garifuna and non-indigenous population in public management, for the democratic process of development, taking into account principles of national, multiethnic, pluricultural and multilingual unity of the Guatemalan nation.</p> <p>Decree of the National Congress ratifying International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.</p> <p>Decree Law 19-2003 of the National Congress on National Languages.</p>
<p>INTERNATIONAL PUBLISHERS ASSOCIATION (IPA)</p>	<p>IPA appreciates the importance of recognising traditional cultural expressions/expressions of folklore (TCEs/EoF).</p> <p>As previously outlined, publishers play a crucial role in promoting and preserving TCEs/EoF within and between cultures. They do this in many ways, for example:</p> <ul style="list-style-type: none"> - Local publishers of children’s books and school books may make reference in their works to the cultural context and environment of their readers. - Academic publishers publish works of scientists describing ethnological observations. - Similarly, many writers of fiction are inspired by their local customs, traditions and the social environment in which they were raised. <p>These examples not only delineate areas where publishing satisfies particular public needs, they also exemplify areas where the need to protect certain other public goods (e.g. freedom of expression, freedom of science and research) must be reconciled with the protection of TCEs/EoF. To ensure a balanced approach in this exercise, IPA has been actively participating in the discussions of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources (IGC) since its first session.</p> <p>IPA’s retains its position as set out in its previous submissions (relating to WIPO/GRTKF/IC/7/3 and/or 5). These regard in particular the need:</p> <ul style="list-style-type: none"> - For clearer and more concise definitions (e.g. with regard to the existence and scope of possible rights, the notion of “community”, and the intended beneficiaries) for increased certainty; - To respect the fundamental right of freedom of expression which may be unduly restricted by attempts to protect ideas or concepts, rather than specific forms of expressing ideas, and by calling for the establishment of (possibly state-controlled) authorisation mechanisms. - Not to undermine the concept of the “public domain”, according to which content can be used freely for further creative acts once the term of protection (in the field of intellectual property laws) has expired. - To carefully consider any notion of compulsory “benefit sharing” reducing the flexibility given to rightsholders in other legal frameworks (e.g. intellectual property law) to freely negotiate the terms of use, and which may ignore the variety of forms in which a “benefit” can manifest itself and/or the risk of the user in investing in the development of traditional content. <p>These concerns remain valid in particular with regard to the newly added Objective I. (iv) (“Prevent the misappropriation of TCEs/EoF”) which embodies many of our points of criticism:</p> <ul style="list-style-type: none"> - Traditions in the public domain cannot be misappropriated - The protection of TCEs/EOF derivatives would prevent creative acts building upon existing subject-matter (whether protected or not), thereby impeding on one’s freedom of expression. Scientific observations, educational books, anthologies all could be considered such “derivatives”. - The compulsory “equitable sharing of benefits” may ignore the risks taken by those investing in the use of traditional content, and the fact that benefits can take multiple forms. <p>The shortcomings of this Consultation Document as summarised above may impede publishers (from an</p>

	<p>administrative and possible also financial perspective), and make some publishing ventures impossible. We are deeply concerned that “traditional knowledge protection” can be used as a pretext to stifle scientific debate and academic dispute, for example, into tribal history or sociology, in particular in the case of critical authors, e.g. where a community can control whether or how one comments on, for example, its history (conflicts with another community). The exceptions contained in the Consultation Document in this respect are insufficient and vague.</p> <p>In the light of the complexity of issues and the lack of international consensus on the aim of the IGC’s work, IPA does not believe that the time is ripe for an attempt to develop treaty language, and we therefore urge WIPO to refrain from doing so in the next consultation documents. There is not enough consensus that can already be set into legal wording. IPA suggests that the IGC continues its discussions not on the basis of a document drafted in treaty-like language like the Consultation Document, but rather with the aim of building on more easily achievable aims. Consensus can more likely be achieved when carving out the very small and restricted, elements of TCEs/EoF for immediate protection (sacred content), or when calling for recognition of the value of TCEs/EoF in the form of industry guidelines or best practices.</p> <p>The above comments are preliminary and part of the ongoing consultation process IPA undertakes with its constituency. We look forward to participating in the ongoing debate about these matters and look forward to a constructive solution of the issues outlined in our submissions.</p>
INTERNATIONAL TRADEMARK ASSOCIATION (INTA)	<p>The International Trademark Association (INTA) appreciates that its previous comments to the WIPO secretariat on the draft policy objectives and core principles for the protection of traditional cultural expressions (TCEs) /expressions of folklore (EoF) (document WIPO/GRTKF/IC/7/3) were considered in comparing the revised draft provisions for protection of TCEs/EoF (document WIPO/GRTKF/IC/9/4) (“revised draft”). As the WIPO secretariat is aware, INTA represents the interests of trademark owners, and we have reviewed the revised draft document in this context and by reference to our previous articulated concerns. Our comments are limited in this regard and our specific comments follow. However, as a preliminary matter we make the observation that the provisions adopt and merge language from various intellectual property regimes but mainly find their precursors in copyright. This heavy reliance on copyright language creates concerns for trademark owners. The definition of TCEs/EoF includes within its ambit “words, signs, names and symbols”, which are the most common material for trademarks. Most countries’ trademark systems include a mechanism for managing conflicts between trademarks with a level of international uniformity. In addition, a body of associated jurisprudence has developed to address many of the issues thought to be of concern. Much of the language and principles sought to be adopted within this document are foreign to the trademark owner and generally not appropriate to the intellectual property regime whose purpose is to encourage free and fair competition within a transparent operating system.</p>
JAPAN	<p><i>General opinion</i></p> <p>Traditional cultural expressions (TCEs)/expressions of folklore (EoF) is an important issue for many members, and we appreciate the work by the WIPO Secretariat to produce the document WIPO/GRTKF/IC/9/4. However, as the current document does not fully reflect the view of the Japanese Government, we wish to submit comments for changes.</p> <p><i>Legal status of the document WIPO/GRTKF/IC/9/4 and the principle of flexibility and comprehensiveness</i></p> <p>Regarding the status of the document WIPO/GRTKF/IC/9/4, the Japanese Government cannot at this point agree to make it internationally legally binding. For the time being, international harmonization should be pursued mainly through giving the document a status of a guideline or a model provision. This means, in relation to the GENERAL GUIDING PRINCIPLES of the document, that the principle of flexibility and comprehensiveness needs to be fully carried through. Protection of TCEs/EoF is appropriately realized through a combination of framework for preservation of cultural property, unfair competition laws and other means, with each country choosing the appropriate combination that suits its local culture and characteristics. It is desirable that each country should “comprehensively” create its system of protection by “flexibly” choosing the system. This is because protection of TCEs/EoF should not be attained by any single “one-size-fits-all” or “universal” framework, and a variety of approaches tailored to its culture and customs should be accepted.</p> <p>Regarding the present version of the document WIPO/GRTKF/IC/9/4, because the drafting of SUBSTANTIVE PROVISIONS has been started without consensus and sufficient understanding of POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES, there is currently an inconsistency between GENERAL GUIDING PRINCIPLES and SUBSTANTIVE PROVISIONS. That is, on the one hand, the principle of flexibility and comprehensiveness, which allows a country to choose its means of protecting TCEs/EoF according to the nation/region’s characteristics, has been adopted as part of the GENERAL GUIDING PRINCIPLES (paragraph (d)), but on the other hand, the proposed SUBSTANTIVE PROVISIONS is drafted in a way that in effect provides for the right of authorization. Such provision of substantive right of authorization is inconsistent with the principle of flexibility and comprehensiveness. In order to avoid such inconsistency, the Japanese Government is of the position that we should first build consensus on issues of POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES before moving on to SUBSTANTIVE PROVISIONS which lays out the more detailed mechanism of their implementation.</p> <p><i>The basic position of the Japanese Government on the desirable means of protection of TCEs/EoF</i></p> <p>The basic position of the Japanese Government on protection of TCEs/EoF is that while we recognize the importance of respect for and preservation and maintenance of TCEs/EoF, discussions regarding creation of a new</p>

	<p>type of intellectual property or a similar proprietary right for the protection of TCEs/EoF should be dealt with precaution. Historically, culture has evolved through mutual exchange and borrowing of cultural expressions among different cultural zones, often without the consent of the original creator of such cultural expression. We must be cautious in attempting to create a new type of intellectual property right regarding TCEs/EoF, as it could interfere with such development of rich culture through mutual exchange and enlightenment. Many of what is currently being proposed as POLICY OBJECTIVES can be attained through utilization of existing frameworks of intellectual property or frameworks outside intellectual property such as a framework for preservation of cultural property. On the other hand, our above-stated apprehension leads us to believe that those POLICY OBJECTIVES that can only be attained through creation of a new type of right call for cautious deliberation as to whether they should be included in the POLICY OBJECTIVES in the first place.</p> <p>We will elaborate on the reasons for taking our position in correspondence to the reasons proposed for the need to protect TCEs/EoF. To begin with, the need to protect TCEs/EoF can be basically categorized into the following three: (i) the need to provide equitable benefit sharing to the holder of TCEs/EoF in cases of commercial exploitation, (ii) the need to secure and maintain the dignity of the TCEs/EoF and its holder, (iii) the need to assure that TCEs/EoF that has been passed down within a community with spiritual importance attached to it does not disappear and is passed down to the next generation. Regarding (i), giving something that is already in the public domain protection through creation of a new type of quasi-intellectual property system or giving it permanent monopoly right conflicts with the purpose of the intellectual property system, which is to provide incentives for new creation. (ii) should be understood as a matter of moral for the whole society to respect each other's culture. Giving TCEs/EoF moral right-type of protection even when it is difficult to identify its creator is essentially out of line with the concept of intellectual property system. (iii) should be dealt with as a part of a country's policy of preservation of cultural property, and not in the realm of intellectual property.</p> <p><i>Procedural issues in discussing the document WIPO/GRTKF/IC/9/4</i></p> <p>Regarding the discussion on traditional cultural expressions/expressions of folklore, even the definition of the term "traditional cultural expressions/expressions of folklore" has not been clarified in international fora, and although the initial discussion on TCEs/EoF should be concerned with the current status of respecting, preserving, and maintaining TCEs/EoF and identifying where problems exist, this has not yet been done. Therefore, taking into account the current status of the discussion, it is premature to discuss SUBSTANTIVE PROVISIONS related to TCEs/EoF. In order to conduct TCEs/EoF-related discussions in a more structured manner, we should first lay common ground by discussing POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES, and, after reaching consensus on them, move on to SUBSTANTIVE PROVISIONS, taking into consideration the current situation regarding how to respect, preserve and maintain TCEs/EoF and the relevant international and national systems, rather than starting a discussion on SUBSTANTIVE PROVISIONS prematurely.</p> <p>Therefore, we would like to focus our comments solely on POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES at this time and, in this regard, provide additional comments and clarification in the future course of discussion, if necessary, while reserving our position on the SUBSTANTIVE PROVISIONS.</p>
<p>NGA RINGA WHAKAHAERE O TE IW MAORI, submitted by the Government of New Zealand, with following accompanying words: "These comments do not represent a New Zealand government position, however we considered it would be useful for the IGC to consider the comments as indigenous people's perspectives on the draft objectives and principles".</p>	<p>The approach taken by NRW in evaluating the WIPO revised policy objectives and principles for the protection of traditional knowledge and traditional cultural expressions, is informed by our Te Iringa Wananga Declaration [see attached]. This declaration is a Statement of Position resulting from the traditional practitioner networking hui held last year at Te Iringa Marae, Tai Tokerau. Sections 3 & 4 of the Te Iringa Wananga Declaration state:</p> <p>"Tangata Whenua rights under the Treaty of Waitangi to control Ngahere resources have been consistently, and in some cases deliberately, eroded as a result of the actions and omissions of the Crown and its various entities [Section 3]"; and</p> <p>"We support Maori as Tangata Whenua and Tangata Kaitiaki in upholding their traditional relationship with the environment by asserting full Intellectual Property rights over the Indigenous Flora, Fauna and other Ngahere resources of this country [Section 4]".</p> <p><i>Key submission points</i></p> <p>Ministry of Economic Development consultation on WIPO has not been satisfactory or extensive enough for NRW to offer a detailed analysis of the draft principles and policy objectives. This said, in respect of NRW's kaupapa and on behalf of our membership, we submit the following points for consideration at the highest level of Crown policy development:</p> <p>1. While accepting that "the interface between any new protective mechanisms and existing rights or practices will be a key challenge", NRW considers that the present policy process must also address the situation of existing patents over products deriving from indigenous flora, fauna and traditional knowledge. For example:</p> <p>Principle – "Application of these principles and policy objectives will apply retrospectively to existing patents and related processes".</p> <p>There is a critical need to include principles and policy objectives that will provide for evaluating the status of patents already granted, in particular, establishing a compensation process for the relevant parties, should revoking of patents be deemed appropriate. Promoting the concept of a special fund for this purpose contributed</p>

	<p>to by all WIPO participating countries is also a priority.</p> <p>2. NRW support for the “guiding principle of flexibility for national policy and legislative development” would be dependent on how the overarching principles and policy objectives are resolved. For instance, if the set of finalised principles and objectives were strongly oriented around protecting indigenous mātauranga, then in our view, there would be less emphasis on providing for flexibility of implementation at the national level.</p> <p>3. We reiterate the importance that any Crown policy on traditional knowledge and traditional cultural expressions not prejudice its ability to abide by the Treaty of Waitangi, including responding to key claims such as WAI262.</p> <p>4. That in addition to the Treaty of Waitangi, statements of Maori position such as the Mataatua and Te Iringa Wananga Declarations be tabled as primary references for the administrative purposes of WIPO; and</p> <p>5. Maori/Tangata Whenua organisations seek direct input to WIPO administration processes rather than have their views represented via government agencies.</p> <p>In conclusion, I would like to formally register NRW’s interest in becoming an accredited observer to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.</p> <p style="text-align: center;">TE IRINGA WANANGA DECLARATION</p> <p style="text-align: center;"><i>Ratified by the Executive Committee at their meeting on 29 October 2005</i></p> <p>1 Due to the current state of diminished and diminishing access to Indigenous Flora, Fauna and other Ngahere resources because of:</p> <ul style="list-style-type: none"> (i) Widespread destruction of the natural environment (ii) Developmental and pollutant activities (iii) Restrictions on entry to land and coastal areas (iv) Legislative and Intellectual Property constraints (v) Introduced and new or modified species; and (vi) Increased herbicide and pesticide use, <p>Maori healers are under critical pressure regarding their ability to maintain traditional practices, and the traditional knowledge associated with them.</p> <p>2 Achieving full and tangible health benefits for the people of this country will require actively protecting, respecting and nurturing Ngahere resources.</p> <p>3 Tangata Whenua rights under the Treaty of Waitangi to control Ngahere resources have been consistently, and in some cases deliberately, eroded as a result of the actions and omissions of the Crown and its various entities; and</p> <p>4 We support Maori as Tangata Whenua and Tangata Kaitiaki in upholding their traditional relationship with the environment by asserting full Intellectual Property rights over the Indigenous Flora, Fauna and other Ngahere resources of this country”.</p> <p>[A Statement of Position resulting from the support by Ngati Tautahi for Nga Ringa Whakahaere o te Iwi Maori at their hui held 30 September to 2 October 2005 at Te Iringa Marae, and endorsed by all those in attendance]</p>
<p>FEDERATION OF MĀORI AUTHORITIES, submitted by the Government of New Zealand, with following accompanying words: “These comments do not represent a New Zealand government position, however we considered it would be useful for the IGC to consider the comments as indigenous</p>	<p>The Federation of Māori Authorities (the Federation) welcomes the opportunity to make a submission on the Revised Policy Objectives and Guiding Principles (guidelines).</p> <p>The Federation does not wholly oppose the guidelines and this submission reflects areas of concern and areas of development.</p> <p>The relationship between Māori and the Crown is one of partnership under the Treaty of Waitangi and should be recognised with the development and support of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) guidelines.</p>

<p>people's perspectives on the draft objectives and principles".</p>	<p>It has been noted that a number of the guidelines are subject to National or Regional laws and regulation. The Federation therefore notes that these provisions require that New Zealand laws are fair and equitable to Māori.</p> <p>As Treaty of Waitangi partners the Federation emphasises that there is a greater onus on the Government to protect and respect the rights of Māori following the guidelines from the IGC endorsed by Maori.</p> <p>The Federation would like to note that any of the guidelines that are 'subject to national laws and regulations' there is risk that there will be no or limited protection for Maori and Indigenous people if Governments decide not to implement, uphold or limited the number of the guidelines in National laws and regulations.</p> <p>RECOMMENDATIONS</p> <p>Recognition of the Treaty of Waitangi and the partner relationship between Māori and the Crown when developing National frameworks and implementing IGC guidelines.</p> <p>Ensuring that Māori are informed and up to date through the whole process and that Māori have the opportunity to have input and representation in New Zealand's development of laws and regulations</p> <p>Establishment of a Working Group, with the inclusion of Māori representative, to establish a National Framework implementing the principles of the IGC Traditional Knowledge and Traditional Cultural Expressions.</p> <p>Continuation of the development of International and Regional protection of Indigenous rights of Traditional Knowledge and Traditional Cultural Expressions.</p>
<p>MARC-RENÉ RUAKERE, submitted by the Government of New Zealand, with following accompanying words: "These comments do not represent a New Zealand government position, however we considered it would be useful for the IGC to consider the comments as indigenous people's perspectives on the draft objectives and principles".</p>	<p>In principle, I submit that the Draft Provisions as stated in the above documents are meritorious, and although others have pointed out its shortcomings (of which there are a few) I prefer to build on what is already there and look for pragmatic ways to protect TK and TCEs.</p> <p>After having studied the Theory and the Practice of the Enforcement of International Human Rights Conventions, Covenants and Other Instruments, the main part of this submission shall focus on the enforcement of the rights contained therein.</p> <p>Any comments made in this submission are not going to be a detailed treatise on the enforcement of specific claims relating to specific rights, but merely some practical measures that will strengthen what is already there.</p> <p>Therefore the emphasis in this submission will be on the prevention of the misappropriation of TK and TCEs.</p> <p><u>UN Enforcement of Human Rights Instruments and National Sovereignty of International Member States</u></p> <p>The enforcement of any International Instrument will be difficult in any context. The main obstacle is that the global body entrusted with its enforcement has to contend with the <u>sovereignty</u> of the member nation that it is dealing with.</p> <p>As recent new reports has been the example of the UN Special Rapporteur who has been roundly criticized by the New Zealand government and moves are being made to rebut his Report which was recently published. The following news article outlines:</p> <p><i>UN Official Recommends Repeal of Foreshore and Seabed Act 12:18 PM, 04 Apr 2006</i></p> <p>A United Nations human rights investigator is recommending changes to the Foreshore and Seabed Act. UN special Rapporteur Rodolfo Stavenhagen visited New Zealand in November last year when he met government and Maori representatives. In his report, he recommends the Foreshore and Seabed Act be repealed or amended, and says the Crown should engage in Treaty negotiations to recognise the inherent rights of Maori in that area.</p> <p>He also says there should be Constitutional reform in New Zealand to entrench the Treaty of Waitangi and regulate the relationship between the Government and Maori.</p> <p>Prime Minister Helen Clark dismissed the report, describing it as unbalanced and a missed opportunity.</p> <p>In this case even though the Rapporteur's report has been panned by the New Zealand government, it has highlighted the importance of an objective international viewpoint which states the issues and possible solutions.</p> <p><i>So What Modes Of Enforcement Are There?</i></p> <p>In any International Instrument there are always going to be enforcement provisions. In relation to the enforcement of human rights there are a few modes of enforcement already in place:</p>

Incorporation of the International Instrument into the municipal laws of the state that ratifies them (this is subject however to the member state ratifying the whole Instrument and not reserving on some clauses);

Civil and criminal penalties in law – i.e. Injunctions and other equitable remedies;

Current IP law (which can cover the enforcement of pure economic interests in some modes of TK and TCEs);

International arbitration and mediation;

Education programmes that underline the importance of the protection of TK and TCEs, and that indigenous people do have recourse to misappropriation of their cultural intellectual property;

The Investigation and Reports of the Special Rapporteur to the UN (and ultimately to the member state under investigation) – however this would only be enforceable if the member state was themselves an offender/misappropriator;

Application of the aggrieved party to the International Court of Justice for the breach of an international instrument;

The involvement of Non-Governmental Organisations (NGOs);

Specific bodies created to deal with the issues of indigenous rights i.e. in Aotearoa/New Zealand we obviously have the Waitangi Tribunal and the Māori Advisory Group to the Intellectual Property Office of New Zealand.

The World Intellectual Property Organization's (WIPO) *Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999) has identified and acknowledges the importance of the modes of enforcement of an IP rights (footnote: At page 47).

SUBMISSION

This submission is now to focus on the strengthening of each one of these modes of enforcement:

Incorporation of the International Instrument into the municipal laws of the state

In jurisdictions such as the United States of America, there has merely to be ratification by Congress in order to execute an international instrument. Said jurisdictions are “self – executing” jurisdictions, and therefore ratified international instruments become domestic law. In most Anglo based legal systems the international instrument needs to be incorporated into domestic law by inclusion into a statute before it can be “executed” and therefore those jurisdictions are “executory”.

I submit that the final WIPO Instrument should have *mandatory provisions* so that member states that ratify it have to sign the document *without reservations* to any of the clauses stated therein. This would mean that for those “executory” jurisdictions, the power of the instrument is not diluted and is more likely to be followed in courts of competent jurisdiction. The instrument itself, in other words, would have “authoritative” status, rather than just “interpretative” status.

Civil and criminal penalties in law

In the Aotearoa/New Zealand as in many Anglo-American legal systems there are provisions in the criminal and civil law that can be strengthened.

In the criminal law, property theft (which includes in this country, any *chose in action* – including any intellectual property right) is protected any that theft. Moreover, there is in Anglo-American criminal justice systems a principle that, ignorance of the law is no excuse for commission of a crime (in this case the theft or misappropriation of property). This means that even those who misappropriate TK and TCEs without commercial permission of the indigenous owners can be held criminally liable.

Civil law systems, again in the Anglo-American context can protect many concerns of indigenous people such as through injunction, or other equitable remedies such as account of profits (if there is a prior arrangement between the indigenous group and an alleged misappropriator). The law of torts can include actions for “Passing Off”, plus other forms of protection provided by legislation such as fair trading laws, which mostly deal with misrepresentation.

One should not forget as well the contractual remedies available for those parties who have entered into a Prior Informed Agreement.

In some jurisdictions there may also be some element of Strict Liability either in a criminal or civil context. *I*

submit that misappropriation of TK and TCEs should be written into the WIPO instrument as encouraging member states make misappropriation of TK and TCEs as a Strict Liability offence in both civil and criminal jurisdictions. This therefore would therefore absolutely make it a clear that offenders stand a chance of prosecution should they not even know that they have misappropriated TK and TCEs.

Current IP law (for the enforcement of pure economic interests of modes of TK and TCEs);

In addition to the civil remedies mentioned above, the provisions relating to the protection of IP can also cover the economic interests of indigenous peoples wishing to protect their TK and TCEs. Although TK and TCEs are not always complimentary to each other, there is still benefit for indigenous populations to use IP law as a means of protecting the economic interests, and other laws (such as those relating to damages, and injunctions) can protect the other interests (for example Moral Rights under Copyright Law).

I submit that Aotearoa/New Zealand's example of a Māori Advisory Group to the Intellectual Property Office of New Zealand is a good example for the rest of the world to follow if it has not already done so already. This addresses both IP and TK / TCE concerns directly, although, even New Zealand's example can still be improved. An Indigenous Intellectual Property Office in every state that ratifies the WIPO Instrument would be a good start.

Registration of TK and TCEs with a central body would be a good way of letting the public in general know that there is a pre-existing right to that TK and / or TCE. There is probably no other method of informing the public at large that such a right exists, other than a legal declaration / or statutory Act of Parliament. The right must, *I submit* be registered as belonging to a defined indigenous group in perpetuity (until that right has rightfully been disposed), which would distinguish it from regular IP rights which in Anglo-American legal systems only last a certain duration.

International arbitration and mediation

This is probably not going to be of interest to an indigenous people against a corporation or other individual (although it may be of assistance in some of these disputes). However this method of enforcement would be critical in disputes between indigenous peoples and their governments (because they sometimes misappropriate TK and TCEs of their indigenous peoples), or even when the dispute is transnational (i.e. an alleged misappropriation has taken place in Germany, and the plaintiff is say, Samoan).

I submit that international arbitration and mediation are included as *mandatory* in the WIPO Instrument particularly for cases between indigenous peoples and their governments, and transnational disputes.

Education programmes

Although this is not strictly a method of enforcement, education programmes on would be critical to highlight to people who need to know about the rights they can enforce, as well as to those who would be perpetrators / misappropriators, who can have those rights enforced against them. WIPO has made great progress in the education of the global population of the fact that it wishes to create an international instrument to protect TK and TCEs. The same would no doubt be directed to the education programmes that are required to heighten the awareness of the issue to the global population.

I submit that education programmes specifically dealing with issues surrounding TK and TCEs become part of the provisions in the final WIPO instrument.

The Investigation and Reports of the Special Rapporteur to the UN

Like education programmes, the reports of the human rights Special Rapporteur have the effect of highlighting the deficiencies and the possible resolutions in relation to specific areas i.e. there are Special Rapporteurs for disabilities, torture, rights to health and racism. The 1503 procedure to the Economic and Social Council (ECOSOC) of the United Nations has to be invoked before this enforcement mode can be activated, and then there are special criteria that have to be met before the Rapporteur can assist in reporting to the UN, thereby invoking a number of responses from the UN (in extreme cases either economic sanctions or a Security Council resolution to send in peacekeeping forces).

I submit that WIPO should submit a similar procedure with a view to investigating claims of misappropriation of TK and TCEs and then reporting back to the UN with recommendations on how any resultant breaches may be remedied.

It is noted that the United Nations Commission on Human Rights (UNCHR) has a Sub-Commission on Prevention of Discrimination and Protection of Minorities. *I submit* that WIPO should work together with this organization so that the protection of TK and TCEs is not merely seen as an enforceable IP right, but as a basic human right.

Application to the International Court of Justice for the breach of an international instrument

When a one state wants to sue another state it has to go to the International Court of Justice at The Hague in the Netherlands. It is conceivable that one state could sue another state for the misappropriation of TK and TCEs; however I don't envisage that this would actually happen. *This method of enforcement would not be recommended*

	<p><u>for TK and TCEs.</u></p> <p><i>Non-Governmental Organisations (NGOs);</i></p> <p>I have found that in the area Human Rights, the involvement of NGO's is the most effective way of enforcing human rights instruments. Mostly groups like Amnesty International and Save the Children will have a far greater impact on the enforcement of any International Human Rights Instruments mainly because they can achieve objectives that governmental agencies cannot, and can often act or react quicker to various crises.</p> <p>When it comes to the enforcement of the rights of indigenous TK and TCEs, NGO's can play a vital role such as the lobbying for, or advocacy for the rights of indigenous peoples.</p> <p>Such an international NGO that works with indigenous peoples is the Minority Rights Group International. <i>It is submitted</i> that WIPO work alongside this organization, and give them a Special Consultative Status as other NGO's have with ECOSOC.</p> <p><i>Specific bodies created to deal with the issues of indigenous rights</i></p> <p><i>I submit that:</i></p> <p>Member states must ratify WIPO's instrument with the stipulation that it is a non-negotiable and non-reservable article / clause, that the member state will create a Commission or body that is adequately resourced and with appropriate competent jurisdiction to determine and prosecute indigenous claims of misappropriation of TK and TCEs,</p> <ol style="list-style-type: none"> i. If such a body exists (i.e. the Waitangi Tribunal) then such body should also be given the jurisdiction to determine such claims and co-ordinate with other agencies that have an interest in the protection of TK and TCEs (i.e. IPONZ, the National Archives, the National Film Archives etc). ii. In those countries that have indigenous people's departments (such as the Canadian Indian and Northern Affairs Department or the Department of Families, Community Services and Indigenous Affairs in Australia etc), powers should be given them to bring prosecutions for the misappropriation of indigenous TK and TCEs, whether it be at national or international level. <p><i>Other Miscellaneous Submissions and Conclusions</i></p> <p><i>I also submit that:</i></p> <p>An Indigenous Committee comprised of people from first nations and indigenous populations be established in WIPO whose functions would be:</p> <ol style="list-style-type: none"> 1. To assess all claims of misappropriation of TK and TCEs; 2. As well as co-ordinate with other organisations (i.e. UNESCO, the ILO and other organisations with an interest in the protection of TK and TCEs). <p>In the final analysis there is a dividing line between the private commercial interests that any indigenous association would want to protect, and this would be mainly against a another corporation and / or human individual. On the other side of the line are the cases where the state itself is the alleged perpetrator of the misappropriation of TK and TCEs. These cases will require very creative enforcement measures and hopefully this will be addressed by the investigation by a Special Rapporteur and subsequent arbitration or mediation between the parties would be appropriate.</p> <p>It is also hoped that the measures outlined in this submission are not in any way challenging the sovereignty of any particular member state, but instead enhance the sovereignty of a state and make it clear that if any of the provisions outlined in the final WIPO instrument are to be effective, then any enforcement measures must indeed work along with the sovereignty of the member state, as well as the sovereignty of the indigenous people.</p> <p>Moreover these enforcement measures seek to protect not only the economic interests but also the social, political and cultural interests of TK and TCEs.</p>
<p>Mr. MAUI SOLOMON, submitted by the Government of New Zealand, with following accompanying words: "These comments do not represent a New Zealand government position, however we considered it would be</p>	<p>Note by WIPO Secretariat: In view of its length, Mr. Solomon's submission is reproduced in full as an appendix to this document. Specific references to objectives, general guiding principles or substantive principles in Mr. Solomon's submission are referred to throughout this table. Mr. Solomon's comments were prepared by him in relation to the annex to document WIPO/GRTKF/IC/8/4, which is identical to the annex to document WIPO/GRTKF/IC/9/4.</p>

useful for the IGC to consider the comments as indigenous people's perspectives on the draft objectives and principles".	
NORWAY	<p>Document WIPO/GRTKF/IC/9/12 was submitted by Norway before the ninth session regarding documents 9/4 and 9/5. The objective of document 9/12 is to contribute to the discussions in the IGC regarding the policy objectives and principles for the protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE) in order to proceed within the renewed mandate period. The first parts of the document is proposed to focus on trying to find areas where there seems to be consensus or emerging consensus, instead of focusing on issues where the discussions have been polarized so far. Following this track the paper presents suggestions on how to divide the objectives and guiding principles in the annexes of documents 9/4 and 9/5 into two categories; (1) objectives with a preambular or contextual character and (2) objectives/principles that may be more suitable for being dealt with in international substantive provisions. Finally, the document presents a proposal on the possible use of article 10bis in the Paris Convention as a model for a future instrument for the protection of TK.</p> <p>Document 9/12 reflects Norway's point of view on how the Committee should be dealing with documents 9/4 and 9/5. We would like to emphasize that document 9/12 simply presents one idea on how the Committee could move ahead to reach an outcome within the present mandate period, and that Norway at this stage does not exclude any final outcome of the deliberations of the IGC.</p> <p>(Note by WIPO Secretariat: Norway's comments continues with information regarding the disclosure of origin of genetic resources and TK; this information is contained in the compilation of comments on WIPO/GRTKF/IC/9/5)</p>
RUSSIAN FEDERATION	<p>The Russian Federation supports the development by the Secretariat of the draft provisions on the protection of Traditional Cultural Expressions (TCEs)/ Expressions of Folklore (EoFs), political objectives and general guiding principles of protection.</p> <p>The Russian Federation supposes that the development of the draft political objectives and general guiding principles provides for a solid basis for further constructive discussion of important issues of protection of TCEs/EoFs within the Committee.</p> <p>In general, the document WIPO/GRTKF/IC/9/4 containing main text and Annex is built on the model and the basis of the document WIPO/GRTKF/IC/8/4. The main text of the document WIPO/GRTKF/IC/9/4 contains brief statement of the activities of the Committee on the issue of protection of traditional cultural expressions/folklore. We consider to be important the provision mentioned in Section III (p. 13) of the main text of the document WIPO/GRTKF/IC/9/4 stating that the results of the work of the Committee are not determined in advance by the mandate of the Committee neither in their form, nor in the status. Para 13 also contains possible approaches, many of which may be acceptable in the preparation of the results of the work of the Committee. Thus, the possibilities of the Committee in respect of the issues related to the protection of the traditional cultural expressions/folklore are broadened.</p> <p>The Annex to the main text of the document WIPO/GRTKF/IC/9/4 "Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore: Policy Objectives and Core Principles" is divided into three sections: objectives of the protection, principles for the provisions of the granted protection, and also substantive provisions.</p> <p>According to Article 3 of the Basics of the Legislation of the Russian Federation on Culture folklore is considered to be a cultural value, one of the elements of the common cultural property of the peoples of the Russian Federation.</p> <p>We suppose that the protection of the traditional culture or folklore expressions must be, among others, aimed at: recognition of value, promotion of respect to traditional culture, in particular, Russian Federation recognizes the equal value of cultures (i.e. recognition of their value and expression of respect), equal rights and freedoms in the field of culture for all the peoples of the Russian Federation and promotes the creation of equal conditions for preservation and development of these cultures; support of traditional practices and cooperation of the community, barriers to illegal appropriation of traditional cultural expressions and expressions of folklore, promotion of preservation of traditional cultures, encouragement of innovation and creativity of communities, promotion of development of freedom of intellectual and artistic creativity, scientific and cultural exchange, promotion of development and protection of diversity of cultural expressions, and the increase of confidence, transparency and mutual trust. Thus, in Russian Federation everyone has the right for the protection by the state of his cultural identity. Every man is granted the right of participation in the cultural life, attribution and access to cultural values.</p> <p>Peoples of the Russian Federation have the right to preservation and development of their cultural identity, protection, restoration and preservation of original cultural and historic habitat. At the same time the policy in the field of preservation, creation and distribution of cultural values of indigenous peoples must not be detrimental to the cultures of other peoples of the country.</p> <p>Special attention in the Russian Federation legislation is paid to minority peoples. Russian Federation guaranties its patronage in respect to preservation and restoration of cultural and national identity of minority ethnic</p>

	<p>communities of the Russian Federation by means of protection and stimulation, provided for in the federal governmental programs.</p> <p>We should also mention the Federal Law of April 4, 1999 #82-FL “On the Guaranties of the Rights of the Indigenous Minority Peoples of the Russian Federation”. The Russian Federation according to its legislation is responsible before the nationals for the securing of conditions for accessibility of cultural activities, cultural values and goods. With an aim to secure the accessibility of cultural activities, cultural values and goods for all the nationals the executive and administrative bodies, and local governing bodies according to their competence should:</p> <ul style="list-style-type: none"> - encourage the activities of nationals on attraction of children to creativity and cultural development, self- education, amateur art, crafts; - create conditions for wide esthetic upbringing and mass primary artistic education mainly through the humanitarization of the overall education system, support and development of a network of special institutions and organizations – art schools, studios, courses, amateur art (independent artistic creativity); - provide patronage in the field of culture with respect to least economically and socially protected groups. <p>Besides, it is worth mentioning, that Russian Federation promotes increase in the number of participants of international cultural relations, encourages independent direct participation in cultural exchanges of individuals and cultural organizations, and also promotes the development of Russian culture abroad through relations with foreign co-countrymen and their descendants, by organizing cultural centers, by holding joint cultural activities.</p> <p>In the Russian Federation everyone is responsible for the preservation of historic and cultural heritage.</p> <p>At the same time, it seems that a distinction should be made between traditional and other cultural communities.</p> <p>We also consider important the general guiding principles stated in Section 2 of the Annex to the document WIPO/GRTKF/IC/9/4, such as the principle of responsiveness to aspirations and expectations of relevant communities (peoples), the principle of balance, the principle of Respect for and consistency with international and regional agreements and instruments, the principle of Flexibility and comprehensiveness, the principle of Recognition of the specific nature and characteristics of cultural expression, the principle of Complementarity with protection of traditional knowledge, the principle of Respect for rights of and obligations towards indigenous peoples and other traditional communities, the principle of Respect for customary use and transmission of TCEs/EoF, the principle of Effectiveness and accessibility of measures for protection.</p> <p>Given the abovementioned, we consider the provisions concerning the objectives and the general guiding principles, in general acceptable.</p> <p>Clear determination of subjects of the granted protection, the scope of the rights given and the term of protection is important for the grant of protection to the intellectual property objects. In this connection, the provisions stated in the section 3 of the Annex to the document WIPO/GRTKF/IC/9/4 require a more detailed study and clarification.</p> <p>Thus, for example, we can pay attention to the provision of Article 2 Section 3 (substantive provisions) of the Annex to the document WIPO/GRTKF/IC/9/4, stating that indigenous peoples and traditional and other cultural communities are considered to be the subjects of protection. The criteria of attribution of persons to the subject of rights is the entrustment to them of the safety, care and ensuring the guarantees for the traditional cultural expressions/expressions of folklore in compliance to their traditional laws and practices, and also the support, use and development of traditional cultural expressions and folklore as a distinctive feature of one’s cultural identity. The given provisions do not allow to sufficiently determine the subject of legal protection.</p> <p>Besides, traditionally the protection granted to intellectual property items is always limited in time, however, the provisions of Section 3 of the Annex to document WIPO/GRTKF/IC/9/4 state that the protection granted, which in its essence is close to the protection of intellectual property objects, may turn out to be unlimited in time, which makes it reasonable to study more thoroughly the possible consequences of such protection.</p>
SAAMI COUNCIL	<p>The Saami Council has previously commented extensively on the Policy Objectives and Core Principles contained in the Annex to Document 9/4, both during the IGC sessions and in written document submitted to the WIPO Secretariat, as requested. We essentially refer to these earlier submissions, and will here only offer comments on the most crucial issues contained in Document 9/4.</p> <p>Generally speaking, we believe that the Traditional Cultural Expressions (TCEs) draft Policy Objectives and Core Principles have improved considerably during the cause of the IGC. We particularly appreciate the fact that many of the observations submitted by indigenous peoples’ representatives have found their way into the Policy Objectives and Core Principles. As a result, it is the Saami Council’s position that the Policy Objectives and Core Principles now contain several elements that – if adopted and implemented – could prove very useful for the protection of indigenous peoples’ TCEs. Still, certain improvements are necessary for the Guidelines to be acceptable.</p>

	<p>Chiefly, our concern is that the Guidelines are not sufficiently clear on who are the owners, holders and custodians of TCEs. In addition, further work is needed to address the matter of TCEs that conventional IPR-regimes regard to be in the so-called public domain.</p> <p>...</p> <p><i>Conclusion</i></p> <p>If the concerns outlined above are catered for, the Saami Council can support the adoption of the Policy Objectives and Core Principles, as well as the initiation of a process aiming at transferring the Guidelines into a legally binding document.</p>
SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES	<p>The secretariat's comments are based on an analysis of the documents and are not, in any way, intended to represent the views of the members of the United Nations Permanent Forum on Indigenous Issues.</p> <p>The Secretariat of the Permanent Forum on Indigenous Issues (SPFII) was established by the General Assembly in 2002. SPFII is based at UN Headquarters in New York in the Division for Social Policy and Development of the UN Department of Economic and Social Affairs (DSDP/DESA).</p> <p>SPFII's main role is to prepare for the annual sessions of the Permanent Forum each May. The secretariat</p> <ul style="list-style-type: none"> - also provides support to the Members of the UNPFII throughout the year; - advocate for, facilitate and promote coordination and implementation within the UN system of the recommendations that emerge from each annual session; - promote awareness of indigenous issues within the UN system, governments, and the broad public; and - serve as a source of information and a coordination point for advocacy efforts that relate to the Permanent Forum's mandate and the ongoing issues that arise concerning indigenous peoples. <p>The SPFII acknowledges the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore over the past nine sessions. SPFII also acknowledges the previous work undertaken over several decades by the WIPO secretariat on the protection of Traditional Cultural Expressions/Expressions of Folklore, its fact finding missions, extensive community consultations, surveys and analysis of existing national and regional legal mechanisms under existing intellectual property and other laws.</p> <p>The revised policy objectives and principles of both documents are very comprehensive as they include policy issues, statements and debates from member states, indigenous peoples' organizations and other interested civil society organizations and parties. While it has been pointed out on numerous occasions in the past, by indigenous peoples' organizations, it needs to be stated again that having the two distinct draft objectives (Cultural Expressions/Expressions of Folklore and Traditional Knowledge) could be seen as overlooking the fact that that indigenous knowledge systems are holistic and interrelated. At the same time it is acknowledged that attempts have been made to make both areas complementary to each other.</p> <p>...</p> <p><i>Conclusion</i></p> <p>The SPFII acknowledges that policies and debates regarding the protection of indigenous knowledge systems is a rapidly evolving area and for this reason there is no one solution that fits the large number of diverse indigenous communities not only at the international level but also at the national and local levels. There is also the recognition that this is a complex area and the challenge is to find solutions that do not place administrative burdens on indigenous communities that are already dealing with a myriad of agencies on many levels in regards to the multiple issues affecting them.</p> <p>There is a view within indigenous communities that the current intellectual property rights regime is an alien and problematic construct and therefore should not be the only solution for protecting TCEs/EoF and Traditional Knowledge. Further, the burden of proof of how indigenous peoples maintain, practice and transmit traditional knowledge should not rest with indigenous peoples. Hence, the focus on establishing registers has to be considered carefully to avoid this any unnecessary burdens being placed on indigenous peoples. Indigenous peoples need to maintain their responsibilities in regulating traditional knowledge protection and practices including defining traditional knowledge within their communities. Therefore, the development of any protection measures must consider these wider issues.</p>
SOUTH AFRICA	<ol style="list-style-type: none"> 1. Traditional Cultural practices an important foundation for Community Identity and Social Cohesion. 2. This has implications for our constitution, particularly as it pertains to Customary Law, customary marriages

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	<p>are recognized by the constitution, but the Western notions seem to take precedence.</p> <p>3. This is a complex matter, one way or the other, our inputs should take into account the position taken by Traditional Leaders on some of these issues. We need to be cautious about the implications of ratifying such a convention, as it opens up a seriously suppressed issue of the position of traditional leadership in the politics of this country.</p> <p>4. The angle of human rights - this is critical, only traditional Cultural practices that are in line with human rights should be protected.</p> <p>5. Individuals are an important element of protecting and promoting Traditional Cultural Expressions, there should be institutional incentives that encourage people to impart this knowledge to other members of the community.</p> <p>6. Most Traditional Cultural Expressions transcended national boundaries, its protection should therefore be located both at community, National and Regional levels. This means that National policies and legislations should be aligned.</p> <p>7. Traditional Cultural Expressions were basis of contemporary Cultural or art forms, where possible this needs to be highlighted. We need to guard against ghettoizing Traditional Cultural Expression.</p> <p>The following points identified are made within the context of the IKS Policy which falls within our competencies. Every attempt has been made to provide reasoning for the comments and suggested changes.</p>
<p style="text-align: center;">SWITZERLAND</p>	<p>In the view of Switzerland,</p> <ol style="list-style-type: none"> 1. agreeing on the policy objectives and general guiding principles of the protection of traditional knowledge and of traditional cultural expressions (TCEs), and 2. establishing a working definition of the terms “traditional knowledge” and “TCEs”, <p>are two fundamental tasks that need to be carried out at the outset of any discussions of the Committee on traditional knowledge and TCEs.</p> <p>The Committee has been discussing the policy objectives and general guiding principles at several of its previous sessions. Furthermore, the Secretariat put forward comprehensive definitions of the terms “traditional knowledge” and “TCEs” (see, e.g., WIPO/GRTKF/IC/3/9, para. 25, and WIPO/GRTKF/IC/8/4, Annex, p. 10), which provide an excellent basis for the Committee’s discussions on terminology. Up to now, however, the Committee’s work on these tasks has not been concluded. Accordingly, it is necessary for the Committee to continue discussing in greater detail and eventually agree upon these policy objectives and general guiding principles, and to establish working definitions of the two terms.</p> <p>Only once these fundamental tasks have been carried out, can the Committee take further steps with regard to the protection of traditional knowledge and TCEs. Otherwise, the Committee’s work will leave out these fundamental and necessary steps. Accordingly, Switzerland agrees with those delegations who consider discussing possible substantive provisions on the protection of traditional knowledge and TCEs as are proposed in WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 to be premature at this point in time. We will therefore provide comments on the proposed substantive provisions only at a later stage in the discussions of the Committee on the protection of traditional knowledge and TCEs.</p> <p>In contrast to what has been stated by some delegations at the ninth session of the Committee, continuing the discussions on the policy objectives and general guiding principles as well as establishing working definitions of the terms “traditional knowledge” and “TCEs” is not a futile exercise. On the contrary, Switzerland views these discussions as a necessary prerequisite for any meaningful and result-oriented further work of the Committee on the protection of traditional knowledge and TCEs.</p> <p>In light of these considerations, Switzerland considers it to be crucial that the Committee continues and intensifies its work on the policy objectives and the general guiding principles of the protection of traditional knowledge and TCEs as well as on relevant terminology. One important step in this process is the current compilation of written views on these objectives and general guiding principles.</p>
<p style="text-align: center;">UNITED STATES OF AMERICA</p>	<p>The United States expresses its appreciation to the International Bureau for its work on “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” in document WIPO/GRTKF/IC/9/4. We benefited greatly from the discussion of these objectives and principles at the ninth session of the IGC, and we look forward to continuing and deepening that discussion at the tenth session of the IGC, with a view toward enriching our understanding of these complex issues. In advance of the tenth session of the IGC, the United States submits these written comments.</p> <p>The United States is extremely interested in learning from the experience of other IGC members, listening carefully to specific issues and concerns related to TCEs/EoF, and exchanging views, information, and best</p>

practices on preserving, promoting, and fostering an environment of respect for TCEs/EoF. The United States believes that such a sustained and focused discussion will lead to the kind of deep, mutual understanding that will inform and clarify the future work of the IGC

Building on a record of accomplishments in the IGC over the last several years, the United States believes that a shared understanding on many objectives and principles is beginning to emerge. In the view of the United States, recognizing the intrinsic value of and promoting respect for TCEs/EoF are of fundamental importance. Other very important values are reflected in a number of objectives and principles related to the role of communities in creating, sustaining, promoting, protecting and preserving TCEs/EoF, including customary practices, community cooperation, innovation, creativity and development.

In a world where the very survival of some TCEs/EoF is threatened, the United States believes that contributing to their safeguarding is of critical importance. The United States believes that the important values of intellectual and artistic freedom, research, and cultural exchange, which help to highlight and celebrate our cultural diversity, must co-exist with the values of protecting and sustaining TCEs/EoF in an environment that recognizes their intrinsic value.

Once a consensus has been reached around the policy objectives and core principles, the United States looks forward to a robust, focused and sustained discussion within the IGC of the application of these concepts to specific issues and concerns related to TCEs/EoF. Of these, measures related to preventing the misappropriation of traditional cultural expressions/expressions of folklore and precluding invalid IP rights will demand our full attention. The United States looks forward to exploring these and other issues in greater depth at the extended tenth session of the IGC, November 30 to December 8, 2006.

II. COMMENTS ON OBJECTIVES	
ISSUES	COMMENTS
GENERAL COMMENTS ON OBJECTIVES	
General Comments	<p>Australia strongly agrees with the statement on page five of the Annex that the key initial step in the development of any regime or approach for the protection of TCEs/EoF is to first determine the relevant policy objectives. Only once objectives are developed which clearly outline the intended purpose behind the protection of TCEs/ EoF, will the Committee be able to focus on a possible outcome.</p> <p>It is also important that the objectives and principles are clearly linked to the WIPO IGC mandate. The Secretariat has noted that the revised objectives have been rephrased to distinguish between objectives relating to the protection of TCEs/EoF at the IP interface and other objectives relating to other policy areas. It is important that the objectives do not lose their connection to the aim of protecting TCEs/EoF and do not extend into issues which would be more appropriately considered in other international fora.</p> <p>Australia supports in principle objectives (i)-(iii) relating to recognising, respecting and being guided by Indigenous communities about treatment of TCEs/EoF. These three objectives cover broad elements which are central to developing effective and desirable mechanisms to protect TCEs/EoF. However, the breadth of these objectives means that they incorporate elements that are raised elsewhere in other objectives and principles. For example, objective (i) requires that TCEs/EoF be acknowledged as frameworks of innovation and creativity, while this is also specifically referred to in objectives (viii)-(x) which require the encouragement of innovation and cultural diversity. As the objectives and principles are expected to provide clarity and scope, it is necessary to ensure that they do not overlap in this way.</p> <p>(AUSTRALIA)</p> <hr/> <p>As stated by the drafters of the provisions, the objectives must be clear, measurable, achievable and permanent, and must in themselves be sustainable.</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>First of all, we would like to raise attention to the fact that the term “traditional cultural expressions/expression of folklore” itself is not yet clear and may have diverse interpretations. This issue is specifically identified as one of “the recurring issues” in paragraph 11 of the document WIPO/GRTKF/IC/9/4 (p.4). The definition of “traditional cultural expressions/expressions of folklore” concerns not only paragraph (i) (Annex, p.3), but also every other paragraph which includes or refers to the term “traditional cultural expressions/expressions of folklore.”</p> <p>The term “right(s)” appears several times in the POLICY OBJECTIVES section. Although the term “right(s),” as it is used in this section, possibly implies that a new type of right is to be given, there has been no consensus established on creating such a right. In order to make clear this point, we would like to propose the insertion of the following NOTE (or footnote) in the POLICY OBJECTIVES section.</p> <p><i>Note: The use of the term “right(s)” in this POLICY OBJECTIVES section does not prejudge the creation of a new type of right currently nonexistent under national and international laws.</i></p> <p>(JAPAN)</p> <hr/> <p>The Saami Council can accept the “Objectives” of the Policy Objectives and Core Principles, as drafted in Document 9/4. We particularly underline the importance of Principles (iii) – respect for indigenous peoples’ human and other rights – and (vi) – respect for indigenous peoples’ customary practices. These objectives are absolutely imperative in any regime on protection of TCEs.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>The policy objectives for the protection of TCEs and EoF are broad statements that cover a range of issues from recognizing the value of indigenous cultural heritage, empowering communities, to promoting intellectual and artistic freedom, research and cultural exchange on equitable terms. As broad statements, they should typically form part of a preamble to law or other instruments.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p>
General Comments on Opening Line “The	<p>Canada has commented that the “protection” of TCEs can have a variety of meanings (footnote: WIPO, <i>Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)</i>, Geneva, April 2001, p. 21). While recognizing that non-IP tools have an important role to play in preserving, protecting and promoting TCEs and may be usefully considered by giving some context to the deliberations of the IGC, the focus of the IGC is and</p>

<p>Protection of traditional cultural expressions or expressions of folklore should aim to:</p>	<p>should be IP. Accordingly, Canada noted in its earlier response to document 7/3 that WIPO is the most appropriate forum to discuss IP-related issues connected to TCEs and suggested that document 7/3 could benefit from being more focused on the specific IP aspects of protecting TCEs. With these considerations in mind, Canada repeats its earlier recommendation that the WIPO Secretariat amend the text as follows:</p> <p>“The protection of traditional cultural expressions or expressions of folklore in relation to intellectual property should aim to:”</p> <p>(CANADA)</p>
<p>COMMENTS ON SPECIFIC OBJECTIVES</p>	
<p>i. Recognize value</p>	<p>While some communities may view their TCEs as having “scientific” value, it is our understanding that many TCEs have no direct connection to science. The draft objective could be improved by replacing “including” with “which may include”.</p> <p>(CANADA)</p> <hr/> <p>recognize the contribution of communities for the benefit of humanity</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>The scope of communities who are holders of TCEs/EoF that this document addresses, and who are the beneficiaries of protection of TCEs/EoF, is still unclear. Therefore we propose the insertion of the following NOTE that is attached to the term “indigenous peoples and traditional and other cultural communities” in Article 2 of the SUBSTANTIVE PROVISIONS (Annex, p.16) in this paragraph as well:</p> <p><i>Note: The broad and inclusive term “indigenous peoples and traditional and other cultural communities”, or simply “communities” in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.</i></p> <p>(JAPAN)</p> <hr/> <p>We recommend the inclusion of “affirmation” in bullet point (i) which is consistent with working document 9/5. The statement now reads as “Recognize and affirm value.”</p> <p>(SOUTH AFRICA)</p>
<p>ii. Promote respect</p>	<p>Respect for TCEs is a theme that has been repeatedly raised by Member States and by the representatives of many communities taking part in this and other <i>fora</i>. WIPO has also previously noted that IP law can play a role in promoting respect for TCEs (footnote: WIPO, <i>Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)</i>, Geneva, April 2001, p. 7). The objective can benefit from some additional clarity. It would be useful if it better reflected the fact that the successful promotion of respect for traditional knowledge systems, including TCEs, will only be possible if the views of all creators and users of TCEs are taken into account, including the broader interests of society.</p> <p>(CANADA)</p> <hr/> <p>promote the respect of humanity for communities</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>The phrase “indigenous peoples and traditional and other cultural communities” should be included.</p> <p>(GUATEMALA)</p>
<p>iii. Meet the actual needs of communities</p>	<p>Canada notes that the objective statement is overly broad; IP is only one way in which the “actual” needs of communities can be met. Canada, therefore, recommends re-stating the objective as follows: “Contribute to Meeting the Intellectual Property Needs of Communities”.</p> <p>In keeping with the need for greater consistency, clarity and focus in the text overall, Canada also suggests that this objective be combined with objective (xi) dealing with the promotion of community development and legitimate trading activities. The two are notionally related and should be read together.</p>

	<p>(CANADA)</p> <hr/> <p>meet and contribute to the actual needs of communities</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>the word “respect” should be replaced by “respecting” and, instead of the words “international...contribute”, “international...contributing” should be used.</p> <p>(GUATEMALA)</p> <hr/> <p>This paragraph contains such wordings as “respect their rights”. These might imply that a new type of right is to be given, but there is no consensus on creating such a new type of right and this issue has yet to be discussed. We understand that there are some existing rights, under customary laws or legal practices, which can deserve respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.</p> <p>(JAPAN)</p> <hr/> <p>We suggest that in bullet (iii) communities be defined. Hence we recommend the inclusion of “indigenous and local.” The bullet point now reads as “Meet the actual needs of indigenous and local communities.”</p> <p>(SOUTH AFRICA)</p>
<p>iv. Prevent the misappropriation of TCE/EoF</p>	<p>Australia supports the need to ensure that TCEs/EoF are not misappropriated under objective (iv) but this should not conflict with existing proprietary rights.</p> <p>Australia notes that the term ‘misappropriated’ can potentially cover a broad scope of issues and therefore encourages greater discussion about the meaning of ‘misappropriated’ to ensure that the term is fully considered by Member States.</p> <p>Australia has remedies to address instances where TCEs/EoF have been misrepresented or misappropriated. Australia is developing Indigenous communal moral rights legislation. This legislation will facilitate the attribution of copyright works based on Indigenous beliefs to the relevant Indigenous community and provides that a community may obtain a right of integrity in relation to the work.</p> <p>Australia is also taking practical steps to promote equitable benefit-sharing from the use of TCEs associated with genetic resources and to discourage misappropriation through the fair dealing and transparency provisions contained in regulations 8A.08 and 8A.10 of Division 8A.2 of the Environment Protection and Biodiversity Conservation Regulations 2000. Australia also has a number of other pieces of legislation which help protect material of significance to Indigenous communities, including: the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 which allows a Federal Minister to make declarations for the protection of areas or objects under threat of injury or desecration that are significant in accordance with Aboriginal tradition and the Protection of Moveable Cultural Heritage Act 1986 which restricts the transfer of ‘significant’ cultural items outside of the country and restricts the importation of illegally exported moveable cultural heritage from the country of origin.</p> <p>Australia is also exploring practical measures to address unethical conduct in the Indigenous art sector. For example, a parliamentary inquiry into the Indigenous visual arts and crafts sector will examine and make recommendations on strategies and mechanisms to strengthen and protect the sector. This will include recommendations to address unscrupulous conduct that occurs in relation to Indigenous art works.</p> <p>These pieces of legislation and projects seek to prevent misappropriation in the context of both gaining the use of TCEs without acknowledgement or authorisation of an Indigenous community or inappropriately exploiting material obtained with consent.</p> <p>Greater discussion about the term ‘misappropriated’ is desirable so that Member States have a greater appreciation of what the term covers (i.e. would it cover the examples outlined above). This would assist in determining whether the objective overlaps with other objectives or guiding principles.</p> <p>In objective (iv), Australia considers that the phrase ‘including effective enforcement measures’ is too prescriptive a requirement for a policy objective and should be removed. Without this phrase, Member States will have greater flexibility to determine what means can be provided to ensure the TCEs/EoF are not misappropriated. Flexibility is required in the policy objectives and guiding principles so that Member States can appropriately adopt local solutions for the benefit of their Indigenous communities.</p> <p>(AUSTRALIA)</p>

Clarification would be appreciated as to the meaning of the expression “derivatives of cultural expressions”, which is also found in other parts of the document (e.g., articles 3 and 10)

(BRAZIL)

We are of the view that more work and discussion with regards to the meaning of “misappropriation” is needed before being in a position to support this objective. Canada further notes that during the ninth session of the IGC other Member States pointed out that the inclusion of the term “derivatives” in objective 4 raises complex legal and policy issues. Questions about the relationship between a derivative work and the original TCE have also been raised by some NGO’s (footnote: For example, see comments by the representative of FILAIE, WIPO/GRTKF/IC/7/15, p. 47.). And document 9/4 also highlights that some “key policy and legal questions pivot on the adaptation right, the right to make derivative works” (footnote: WIPO/GRTKF/IC/9/4, Annex, p. 23.). This suggests that further consideration should be given to the implications of the inclusion of derivative works in this objective.

(CANADA)

guarantee the existence of TCEs/EoF

(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)

After cultural communities the phrase “capacity for self-management providing them...” should be added.

(GUATEMALA)

Objective (iv): Prevent the misappropriation of traditional cultural expressions/ expressions of folklore We note inclusion of this new objective. While INTA empathises with the challenges faced by the various indigenous communities and peoples for the recognition and protection of their TCEs/EoF, INTA strongly believes that in seeking to provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including enforcement measures, to prevent misappropriation, it would be inappropriate to create a separate system which would conflict with current intellectual property regimes, and in particular trademark law. Most countries’ trademark laws, to the extent that they are TRIPS compliant, provide adequate remedies within the statutory framework to prevent the registration and/or use of symbols or other marks or badges of origin if their use by the proposed registrant/user would create a likelihood of deception or confusion. Mechanisms also exist to prevent bad faith trademark registrations. Furthermore, there exists in most trademark systems an opportunity for the collective community to own and register marks to obtain the benefit of statutory protection. To the extent that existing and tested intellectual property systems have not been fully utilized by indigenous peoples for the protection of their TCEs/EoF, it appears counter-intuitive to create a new system over which there is no experience or knowledge of operation. It would seem more appropriate for, and INTA would encourage, indigenous communities being informed about and encouraged to use existing systems.

(INTERNATIONAL TRADEMARK ASSOCIATION - INTA)

The phrase “provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including effective enforcement measures to prevent the misappropriation of their cultural expressions and derivatives therefrom” means in effect to create a system of a new type of intellectual property right or a similar system, and is apparently substantive and normative. Therefore this clause is inappropriate as a POLICY OBJECTIVE, and its first half before “to prevent” should be deleted. In addition, in line with the wording of paragraph (viii) of the POLICY OBJECTIVE of document WIPO/GRTKF/IC/9/5 (Annex, p.4), the word “prevent” should be changed to “repress”. The phrase “control ways in which they are used beyond the customary and traditional context” should also be deleted, as this is also normative, and making possible such control could hinder the development of culture. We believe that a balanced protection of TCEs/EoF can sufficiently be achieved by “repressing the misappropriation”. However, the meaning of the term “misappropriation” itself is still unclear and needs further clarification. This is how paragraph (iv) would appear after the proposed changes:

Repress the misappropriation of traditional cultural expressions/expressions of folklore (iv) repress the misappropriation of their cultural expressions and derivatives therefrom and promote the equitable sharing of benefits arising from their use;

(JAPAN)

In bullet point (iv) we favour the inclusion of “distortion that may result from their use,” also this comment should be read in tandem with document 9/5 regarding “misappropriation” The heading statement now reads as, “Prevent the misappropriation of traditional cultural expression/ expression of folklore, and the distortion that may result from their use.”

(SOUTH AFRICA)

<p>v. Empower communities</p>	<p>Australia could support objective (v) to the extent that any rights given over TCEs/EoF are consistent with current national and international law and principles and would not affect the integrity of the current IP system.</p> <p>(AUSTRALIA)</p> <hr/> <p>The meaning of the expression “rights and authority” in this objective should be clarified. In keeping with the need for greater consistency, clarity and focus in the text overall, Canada repeats its previous suggestion that this objective be combined with objective (viii) dealing with encouraging community innovation and creativity and objective (xiii) dealing with enhanced certainty, transparency and mutual confidence. The three objectives are notionally related and should be read together.</p> <p>(CANADA)</p> <hr/> <p>disseminate intellectual property (IP) rights within communities</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>The phrase “empowers indigenous peoples and traditional and other cultural communities to exercise rights and authority” is normative and can mean in effect to create a system of a new type of intellectual property right or a similar system. Therefore we propose this paragraph to be changed to the following:</p> <p><i>Facilitate communities</i></p> <p><i>(v) be achieved in a manner that is balanced and equitable but yet effectively facilitates indigenous peoples and traditional and other cultural communities to exercise their existing rights and authority under existing laws over their own traditional cultural expressions/expressions of folklore.</i></p> <p>(JAPAN)</p> <hr/> <p>See paragraph 6.24 in the Appendix.</p> <p>(MAUI SOLOMON)</p>
<p>vi. Support customary practices and community innovation and creativity</p>	<p>To a large extent customary practices take place on a daily basis within Canada’s existing legal framework. As with other societal activities, such customary practices should not be contrary to the domestic laws of a Member state or its international legal obligations. In keeping with the comments made about the need for greater consistency and clarity in the text overall, Canada repeats its earlier suggestion that this objective be combined with objective (vii) dealing with the safeguarding of traditional cultures.</p> <p>(CANADA)</p> <hr/> <p>support customary practices and community cooperation</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p>
<p>vii. Contribute to safeguarding traditional cultures</p>	<p>Add “natural and cultural” before “the environment”</p> <p>(BRAZIL)</p> <hr/> <p>Canada notes that there is a difference in the heading of this draft objective “...Safeguarding Traditional Cultures” and the supporting narrative “...safeguarding of the environment...”. The objective could be interpreted as focusing on the physical environment in which TCEs are practiced. In light of our above noted comments that the proposed objectives should focus on the possible IP role to protect TCEs, this objective should be clarified to ensure that we are not talking about the general IP protection of the physical environment per se, but the general safeguarding of the cultural environment in which TCEs are practiced by individuals and communities.</p> <p>Subject to the above noted clarification, Canada believes that this objective and objective (vi) dealing with support for customary practices and community cooperation are notionally related and should be read together.</p> <p>(CANADA)</p> <hr/> <p>contribute to safeguarding traditional cultures</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>Objective (xi): Preclude unauthorised IP rights</p>

	<p>We note that the term “curtail” used in the earlier draft of the stated objectives has been replaced by the term “preclude”. The use of such mandatory language is of concern to INTA, particularly with the use of the word “derivatives” in this context. The term “derivatives” has no established meaning in trademark law and in this context is ambiguous in its scope for those who create trademarks and may draw their inspiration from various sources. The apparently infinite scope of the term “derivative” is problematic, particularly when the revised draft simultaneously seeks to provide specific groups certain absolute property rights in TCEs/EoF. If that term were adopted, a trademark owner would be required to determine what constitutes a TCE/EoF and then face with the uncertainty of the extent of protection of the infinite variations that may be legitimately considered to be “derivates”. For example, if the TCE comprises common geometric shapes or combinations of such shapes, to what extent would this inhibit the legitimate use of such shapes in other contexts, solely on the basis of a claim that the shapes are derivative? Only by including an assessment of such subsequent use on the basis of “likelihood of confusion” can the legitimate interests of all parties be properly defined and balanced.</p> <p>Furthermore, the terminology in relation to assessing the likelihood of deception or confusion is familiar to the trademark community, has an accepted meaning, and has been used effectively for many years to protect consumers. Similarly, there is significant experience in handling trademark applications which may have been made in bad faith.</p> <p>(INTERNATIONAL TRADEMARK ASSOCIATION - INTA)</p>
<p>viii. Encourage community innovation and creativity</p>	<p>The present draft objective could be further improved by ensuring greater consistency between its title and its corresponding description. While the title of the objective refers to encouraging community innovation and creativity, the description of the objective, however, is to reward and protect tradition-based creativity and innovation. If the underlying idea of the objective is to “encourage” community creativity and innovation, and such encouragement may take a variety of forms beyond rewards and protection, the same language should also be used in the text describing the objective in more detail.</p> <p>The draft objective includes the phrase “especially by”. As all communities create TCEs and all such TCEs should be, for the purposes of the IGC the subject matter of discussion, it is unclear why the words “especially by” should be included in the objective.</p> <p>In keeping with the comment about the need for greater consistency and clarity in the text overall, Canada also suggests that this objective, as amended, could be combined, as appropriate, with objectives (v) dealing with the empowerment of communities and (xiii) dealing with enhancing certainty and transparency. The three are notionally related and should be read together.</p> <p>(CANADA)</p> <hr/> <p>encourage community innovation and creativity</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p>
<p>ix. Promote intellectual and artistic freedom, research and cultural exchange on equitable terms</p>	<p>Include “according to the prior informed consent” after “promote”</p> <p>(BRAZIL)</p> <hr/> <p>As noted above, Canada is of the view that any outcome of the IGC to address the IP concerns associated with TCEs must always take account not only the concerns of creators of TCEs and their respective communities, but also users of TCEs and the broader public interest.</p> <p>Consistent with this view, Canada suggests that the objective reflect the fact that any exchange must also be equitable for the users of TCEs and reflect the broader interests of society.</p> <p>(CANADA)</p> <hr/> <p>promote intellectual and artistic freedom, research and cultural exchange on equitable terms</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>We support the inclusion of “ethical research” and “fair and equitable” in bullet point (ix).</p> <p>The statement now reads as, “Promote intellectual and artistic freedom, ethical research and cultural exchange on fair and equitable terms.”</p> <p>(SOUTH AFRICA)</p>
<p>x. Contribute to</p>	<p>As a multicultural society, Canada is a strong proponent of promoting cultural diversity. Cultural diversity is promoted not only by preserving TCEs, but also by allowing cultural interchange between individuals and</p>

<p>cultural diversity</p>	<p>between communities. Canada is in principle supportive of this policy objective to the extent that the objective recognizes that IP protection of TCEs may contribute to promoting and protecting cultural diversity, where appropriate, while still allowing for creative and intellectual exchange.</p> <p>(CANADA)</p> <hr/> <p>contribute to cultural diversity</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p>
<p>xi. Promote community development and legitimate trading activities</p>	<p>In its previous comments, Canada indicated that this objective was overly prescriptive. In particular, Canada expressed concerns that the draft objective suggested that all communities view all their TCEs as necessarily “collective asset[s]”. From domestic work undertaken to date, it is Canada’s understanding that not all Aboriginal people in Canada, for example, share this view with regards to all their TCEs. In some cases there may not be a consensus as to what the community and some of its members should or should not commercialize in respect of TCEs. Consequently, it may be more appropriate for the text to focus on facilitating traditional and cultural knowledge holders’ ability to identify and treat their expressions as collective assets if they so choose. Canada understands that such facilitation will require further discussion domestically and internationally to be effective. In this context, the draft objective could be amended to read as follows: “where so desired by communities and their members and/or by creators or holders of TCEs from the community, promote the use of traditional cultural expressions/expressions of folklore for community-based development, recognizing that they are an asset of communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations.”</p> <p>(CANADA)</p> <hr/> <p>promote community development and legitimate trading activities</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>Under bullet point (xi) we recommend the inclusion of “and exclude competitors from free exploitation” at the end of the statement.</p> <p>(SOUTH AFRICA)</p>
<p>xii. Preclude unauthorized IP rights</p>	<p>Objective (xii) is unclear as to who is an ‘unauthorised party’ and in what circumstances are they ‘unauthorised’? For example, is it a party who does not have authorisation by an Indigenous community to gain legal ownership over the IP rights or is it a party who misrepresents themselves as being Indigenous or a party who claims IP rights over a work which they pass off as being Indigenous in origin?</p> <p>Australia would be unable to support objective (xii) if any rights given in relation to TCEs/EoF were to prevail over the existing IP system. It could not support an objective which has the potential to undermine national and international IP laws. Further discussion is required about the meaning of this objective and its potential scope.</p> <p>(AUSTRALIA)</p> <hr/> <p>In our earlier comments, Canada stated that it was very important that this text clearly state that future development of this draft objective would need to be informed by the work of other WIPO committees as well as various international bodies in order to ensure global clarity and consistency.</p> <p>Canada further notes that this draft objective is unclear in terms of what is meant by the phrase “unauthorized parties”. If it means “unauthorized” by the communities that are the supposed holders of the TCEs, then the objective is not really about “precluding invalid IP rights. Canada would also note the draft objective raises other issues.</p> <p>(CANADA)</p> <hr/> <p>preclude the grant of unauthorized IP rights</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>We note that the term “curtail” used in the earlier draft of the stated objectives has been replaced by the term “preclude”. The use of such mandatory language is of concern to INTA, particularly with the use of the word “derivatives” in this context. The term “derivatives” has no established meaning in trademark law and in this context is ambiguous in its scope for those who create trademarks and may draw their inspiration from various sources. The apparently infinite scope of the term “derivative” is problematic, particularly when the revised draft simultaneously seeks to provide specific groups certain absolute property rights in TCEs/EoF. If that term were adopted, a trademark owner would be required to determine what constitutes a TCE/EoF and then face with the</p>

	<p>uncertainty of the extent of protection of the infinite variations that may be legitimately considered to be “derivates”. For example, if the TCE comprises common geometric shapes or combinations of such shapes, to what extent would this inhibit the legitimate use of such shapes in other contexts, solely on the basis of a claim that the shapes are derivative? Only by including an assessment of such subsequent use on the basis of “likelihood of confusion” can the legitimate interests of all parties be properly defined and balanced.</p> <p>Furthermore, the terminology in relation to assessing the likelihood of deception or confusion is familiar to the trademark community, has an accepted meaning, and has been used effectively for many years to protect consumers. Similarly, there is significant experience in handling trademark applications which may have been made in bad faith.</p> <p>(INTERNATIONAL TRADEMARK ORGANISATION - INTA)</p> <hr/> <p>This paragraph means in effect to create a system of a new type of intellectual property right or a similar system, and is apparently substantive and normative. Therefore this clause is inappropriate as a POLICY OBJECTIVE, and should be deleted.</p> <p>(JAPAN)</p>
<p>xiii. Enhance certainty, transparency and mutual confidence</p>	<p>It is not clear why document 9/4 refers to “mutual confidence” in the heading of this objective but “mutual respect” in the body of the objective.</p> <p>Canada supports the inclusion of government users in the dialogue with traditional knowledge holders. We therefore recommend inserting “governmental” after “educational” in this paragraph. The federal government holds IP workshops in indigenous communities, at the request of those communities, expressly for the purpose of exchanging information on IP law and policy, and on traditional knowledge and traditional cultural expressions.</p> <p>In keeping with the comment about the need for greater consistency and clarity in the text overall, Canada also suggests that this objective should be combined, as appropriate, with objectives (v) dealing with the empowerment of communities and (viii) dealing with encouraging community innovation and creativity. The three are notionally related and should be read together.</p> <p>(CANADA)</p> <hr/> <p>enhance certainty, transparency and mutual confidence between communities and the users of TCEs/EoF</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p>

III. COMMENTS ON GENERAL GUIDING PRINCIPLES	
ISSUES	COMMENTS
GENERAL COMMENTS ON GENERAL GUIDING PRINCIPLES	
General Comments	<p>Several objectives and guiding principles deal with the role of customary law and TCEs/EoF. Australia does not recognise a separate system of law based on Indigenous customary law but aspects of customary practices can co-exist to the extent that they do not conflict with established international and national laws and policies. Australia acknowledges Indigenous customs in a variety of ways including through the development of Indigenous protocols which demonstrate appropriate ways to work with Indigenous cultural heritage in accordance with principles of customary law and through programs such as the Indigenous Protected Areas Program.</p> <p>Australia is therefore able to support general guiding principles (a) and (h) in principle but only to the extent that they are consistent with international law and national law and policy.</p> <p>Australia considers that the background on principle (a) may be inconsistent with principle (c) and should be revised. The background to principle (a) as currently drafted would require that Indigenous communities could rely exclusively on customary law to protect TCEs/EoF and that this should not be constrained by external legal protection. Principle (c) on the other hand refers to TCEs/EoF being protected in a manner which is consistent with international and regional instruments. The scope of principle (a) requires further discussion.</p> <p>As previously stated, Australia strongly supports guiding principles (b)-(d) and considers that they are key elements in guiding the Committee's future work on the protection of TCEs/EoF.</p> <p>Australia supports the need to respect the rights of Indigenous people and other traditional communities but questions whether principle (g) is necessary given the scope of principle (c). Principle (c) requires that the Committee's future work be in accordance with rights under national and international law, which broadly covers the requirements under principle (g). If it is shown that principle (g) is broader in scope or has a different meaning to principle (c) it should be clarified but otherwise it should be removed.</p> <p>(AUSTRALIA)</p> <hr/> <p>The terms "measure(s)", "right(s)", "authority" and "legal protection" appear several times in the COMMENTARY ON GENERAL GUIDING PRINCIPLES section. Although these terms, as they are used in this section, possibly imply that a new type of right is to be given, there has been no consensus established on creating such a new type of right. In order to make clear this point, we would like to propose the insertion of the following NOTE in the COMMENTARY ON GENERAL GUIDING PRINCIPLES section.</p> <p><i>Note: The use of the terms "measure(s)", "right(s)", "authority" and "legal protection" in the COMMENTARY ON GENERAL GUIDING PRINCIPLES section does not prejudice the creation of a new type of right currently nonexistent under national and international laws.</i></p> <p>(JAPAN)</p> <hr/> <p>Largely, we are also happy with the "General Guiding Principles". Here, we place particular importance on that the Commentary to the Principle of responsiveness to aspirations and expectations of indigenous peoples clarifies that the responsiveness includes respect for indigenous customary laws. We have concern, however, with the Principle of balance, as explained in the Commentary. Certainly, there is a need to take into account also the interests of TCE-users. Still, interests can never be balanced against rights of TCE-holders, such as for example to their right to consent or not consent. Naturally, a right – particularly a human right – always takes precedent over an interest.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>Some of the principles in this section include issues that indigenous peoples have been advocating for a number of years. It is crucial that the protection of TCEs/EoF reflect the aspirations and expectations of indigenous communities and well as their customary laws and protocols. SPFII suggests that protection measures should be consistent with relevant binding legal instruments, United Nations declarations and human rights instruments.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>We would like to flag the need for the inclusion of the principles of governance which is consistent with our comments on 9/5.</p> <p>(SOUTH AFRICA)</p>

COMMENTS ON SPECIFIC GENERAL GUIDING PRINCIPLES

<p>a. Responsiveness to aspirations and expectations of relevant communities</p>	<p>This guiding principle covers a number of issues ranging from the recognition of indigenous and customary laws and protocols to the prevention of certain acts, such as those that are insulting, derogatory or offensive. Our comment is focused on the issue of indigenous and customary laws and practices, a topic on which Canada commented at the eighth session (footnote: WIPO/GRTKF/IC/8/15, p. 48). Countries taking part in the IGC have a range of experiences with respect to the relationship between indigenous and customary laws and protocols and their respective national legal systems. It is our impression that the words have different meanings and are used in different ways among the participants in the IGC. It would be useful to determine whether this is indeed the case, and whether a common understanding can be found. Interventions on this issue by Canada and by Aboriginal people from Canada who participate in this forum have tended to focus on the application of the laws and legal traditions of indigenous peoples. Canada believes that much more work is required in relation to the issue of indigenous and customary laws and protocols at the international level. We look forward to learning more about the experiences of and challenges faced by other countries, indigenous people from Canada and other places, and to further work by the Secretariat on this matter. Simply calling on Member States, as if it could be done easily as a matter of course, to recognize and apply indigenous and customary laws and protocols in order to protect TCEs cannot succeed without a better collective understanding of what this entails.</p> <p>(CANADA)</p> <hr/> <p>responsiveness to aspirations and expectations of communities</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>The terms “positive and defensive protection measures” and “measures for the legal protection of TCEs/EoF” might imply that a new type of right be created and given to holders and custodians, but there is no consensus on creating such a new type of right and this issue has yet to be discussed. We understand that there are some existing rights, under customary laws or legal practices, which can deserve respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.</p> <p>(JAPAN)</p> <hr/> <p>See paragraphs 6.17-6.19 in the Appendix.</p> <p>(MAUI SOLOMON)</p> <hr/> <p>In bullet point (a) we recommend the deletion of “relevant” and support the inclusion of indigenous and local. The bullet point now reads as, “Responsiveness to aspirations and expectations of indigenous and local communities.”</p> <p>We recommend the deletion of “traditional” in support of “indigenous.” Our assertion is based on the premise that there is a horizontal resonance with global trends that “Indigenous” is a term used on many international platforms and fora. There is also a global momentum for the development and protection of Indigenous Knowledge, which South Africa can contribute to, and benefit from. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (June 1993), the Julayinbul Statement on Indigenous Intellectual Property Rights (November 1993), and the Kari-Oca Declaration and Indigenous Peoples Earth Charter (May 1992) make explicit statements on indigenous knowledge rather than traditional knowledge. Although these statements, unlike the ILO Convention 169, do not have binding force, they nonetheless provide an important discourse that can guide terminology. By introducing relevant provisions concerning Indigenous Knowledge, South Africa could provide some lead in the context of international progress in the implementation of a legal binding instrument.</p> <p>(SOUTH AFRICA)</p>
<p>b. Balance</p>	<p>Considering that the main guiding principle concerning the protection of TCE/EF is the right to deny access to these expressions, it is not acceptable to adopt the principle of balance between the interests of the holders of the expressions and those of the users.</p> <p>(BRAZIL)</p> <hr/> <p>Canada is in principle supportive of this guiding principle, although we note a diversity of views on what we mean by balance. Some Member States and some observers have, for example, expressed concerns that this principle may tilt any future action away from the interests of communities regarding the protection of their TCEs. For the most part IP law and policy involves more than just creating new IP rights. It is also about taking into account the users of works, for example, and the broader public interest. Future drafts of document 9/4 should clarify the difference, if any, between a “principle of balance” and a reference to an “equitable balance” in the commentary section of the document.</p> <p>(CANADA)</p>

	<p>balance</p> <hr/> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <p>The term “right” in Paragraph (b) of the COMMENTARY might imply that a new type of right be created and given to holders and custodians, but there is no consensus on creating such a new type of right and this issue has yet to be discussed. We understand that there are some existing rights, under customary laws or legal practices, which can deserve respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.</p> <p>(JAPAN)</p>
<p>c. Respect for and consistency with international and regional agreements and instruments</p>	<p>Canada is in principle supportive of this guiding principle. National IP regimes are often based on international IP agreements that have evolved over many years and in some cases many decades and often form the basis of domestic IP laws and policies. In this context, Canada noted in its earlier response to document 7/3 that it has consistently stated at the WIPO that any possible policy approaches that may be developed in the IGC for the protection of TCEs would need to be consistent with the mandate of this Committee as well as with Member States’ existing obligations in international treaties relating to IP and potentially other international agreements that may impact IP right and obligations.</p> <p>Canada could not support any outcome from the IGC that would impact our ability to respect our international obligations, IP or otherwise, including those dealing with human rights. In a similar manner, this general guiding principle should not suggest that any outcome of the IGC would bind a non-Member State to any specific instrument. To this end, Canada believes that this objective should be qualified with “relevant” or “applicable”, given that there is not a unique combination of international obligations, but a mosaic that may vary from state to state.</p> <p>In keeping with the need for greater consistency, clarity and focus in the text overall, Canada also suggests that this general guiding principle be combined with guiding principle (g) that refers to the principle of respect for the rights and obligations towards indigenous peoples and other traditional communities. The two are notionally related and should be read together.</p> <hr/> <p>(CANADA)</p> <hr/> <p>respect for and consistency with international and regional agreements and instruments</p> <hr/> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>The Federation does not wholly object to this principle, but would like to note that where international agreements are counter to Māori and other indigenous rights of protection and use then there needs to be a mechanism to address these issues. Protection for Maori may be at the National level.</p> <hr/> <p>(FEDERATION OF MĀORI AUTHORITIES)</p> <hr/> <p>We once again further recommend under this section the inclusion of “national” in bullet point (c). The statement now reads as, “Principle of respect for and consistency with international, regional and national agreements and instruments.”</p> <p>(SOUTH AFRICA)</p>
<p>d. Flexibility and comprehensiveness</p>	<p>Canada is generally supportive of the need for flexibility in how we address the concerns associated with TCEs. However, Canada expresses caution about seeking to be overly driven to provide “comprehensive” protection for TCEs. For example, as pointed out by an academic, copyright protection does not seek to give authors perfect control over their copyrighted works, but a balanced right (footnote: Lawrence Lessig, <i>The Future of Ideas: The Fate of the Commons in a Connected World</i>, Random House, New York, 2001, pp. 109-110). Similarly, “comprehensiveness” in terms of protecting TCEs needs to address the concerns of creators of TCEs and their communities while also taking into account the concerns of users of TCEs and the broader public interest.</p> <hr/> <p>(CANADA)</p> <hr/> <p>flexibility and comprehensiveness</p> <hr/> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>There is an inconsistency in the document WIPO/GRTKF/IC/9/4 in that while it is stated in the principle of flexibility and comprehensiveness that “effective and appropriate protection may be achieved by a wide variety of legal mechanisms”, the SUBSTANTIVE PROVISIONS lays out a framework of specific legal mechanism.</p>

	<p>Moreover, reference to “the draft provisions” in the second subparagraph of this paragraph seems to prejudice certain specific contents for SUBSTANTIVE PROVISIONS, and this is out of line with our position that we should discuss SUBSTANTIVE PROVISIONS only after we have reached consensus on the POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES. Therefore, in line with the commentary on the principle of flexibility and comprehensiveness in the document regarding protection of traditional knowledge, WPO/GRTKF/IC/9/5 (p.10), we propose that the second subparagraph be changed to the following:</p> <p><i>The draft provisions should therefore be broad and inclusive to allow sufficient flexibility to national and regional authorities to determine the appropriate means of attaining the POLICY OBJECTIVES in accordance with the GENERAL GUIDING PRINCIPLES at the national or regional levels. The POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES themselves should not be understood to prejudice the establishment of any specific means of legal protection.</i></p> <p>(JAPAN)</p> <hr/> <p>As addressed in General Comments, the Federation would like to emphasize the need for strong national protection, with Māori representation in the development.</p> <p>The Federation would also like to address that priority measures would need to be included as the western system of IP does not adequately cover Māori cultural heritage.</p> <p>(FEDERATION OF MĀORI AUTHORITIES)</p> <hr/> <p>See paragraphs 6.20-6.21 in the Appendix.</p> <p>(MAUI SOLOMON)</p>
<p>e. Recognition of the specific nature and characteristics of cultural expression</p>	<p>It is not clear whether the reference to “special” measures refers to the proposed new instrument <i>per se</i> or the community. Interestingly, the last sentence emphasizes the individual while in most of the text the reference to TCEs is to the community. Canada also notes that this guiding principle raises an issue that Canada has raised before but has not been fully discussed at the IGC, namely the impact of any outcome from the IGC to protect TCEs on immigrants who carry with them and practice their TCEs in a new homeland (footnote: WIPO/GRTK/IC/6/14, p. 16). As one of the largest <i>per capita</i> recipients of immigrants in the world, Canada believes that it is important for the IGC to consider the rights of individual practitioners and users of TCEs who immigrate to another community.</p> <p>(CANADA)</p> <hr/> <p>recognition of the specific nature and characteristics of cultural expressions</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>The term “special measures for legal protection” appears in this paragraph, but there is no consensus on creating a new type of right.</p> <p>(JAPAN)</p>
<p>f. Complementarity with protection of traditional knowledge</p>	<p>See our comments note above that this general guiding principle should be restored as a policy objective.</p> <p>(CANADA)</p> <hr/> <p>Complementarity with protection of traditional knowledge</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>The term “legal protection” appears twice in this paragraph, but there is no consensus on creating a new type of right or a new mechanism of legal protection. The second sentence of this paragraph (“These draft provisions concern...”) seems to refer to the content of the SUBSTANTIVE PROVISIONS. However, SUBSTANTIVE PROVISIONS should only be discussed after we have reached consensus on the POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES. Therefore the second sentence should be deleted.</p> <p>(JAPAN)</p>
<p>g. Respect for rights of and obligations towards indigenous peoples and other</p>	<p>Member States are expected to comply with their international legal obligations, whether directed at indigenous or non-indigenous peoples. It is also unclear why there is no reference to cultural communities in this guiding principle.</p>

<p>traditional communities</p>	<p>In keeping with the need for greater consistency, clarity and focus in the text overall, Canada also suggests that this guiding principle be combined with guiding principle (c) dealing with respect for and consistency with relevant or applicable international and regional agreements and instruments. The two are notionally related and should be read together.</p> <p>(CANADA)</p> <hr/> <p>respect for rights of and obligations towards indigenous peoples and other traditional communities</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>It is unclear whether the term “indigenous rights” is included in the category of “rights under customary laws”. We understand that there are some existing rights, under customary laws or legal practices, which can deserve respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.</p> <p>(JAPAN)</p> <hr/> <p>See paragraph 7.2 in the Appendix.</p> <p>(MAUI SOLOMON)</p>
<p>h. Respect for customary use and transmission of TCEs/EoF</p>	<p>In large measure communities are free to exercise their customary practices in Canada to the extent that they do not contravene domestic laws or Canada’s international legal obligations. For example, some comprehensive claims agreements include provisions addressing lawmaking by an indigenous government respecting the language and culture of its indigenous constituents, subject to certain limitations (e.g. Canada’s Charter of Rights and Freedoms, a constitutional document) and certain exceptions (IP and other laws of national importance).</p> <p>(CANADA)</p> <hr/> <p>respect for customary use and transmission of TCEs/EoF</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>With regard to the term “customary laws and practices”, we would like to confirm that rights under customary laws are not necessarily considered legal rights in foreign jurisdictions. With regard to the term “legal protection”, there is no consensus on creating a new type of right or a new mechanism of legal protection.</p> <p>(JAPAN)</p> <hr/> <p>In bullet point (h) we favour the inclusion of “practice.” The statement now reads as, “respect for customary practice, use and transmission of TCE’s/ EoF</p> <p>(SOUTH AFRICA)</p>
<p>i. Effectiveness and accessibility of measures for protection</p>	<p>This principle should not be interpreted as imposing on government any additional financial obligations.</p> <p>(CANADA)</p> <hr/> <p>effectiveness and accessibility of measures for protection</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>With regard to the term “measures for the acquisition, management and exercise of rights”, there is no consensus on creating a new type of right or a new mechanism of legal protection.</p> <p>(JAPAN)</p>
<p>j.</p>	<p>The “principle of national treatment” and the “principle of the most favored nation”, enshrined in the TRIPS Agreement (Articles 3 and 4), should be included</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p>

IV. COMMENTS ON SUBSTANTIVE PRINCIPLES	
ISSUES	COMMENTS
GENERAL COMMENTS ON SUBSTANTIVE PRINCIPLES	
General Comments	<p>The Saami Council is largely in agreement with most of the Substantive Provisions.</p> <p>(SAAMI COUNCIL)</p>
COMMENTS ON SPECIFIC SUBSTANTIVE PRINCIPLES	
Article 1. Subject matter of protection	<p>Article 1 (a)(bb) sets out as one of the criteria for the protection of TCE/EF the idea that the expressions be “characteristic of a community’s cultural and social identity and cultural heritage”. The use of the term “characteristic” suggests that TCE/EF must be both “authentic” and “genuine”. Considering that the Brazilian experience recognizes the dynamic and iterative (in the sense that it represents a process) nature of the cultural expressions, this idea should be reflected in the draft, contrary to the idea conveyed by the current version of the document.</p> <p>Brazil would appreciate some clarification as to the meaning of “tacit consent” (“Criteria for protection, ii) in the text of the comments, as well as possible means to assess the actual occurrence of such “consent” in concrete cases.</p> <p>Brazil does agree with the comment presented under item (iii) according to which “expressions that may characterize more recently established communities or identities established would not be covered.”</p> <p>(BRAZIL)</p> <hr/> <p>In addition to the concepts covered by subject matter for protection, the following should necessarily be included:</p> <p>(ii) in addition to songs and instrumental music, “the characteristic whistles and sounds resulting from ancestral instruments” could be included in musical expressions. It is also necessary to protect the musical instruments specific to each community.</p> <p>“Architectural constructions and works” could be included in (iv).</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>It is noted in the commentary that accompanies this section that further consideration may be given to deletion of the criterion to be applied to determining what comprises a TCE/EoF (paragraph bb) on the basis that it may impose too heavy a burden of proof on communities. INTA notes that the acquisition of rights as foreshadowed by this document - that is, to be used to “preclude” other parties’ activities, surely must be based on the ability to establish some objective and clearly articulated criterion. Anything less creates confusion and uncertainty and does not have the requisite level of transparency of process.</p> <p>(INTERNATIONAL TRADEMARK ASSOCIATION – INTA)</p> <hr/> <p>Article 1(a)(IV), Handicraft is a general term so the paragraph should be amended as follows:</p> <p>(IV) Tangible expressions, such as Productions of Art and/or handicrafts....</p> <p>In the last line the word “handicraft” should be deleted.</p> <p>(IRAN, ISLAMIC REPUBLIC OF)</p> <hr/> <p>We can support Article 1 and Article 2 as drafted, but with regard to the Commentary, we have to underline that the notion that our rights to TCEs should somehow be vested in a governmental office or agency is completely unacceptable.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>Under the title Criteria for Protection, section iii, it is stated that “Expressions that characterize more recently established communities or identities would not be covered”. It is acknowledged that this term refers specifically to the statement “where the collective has developed only in recent times, such as with modern religious sects”.</p>

	<p>SPFII suggests this issue requires further clarification because the situation of indigenous peoples is not static and is always changing. For example, migration of indigenous communities from their homelands across borders often results in the formation of new communities. Would the TCEs and EoF of these communities not be afforded protection?</p> <p>Under the title Choice of Terms, SPFII agrees that there should be some flexibility in regards to terminology. However, detailed decisions on terminology at the national and regional level should be undertaken in partnership with indigenous peoples and communities.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p>
<p>Article 2. Beneficiaries</p>	<p>Compliance must be retained with the observations on the document in the sense that communities are made up of individuals, such that the regulation and collective control of TCEs/EoF ultimately benefit the individuals who form part of the relevant community. Thus, in practice it is individuals who benefit in accordance with customary laws and practices.</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>Article 2, in the chapeau after the cultural, the words “or local” should be added.</p> <p>(IRAN, ISLAMIC REPUBLIC OF)</p> <hr/> <p>See paragraph 6.33 in the Appendix.</p> <p>(MAUI SOLOMON)</p> <hr/> <p>We can support Article 1 and Article 2 as drafted, but with regard to the Commentary, we have to underline that the notion that our rights to TCEs should somehow be vested in a governmental office or agency is completely unacceptable.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>We take cognizance of footnote 23 on page 16. However we implore the WIPO secretariat to expedite its efforts in defining “Indigenous Peoples.”</p> <p>(SOUTH AFRICA)</p>
<p>Article 3. Acts of misappropriation (Scope of Protection)</p>	<p>Article 3(a): Enforcement of rights by the custodians of TCE/EF shall not be conditioned upon registration.</p> <p>Although reference is made to PIC under item (a), there is no such reference under the other items. Brazil understands that the requirement for PIC should be incorporated for all the other categories of expressions, regardless of previous registration.</p> <p>(BRAZIL)</p> <hr/> <p>Intrinsically speaking, it is necessary to legislate in favour of the least developed communities in the face of users who exploit TCEs/EoF, with the guarantee that governing offices promote the dissemination of these resources, and ultimately society in general benefits and communities provide their consent.</p> <p>Although in referring to “acts of misappropriation” the Article defines such acts, the sanctions to which those who misappropriate TCEs/EoF would be subject should be mentioned.</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>We note the reference first to TCEs/EoF “which have been registered or notified as referred to in Article 7”. INTA’s experience with alternate registers, such as registers of well-known trademarks, has highlighted concerns of trademark owners in establishing separate recordal systems. While transparency and certainty are important, practices in the establishment of such registries need to be considered. For this reason, it is INTA’s preference that in relation to indicia that may form trademark material, the established trademark registers be used for protection purposes. However, if separate registers are pursued, we urge that guidance be sought from those WIPO members who have experience with both the establishment of registers of well-known marks and the registration systems adopted by many States in relation to the protection of geographical indications. While INTA acknowledges that different standards have been sought to be established in relation to varying levels of disclosure by indigenous people of their TCEs/EoF, we note that the revised draft continues to seek criminal and civil sanctions in relation to such symbols which have not been notified as of significance (Article 3(b)(ii)). It seems extraordinary that such sanctions could be envisaged without adequate disclosure and establishment of rights. There are already sufficient avenues for protection for false and misleading conduct in the legal system and no need to seek to introduce</p>

	<p>additional penalties without requiring full disclosure of the rights upon which there is reliance.</p> <p>Furthermore, we note with concern the continued reference to “or derivatives thereof” particularly in the context of words, signs, names and symbols. Because these are the kinds of signs that trademark owners are most likely to seek to adopt, the use of the term “derivatives” in this context without further limitation again causes uncertainty.</p> <p>Article 3(b)(ii) contains a caveat – “any distortion, mutilation or other modification of, or other derogatory action” – which implies again a subjective assessment. To provide for criminal sanctions against an action for which there is no notice and appears to be indeterminate creates unnecessary uncertainty and would seemingly contravene any notion of due process. Concern continues in relation to that material which is to be kept secret (Article 3(c)). As a matter of natural justice, it seems that no rights should be enforced against a third party who has, without malicious intent, adopted a TCE/EoF with no knowledge that it existed, as protection for it has not been sought. Having made a decision to retain certain elements as secret, to then seek enforcement over third parties using such materials in good faith puts an unfair, unnecessary and unworkable burden on intellectual property rights holders and undermines the role that such systems have within the commercial context. While it is noted that the mechanism for identification or registration is to be left for regional determination, INTA reiterates its concerns regarding the setting up of any kind of regional system which would be seen to grant rights without taking into consideration the established intellectual property principles of territoriality, exclusivity, priority and, where applicable, notice.</p> <p>(INTERNATIONAL TRADEMARK ASSOCIATION – INTA)</p> <hr/> <p>Article 3(a) line 4 after the relevant Community, the words “and the owner” should be added. And Article 3 (c) after communities the words “and the owner” should be added.</p> <p>(IRAN, ISLAMIC REPUBLIC OF)</p> <hr/> <p>See paragraph 6.12 in the Appendix.</p> <p>(MAUI SOLOMON)</p> <hr/> <p>With regard to Article 3, we can sympathize with the three layer approach proposed. Even though this is not the way we would ideally want it to be, today, being realistic, a protection system for TCEs, agreeable to all, probably will have to distinguish between various forms of TCEs, based on the value and importance of that particular element to the originator of the TCE. We commend the inclusion of the reference to free, prior and informed consent, suggesting a right for indigenous peoples to exclusively determine over the central elements of our cultural heritage. That said, the Saami Council firmly believes that the lists contained in Article 3 (a) (i) and (ii) need to be enlarged, so that protection is extended to a larger part of indigenous TCEs, that conventional IPRsystems0 regard to be in the so called public domain. Further, we continue to have concern with the fact that protection for TCEs is made subject to registration in a public register. At least it should be clarified that the provision does not apply, should it be cultural sensitive for the people in question to register that particular element.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>We once again reiterate our recommendation for the inclusion of “distortion” under this article. The heading of the article now reads as “ACTS OF MISAPPROPRIATION AND DISTORTION”</p> <p>Under (b)(i) we suggest the inclusion of the following statements:</p> <ol style="list-style-type: none"> 1. That no willful representation of the traditional cultural expression/ EoF 2. That no distortion of the expression in a manner prejudicial to honour, dignity or cultural interest of the indigenous and local community. <p>(SOUTH AFRICA)</p>
<p>Article 4. Management of rights</p>	<p>The draft article should address those cases in which an expression is under the custody of more than one community.</p> <p>The provision requiring compliance with PIC should turn redundant the expression “when required in these provisions” (item (a))</p> <p>(BRAZIL)</p> <hr/> <p>Authorization should necessarily be requested in the first instance from an individual community. The acts of a governing authority, which grants an authorization, should involve the members of communities.</p>

	<p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>Article 4(a) line 3 after agency acting, the words “on the best of national Law” should be added.</p> <p>Article 4(i) line 2 after the decision-making, the words “in the framework of national procedures” should be added.</p> <p>Article 4(2), after the word directly, the words “or indirectly in accordance with National Law” should be added.</p> <p>(IRAN, ISLAMIC REPUBLIC OF)</p> <hr/> <p>See paragraph 6.33 in the Appendix.</p> <p>(MAUI SOLOMON)</p> <hr/> <p>With regard to Article 4, we take comfort in the fact that the Commentary clarifies that a government agency only has a role to play in the management of TCEs if the people from which the TCE originates consents to such a process. We are concerned, however, that the actual Article 4 – referring merely to “Consultation” – does not clearly convey this demand for consent. The article needs to be redrafted accordingly.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>The role of an “Agency” acting at the request and on behalf of relevant communities is an important concept but the question remains as to how realistic it would be for an agency to act on behalf of indigenous peoples and communities. In this regard, the reservations expressed by Colombia and the Saami Council are supported by SPFII.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>Under this article we suggest the following provisions be made regarding:</p> <ol style="list-style-type: none"> 1. the source/ place and or community from where the traditional cultural expression/ EoF utilized has been derived; 2. when a community cannot be identified who are owners of identified traditional cultural expression/ EoF; 3. when traditional cultural expression/ EoF straddles countries 4. when a particular traditional cultural expression/ EoF in a given area may not be same in another community. <p>(SOUTH AFRICA)</p>
<p>Article 5. Exceptions and limitations</p>	<p>Item (a)(iii): Delete the items “reporting news and current events” and “incidental uses” as these cases refer to too broad instances.</p> <p>(BRAZIL)</p> <hr/> <p>No restriction of any kind should be placed on creativity, artistic freedom, cultural exchanges or ingenuity. Protection should be limited in that those who are not authors of TCEs/EoF should not request protection for such expressions. The protection being provided by WIPO in the drawing-up of appropriate contracts, summary lists of intellectual property and other guidelines and codes of conduct for museums, archives and cultural heritage inventories is of interest.</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>On Article 5, the Saami Council finds ourselves in agreement with para. (a) (i) and (ii) as well as para. (b). The list in para. (a) (iii) is too inclusive, however. The reference to research is particularly troublesome, given that indigenous peoples traditionally have had – and continuous to have - a lot of problems with research institutions.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>SPFII agrees that exceptions and limitations in regards to copyright laws in general should be established by member states however, it should also be established in consultation with indigenous peoples and communities.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>While we broadly endorse sections and subsections of this article we are concerned with phrase “incidental use,”</p>

we request the secretariat of WIPO to define incidental use as a footnote. We make the argument that in its broadest sense it could imply willful misappropriation/misuse.

We fully support the insertion of “customary law” in (a)(i) given that South African constitution provides for customary law and that the courts in South Africa apply customary law when the law is applicable.

(SOUTH AFRICA)

a. Illustration for teaching and learning: Indigenous and local communities may have few objections to sharing some of their knowledge for education. A Tulalip legislator in Washington State, for example, introduced legislation which has been adopted mandating the teaching of tribal history and culture in the public schools. The Tribes in Washington State largely see the value of sharing parts of their history and culture for wider education for intercultural understanding and sharing models for a sustainable society.

However, they do have concerns that the materials are limited to the contexts in which they are shared. The Tulalip Tribes has shared with the WGTKGR an instance where a tribal elder shared a personal story with a classroom. The elder gave permission to the teacher to tape the story, thinking that it would be used by the teacher to prepare lessons related to the story. The teacher transcribed the story and published it. The elder was highly offended, since it was her personal story over which she held custodianship, and in the traditional context could only be told by her. Although people hearing the story were not allowed to carry it in their memory and draw lessons from it, Tulalip custom forbids that they repeat the story to others.

b. Non-commercial research or private study: These activities can become conduits for expanding the availability of TCEs/EoFs to an ever-expanding sphere of third-party users, and can work against cultural privacy or cultural secrecy. Non-commercial research commonly leads to publication, outside of the direct control of the original holders of the TCEs/EoFs.

Without extra legal provisions, published TCEs/EoFs then enter the Western copyright system, which inexorably leads to the public domain. Widely published and distributed information can change the legal presumptions about the status of the TCEs/EoFs, whether or not it was the intent of the original knowledge holders to make this information widely and publicly available. Greater availability also makes it more difficult to traditional knowledge holders to defend any recognized rights to control or benefit from the use of their TCEs/EoFs.

This broad principle may fail on two counts related to prior informed consent. The first issue concerns the authority under which research materials are obtained (who has given the consent). Many researchers, for example, have obtained access to TCEs/EoFs through personal relationships with individual tradition holders. These individuals are embedded in a larger society that may claim collective rights of control over the knowledge. The collective governance system may allow individual tradition holders to disclose knowledge, or it may not.

The second leading issue is the determination of the circumstances of consent. Many indigenous and local communities live in primarily oral cultures. They may have had little, if any, exposure to the non-indigenous academic and publishing system. Unless publishing issues and potential third party access and use issues are addressed, consent is highly problematic. Holders of TCEs/EoFs may not be aware that published and disclosed knowledge takes on a life of its own and has a legal career towards the public domain.

The Tulalip Tribes has no objection to any indigenous or local community that makes the decision, through prior informed consent, to disclose, share, and allow its knowledge to be used for study or research. The rights acquired by researchers or students, and by third parties that encounter their published works should be limited unless released by express consent from the tradition holders.

c. Criticism or review: The objections here are covered in the objections raised above.

d. Reporting news or current events: In many cases, this may not be a problem. But a specific case should clarify potential problems.

In 1984, a reporter from the Santa Fe New Mexican flew over a sacred ceremony of the Pueblo of Santo Domingo, took pictures, and published them in the local newspaper labeled as a pow-wow (example discussed at length in Susan Scafidi, *Who Owns Culture?* Rutgers University Press, 2005 and Daniel Wugner, *Prevention of Misappropriation of Intangible Cultural Heritage through Intellectual Property Laws*, in J. Michael Finger and Philip Schuler (eds.), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries*. World Bank, 2004).

The Santo Domingo Pueblo filed suit. Calling the sacred ceremony a “pow-wow” was highly offensive. But more damaging was that the overflight disrupted the ceremony and reduced its effectiveness, so that in the mind of the Pueblo members it damaged a spiritual ceremony required to renew their relationship with certain spiritual forces for the coming year. The publication of the photographs violated customary law related to this secret ceremony. The case was settled out of court, but the Pueblo probably would have lost any claim based on intellectual property protection. The ceremony was secret, and the Pueblo had taken pains to keep it so. But the fact that it was visible from above meant that the courts would have ruled that since there was no copyright in the ceremony, there could be no remedy since it was performed in the public domain as the roof was open and unprotected. The open roof, however, is necessary for communication with the Creator and tribal spirits. To protect the ceremony,

the Pueblo would have to alter custom to fit the Western IPR law and cover their ceremonial space.

e. Legal proceedings: Although TCEs/EoFs must necessarily be made available in legal proceedings, this needs to be limited. Many countries have laws that make legal proceedings part of the public record and public domain, so that in the act of defending rights indigenous and local communities may in fact be putting their TCEs/EoFs at greater risk of disclosure. States should be encouraged to ensure that any evidentiary use of TCEs/EoFs in tort disputes should be protected from public access and exempt from public domain laws.

f. Archival exceptions: Indigenous and local communities often do not have objections for archives of their TCEs/EoFs, if they are in control of access, care and follow-on uses of archived materials. The Tribes in the United States have collaborated with the Library of Congress, the Smithsonian Institution, the National Museum of the American Indian, and other institutions to archive and display many tribal TCEs/EoFs.

The archiving of some TCEs/EoFs may be objectionable. Indigenous and local communities may not be simply concerned with the commercial/non-commercial distinction, but are also concerned over the appropriateness of archiving. Customary law, for example, may forbid the storage of some forms TCEs/EoFs, particularly those that are highly sacred, secret, or restricted to certain individuals and practice.

It may be highly offensive, for example, to film, digitize and archive certain sacred ceremonies, dances, songs, and paintings. Many Navajo, for example, make sand paintings for trade or sale. But some sand painting are highly sacred, and are destroyed after use in ceremony. Archiving examples of these may be offensive, or even dangerous, as they involve strong spiritual powers.

A national urge to preserve national patrimony has in the past been used to justify archiving many TCEs/EoFs. Tradition holders in some cases disagree that these are part of the national patrimony. As the holders of the traditions, they believe they are the ones to make the decisions about their TCEs/EoFs. Some tribal elders have expressed the view that it is better for some knowledge to not be passed on or archived if the spiritual and traditional conditions for its transfer to the next generation are not met. It is a common indigenous worldview that this knowledge is not truly lost, as it comes through revelation by the Creator. If conditions are not right, the Creator may temporarily withdraw the gifts of knowledge, but these will be given again once the conditions are right.

In summary, the archiving exception should not be used to allow archiving activities that are against the wishes of the holders of the TCEs/EoFs when these can be identified, and there should be provisions for holders of TCEs/EoFs to challenge and claim rights to materials held in archives.

g. Incidental uses: These issues have been mostly addressed in previous and following comments. It will only be added that the use of even small portions of TCEs/EoFs and their incorporation into derivative works may be offensive and violate customary laws.

General Comments: For the Tulalip Tribes, the acceptability of the proposed exemptions will largely depend on national interpretation of the terms contained in the operational paragraph that places restrictions on the exemptions:

“provided in each case that such uses are compatible with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community.”

“Fair practice”, if equated with fair use, can allow users of TCEs/EoFs to extract the ideas contained in the productions of indigenous and local communities as opposed to their expressions. This may be difficult for courts to determine, and it is likely that the presumption in national systems will often reflect national concepts of “fair use.” The idea/expression defense could possibly be used to justify significant amounts of appropriation.

On the issue of acknowledgement, it should be recognized the indigenous and local communities often seek control over their knowledge, rather than acknowledgement. The Tulalip Tribes has made a previous intervention that emphasizes that the concept of the public domain is foreign to many indigenous and local communities. Identifying the source communities as original holders of TCEs/EoFs is difficult, but not impossible. In the realm of physical objects, the United States has adopted provisions in the Native American Graves and Repatriation Act (NAGPRA) that has provisions for Tribes to petition for custodianship of human remains and sacred objects. They are required to present evidence to demonstrate direct historical connection to the human remains and sacred objects. Substantial portions of the objects cannot be affiliated with living descendents, and these fall outside of the scope of protection. Similar provisions could be modelled for TCEs/EoFs, allowing for the development of annexures to exceptions to exceptions.

The “offensiveness” standard is silent on who determines offensiveness. Those using TCEs/EoFs often claim that they are honoring traditions and their derivative works are in the spirit of cultural traditions. Tradition holders may see the derivative uses in a different light.

Under customary law, many TCEs/EoFs are restricted to particular individuals, families, clans, moieties or other locally-defined groupings. They may traditionally be expressed at particular times of the year or in very narrow circumstances.

	<p>Differences in interpretation in the United States have been dealt with through the “Canons of Construction”, interpretive guidelines courts use to reach judgements. On strong principle in treaty interpretation is that treaties are to be interpreted according to how the tribes negotiating the treaties understood them at the time. In cases where this cannot be determined, the courts use an interpretation that is most favorable to the tribes.</p> <p>Other commentators have voiced concerns about the need to preserve fair use, free speech, freedom of expression to create national and global reservoirs of ideas and expressions from which further creations and innovations may be derived. Indigenous and local communities have expressed great concern over the imposition of external standards of fair use regarding knowledge governed by local traditions.</p> <p>Free speech is partially a red herring, as many countries have defined a number of categories of speech that are forbidden, such as hate speech, seditious or treasonous expressions, slander, panic speech, and so on. Speech and expression is regulated in most, if not all, national cultures in many ways. The general rule is that limitations are carefully considered, not made overbroad, serve express purposes and not be made arbitrarily and capriciously.</p> <p>The Tulalip Tribes believes that the limitations of fair use, freedom of speech and freedom of expression TCEs/EoFs argued above meet these criteria. They are narrow because they are not available to all citizens and generally apply to minority cultures within national systems.</p> <p>Many nations recognize indigenous rights to self-governance, and some recognize a stronger principle of tribal sovereignty based on prior rights to self-governance.</p> <p>Resolution 2006/2 of the Human Rights Council contains a number of statements that reinforce this status for all indigenous peoples. Articles 11 and 31 of the current United Nations Draft Declaration on the Rights of Indigenous Peoples are particularly significant:</p> <p>Article 11</p> <ol style="list-style-type: none"> 1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs. <p>Article 31</p> <ol style="list-style-type: none"> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights. <p>The Tulalip Tribes does not believe that those objecting to the proposed limitations on standard exceptions have made their case that: a. The TCEs/EoFs of extant indigenous and local communities naturally “belong” to national or global heritage; or b. That protecting these will cause any large-scale or irreparable harm to national or global innovation systems.</p> <p>Indigenous and local communities have been sharing much of their traditions with national and global cultures. They generally do resist ideas that anyone, anywhere, at any time should have free access to their most sacred and private traditions, or that these traditions belong by default to the public domain. The vast majority of knowledge existing in the world is not derived from indigenous and local communities, and would not be affected by the limitations on exceptions proposed in these comments. These are not arbitrary and capricious limitations, in that they are based on internationally recognized rights to self-determination, cultural integrity, and right to “maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions”.</p> <p>(TULALIP TRIBES)</p>
<p>Article 6. Term of protection</p>	<p>Term of protection should only be related to the fulfillment of the criteria for protection. Once a TCE meets these criteria, protection should be accorded without need for any further requirement.</p> <p>(BRAZIL)</p> <hr/> <p>It is relevant to mention that if efforts are being made to legislate in favour of communities, TCEs/EoF must be of a</p>

	<p>fixed duration. Once this period is complete, they must enter the public domain and it should be established that no community may claim this right.</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>The Federation disagrees with this principle that protection is not indefinite and may head into the public domain. TCE are a living culture within Māori communities. Traditions are intergenerational and should therefore be protect through the generations and protection should not expire. The Western system of protection will not be durable if indigenous views are not considered and implemented adequately.</p> <p>(FEDERATION OF MĀORI AUTHORITIES)</p> <hr/> <p>Regarding Article 6(ii), a term of protection in relation to secret rights as long as they remain secret has no scope for certainty, and thus is clearly prejudicial to the legitimately obtained protection and enforcement of other intellectual property rights such as trademarks.</p> <p>(INTERNATIONAL TRADEMARK ASSOCIATION – INTA)</p> <hr/> <p>We are fine with Article 6.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>Indigenous peoples’ desire for indefinite protection for some aspects of expression of their communities is extremely important and for this reason, the position of indigenous peoples is supported by SPFII in this provision.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>We support ownership of traditional cultural expression/ EoF to exist in perpetuity. Whilst the tenor of this article alludes to perpetuity we implore the secretariat to state this condition of protection explicitly.</p> <p>In terms of (ii) we further implore the secretariat to make the distinction between “secret” and “sacred.” Within this context we recommend the inclusion of “sacred.” The statement now reads as “in so far as sacred and secret TCEs/EoF are concerned, their protection as such shall endure for as long as they remain sacred and secret.</p> <p>(SOUTH AFRICA)</p>
<p>Article 7. Formalities</p>	<p>Brazil does not agree with the need for registration as a condition for protection of the right over TCE/EF by its custodians.</p> <p>Article 7(iv): Brazil has concerns with the use of ADR in order to solve disputes relating to TCE/EF and proposes to suppress reference to this sort of dispute settlement from the draft instrument.</p> <p>(BRAZIL)</p> <hr/> <p>A joint administrative procedure should be followed, as in the case of intellectual property registers.</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>Article7(B): The Federation does not believe that for protection to occur that there needs to be notification and/or registration of TCE with an office or organisation.</p> <p>Registration of a TCE should not go into the public domain, even after use of the TCE is finished. The Federation supports that there should be no extra burdens, financially, socially or otherwise to Māori and other indigenous people, this system is a western system of protection, indigenous people’s rights should be protected automatically within their country of origin, therefore extra burdens imposed on Māori and indigenous people for protection under this system should not be at the cost of Māori.</p> <p>(FEDERATION OF MĀORI AUTHORITIES)</p> <hr/> <p>With regard to Article 7, we have already flagged our concern with the demand for registration for protection of TCEs.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>SPFII agrees that as a general principle, TCEs/EoF should be protected without formality, similar to copyright. The issue of registration or notification for TCEs/EoF that require stronger protection requires further development. SPFII is of the opinion that an administrative organization dealing with the range of issues expressed in the provisional Article would need to be clear about its role to avoid a cumbersome workload due to</p>

	<p>the complexity of the issues.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>We fully support the tenor of this article as we are of the opinion that the desire for enforcement is lost in bureaucracy.</p> <p>It is anticipated that by the insertion of the provisions of this article the prohibitive costs involved in registration and maintenance of ownership of traditional cultural expression/ will be avoided.</p> <p>In respect of subsection (iv) South Africa has already established an office referred to as the National Office of IKS which is mandated to commence with the process of registration of holders and practitioners of IKS. In addition the office is charged with assisting indigenous and local communities in matters of dispute as envisaged in Article 8.</p> <p>(SOUTH AFRICA)</p>
<p>Article 8. Sanctions, remedies and exercise of rights</p>	<p>Although reference is made to cases of breach of protection, details of the enforcement and dispute resolution mechanisms should be given. Also, the relevant sanctions, appeals and methods of enforcement should be described.</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>See paragraphs 6.33 and 6.35 in the Appendix.</p> <p>(MAUI SOLOMON)</p> <hr/> <p>We are fine with Article 8, again, however, provided that it is clarified that the government agency gets involved in the enforcement of rights only to the extent indigenous peoples consent thereto.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>SPFII agrees that civil and criminal sanctions and remedies for breaches of rights, particularly where there has been community hurt and cultural harm should be considered under this provision. Further, indigenous peoples must be consulted at all levels in regards to any development on sanctions, remedies and enforcement.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>We recommend the inclusion of words “civil and criminal” in bullet point (8), the statement now reads as, “Sanctions, civil and criminal remedies and exercise of rights.”</p> <p>Whilst we support WIPO’s dispute- resolution and enforcement mechanisms consideration must be given to customary dispute-resolution and enforcement mechanisms. Equally important within the customary context are sanctions and remedies.</p> <p>(SOUTH AFRICA)</p>
<p>Article 9. Transitional measures</p>	<p>This provision should also permit the application of the protection over rights previously acquired in a manner inconsistent with the other provisions of the draft instrument.</p> <p>(BRAZIL)</p> <hr/> <p>Item (iii) “an intermediate solution, in terms of which utilizations which become subject to authorization under the law or regulation but were commenced without authorization before the entry into force, should be brought to an end before the expiry of a certain period (if no relevant authorization is obtained by the user in the meantime, as required). The public domain principle should be applied in its full context, i.e. no TCE/EoF can be appropriated by any community, which has existed prior to the entry into force of the rule.</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>We note the reference to “continuing acts” in paragraph (b). This terminology is unclear as to the scope of acts it is meant to encompass. With no linkage to Article 1, the reference begs the question whether this expands the manner of use of the TCEs/EoF, for example, in relation to a cultural expression which has become commercial, or indeed to cover the situation where in fact there is no ongoing use notwithstanding the reference back to Article 1. In short, the term “acts” is ambiguous in this context. While the phrase “subject to respect for rights previously acquired by third parties” has been included, it is by no means certain that this phrase is intended to support the general principle of “first in time, first in right” to which INTA strongly adheres.</p>

	<p>(INTERNATIONAL TRADEMARK ASSOCIATION – INTA)</p> <hr/> <p>As to Article 9, we can accept the intermediate solution chosen, acknowledging that it might take some time to bring IPR-legislation into conformity with the Objectives and Core Principles. Still, we need to see the reference to “respect for rights previously acquired by third parties” deleted.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>The statement that the concept of ‘public domain’ is not recognized by indigenous peoples was addressed by Victoria Tauli-Corpuz in her paper presented to the International Workshop on Traditional Knowledge in Panama City in September 2005.</p> <p>In considering Ms Tauli-Corpuz’s paper and the Tulalip Tribes’ statement that the failure of governments and citizens to recognize and respect customary law, it is obvious that indigenous and non-indigenous peoples have different understandings of the concept of ‘public domain’. Therefore SPFII agrees that the concept of ‘public domain’ and the options set out in this provision require further reflection.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>We concur and support this article.</p> <p>(SOUTH AFRICA)</p>
<p>Article 10. Relationship with IP protection and other forms of protection, preservation and promotion</p>	<p>From the explanation given in the observations, we consider that TCEs/EoF can be protected by intellectual property standards such as the use of a complementary standard.</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>Notwithstanding amendment, Article 10 continues to provide for special protection of TCEs/EoF via use of complementary protection mechanisms. As previously stated, INTA opposes any proposal which would seek to grant special trademark status to TCEs/EoF for the reasons previously noted. While it is recognised in the commentary that the mechanism for identification and “registration” of a TCE/EoF is to be left for regional determination, INTA is concerned that insufficient thought has been given to the implementation mechanisms or the general principles for the protection of TCEs/EoF within such systems. Quite clearly, it is the implementation of many of these principles which will be of concern, and careful consideration as to their implementation may avoid subsequent issues arising from vague guidelines, particularly when these may conflict with existing intellectual property systems, the users of which require certainty and consistency. While it is important to recognise and protect the TCEs/EoF of indigenous communities and people, it is not necessary to provide such protection by creating vague or over-reaching rules, or by applying a different standard for what is protectable (and the level and sanctions applicable) under the intellectual property laws of the region in question. The failure to fully consider in the preparatory phases the full impact and ramifications of such a process could ultimately undermine the original desired intent of formulating a doctrine of general protection so as to foster wider community awareness of the inherent value of indigenous heritage and associated traditional cultural expressions.</p> <p>(INTERNATIONAL TRADEMARK ASSOCIATION – INTA)</p> <hr/> <p>We are fine with Article 10.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>This provision includes a good compilation of IP laws as well as non-IP measures that could be used to protect TCEs/EoF.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>Whilst we support the instrument to be complementary and mutually supportive of other intellectual property protection, however we note with concern that conventional intellectual property protection fails indigenous and local communities on many levels.</p> <p>(SOUTH AFRICA)</p>
<p>Article 11. International and regional protection</p>	<p>In order to strengthen further the international agreements and conventions, Article 3 of the TRIPS Agreement, relating to national treatment, should be included, adapted to the arrangements for TCEs/EoF.</p> <p>(ECUADOREAN INTELLECTUAL PROPERTY INSTITUTE – IEPI)</p> <hr/> <p>The Federation agrees that there is a need for international and regional protection and acknowledges that the task</p>

	<p>of implementing this will be onerous and daunting.</p> <p>Regional and international treaties and agreements are one means for protection, as long as indigenous views are adequately considered.</p> <p>Misappropriation of Māori culture is already relevant and there have been a number of cases with one of the most recent being a Halloween Moko kit. This is one example that shows that the development of international protection is important.</p> <p>The Federation would like to consider options for International and Regional protection further and would welcome future opportunities to comment on this.</p> <p>(FEDERATION OF MĀORI AUTHORITIES)</p> <hr/> <p>With regard to Article 11, we believe that this issue demands some further consideration. We would like to commend the WIPO Secretariat, however, for recognizing the role that indigenous customary legal systems must play a role also in cross-boundary protection of TCEs.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>We further recommend under this section the inclusion of “national” in bullet point (11). The statement now reads as, “International, regional and national protection”</p> <p>Whilst we take cognizance that there are real contradictions in essential points of existing international instruments we support the harmonization of these instruments. We base our assertion on the premise that not all countries are signatories of particular instruments hence affording rights to foreigners may be problematic.</p> <p>We also seek clarity on the term “eligible foreigner.” Who determines the eligibility of a foreigner.</p> <p>(SOUTH AFRICA)</p>
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[Appendix follows]

APPENDIX

PEER REVIEW REPORT

prepared for The Ministry of Economic Development

on WIPO documents “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles (WIPO/GRTKF/IC/8/4); and the Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/8/5)”

by Maui Solomon, Barrister
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“These comments do not represent a New Zealand government position. However we considered it would be useful for the IGC to consider the comments as indigenous people’s perspectives on the draft objectives and principles”.

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1. Introduction

1.1 The purpose of this report is to undertake a review, from a New Zealand viewpoint, and particularly from a Maori perspective, of the Principles and Objectives contained in documents 8/4 and 8/5,¹ and to examine, analyse and comment on the extent to which they are appropriate to the New Zealand situation having regard to, inter alia:

- the Treaty of Waitangi,
- the New Zealand legal framework,
- Government policy,
- Maori custom and protocols and the extent to which Maori traditional knowledge and expressions of that knowledge are being misused or misappropriated in New Zealand and overseas.²

1.2 This report reflects the personal views and opinions of the author and no-one else.

2. Contextual statement

2.1 In undertaking this review it is important to reflect and comment on some of the milestone events which have occurred over the past 15-20 years that have served to highlight the growing calls by indigenous peoples' the world over for greater self-determination, protection of their cultures and identities, claims to land rights and other natural resources and challenging the exclusive sovereignty of nation states. In short, indigenous peoples have been engaged in the process of decolonisation for the past three decades. As noted by Maaka and Fleras, this challenge to the orthodoxy is justified by indigenous peoples on the ground of their "*historical continuity, cultural autonomy, original occupancy, and territorial grounding*".³

2.2 Nation States often feel threatened by assertions of indigenous peoples of their right of self determination and will counter these claims by asserting their own right to govern, impose order, enforce rules, and expect compliance in advancing the national interest of all citizens (Maaka and Fleras 2004: 11). It is thus not surprising that the International Decade of Indigenous Peoples (1993-2003), was marked by an intense struggle between indigenous peoples and nation states. Nowhere is this struggle more accentuated than in the negotiations over the development of the draft UN Draft Declaration of the Rights of Indigenous Peoples (DDRIP), which began in 1984 and are still continuing. Last year New Zealand, along with Australia and the United States, made an intervention to the Working Group on Indigenous Populations (WGIP) seeking to prescribe the definition of 'self-determination'⁴ in the DDRIP, so as to "*preserve the political unity and territorial integrity of any State.*"⁵ The concern was that indigenous peoples may use this Article as a pretext to secede from the nation state or otherwise challenge its authority. In response, the Aotearoa Indigenous Rights Trust issued a statement stating that given the obvious imbalance of power between states and indigenous peoples it was not clear why some states (including New Zealand) were "*preoccupied with perceived threats to states, rather than the very grave and pervasive threats to Indigenous Peoples.*"⁶

2.3 Maori have played a significant role in the development and advocacy of the DDRIP over a 20-year period and continue to do so. One reason for this is that Maori consider the Declaration contains many of the protections that were guaranteed under the Treaty of Waitangi. Maori have also been actively engaged in the final phases of the DDRIP including critiquing the New Zealand Government for its stance (together with United States, Canada and Australia) in opposing the adoption of the Chair's compromise text of the DDRIP by the Human Rights Council in June 2006.⁷ In terms of self determination, traditional knowledge, genetic resources and intellectual property rights, the Draft Declaration has been a major focal point for debate among indigenous peoples. The Convention on Biodiversity (CBD) and in particular the provisions dealing with traditional knowledge (TK), access to and equitable benefit sharing of genetic resources has also been an important forum to highlight the matters confronting indigenous peoples and, in particular, their marginalisation from resources and the misappropriation of their knowledge.

2.4 The work of Madame Erica-Irene Daes, the former Chairperson – Special Rapporteur for the Sub-Commission on the Promotion and Protection of Human Rights⁸ has also been a significant factor in highlighting the aims and aspirations of indigenous peoples with regard to their heritage and cultural rights, including intellectual property.

2.5 It is against this general background, that the World Intellectual Property Organisation (WIPO) became involved in undertaking an international fact finding mission 1998-1999 to ascertain the intellectual property needs and expectations of traditional knowledge holders.

¹ Apart from some minor changes, WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 are essentially the same documents as WIPO/GRTKF/IC/10/4 and WIPO/GRTKF/IC/10/5.

² The full Terms of Reference for the peer review are attached as Appendix One.

* For the purposes of this report reference to 'indigenous peoples' is deemed to also include traditional peoples and local communities.

³ Maaka, Roger & Fleras, Augie (2004) 'The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand' p 11.

⁴ As articulated in Article 3 of DDRIP

⁵ Joint statement by New Zealand, Australia and United States government delegations to WGIP, Geneva, 14 December 2005

⁶ Aotearoa Indigenous rights Trust statement to WGIP, Geneva, 15 December 2005.

⁷ Despite these objections, the DDRIP was adopted by a majority vote (48 states for, 8 abstained and 2 absent) of the Human Rights Council in June 2006 and has been referred to the United Nations General Assembly for consideration later this year.

⁸ (In particular the 'Report on Principles and Guidelines for the Protection of Heritage of Indigenous Peoples' (see for example E/CN.4/sub.2/2000/26)

3. To what extent are the Principles or Policy Objectives in the documents appropriate to the New Zealand situation, particularly from a Maori perspective?

GENERAL COMMENTS

3.1 For the past 20 years, Maori have been seeking greater recognition and protection of their cultural, biological and intellectual rights and obligations (hereafter referred to as “Bio-cultural rights”). This process began in earnest in 1991 with the filing of the Wai 262 indigenous flora and fauna and cultural and intellectual property rights claim.⁹ This was followed in 1993 with the signing of the Mataatua Declaration on indigenous cultural and intellectual property rights.¹⁰ This past decade has also witnessed a significant increase in the alleged misappropriation of matauranga Maori¹¹ by companies both in New Zealand and overseas for the marketing, promotion and sale of their commercial products. This misappropriation will continue as companies in New Zealand and overseas look to gain a competitive edge in the marketplace by associating their products and services with ‘trendy’ and ‘exotic’ indigenous brands.

3.2 Development of a *sui generis* system or framework for protecting matauranga Maori *me o ratou taonga katoa*, (including biological, genetic and cultural resources and related intellectual property rights and cultural obligations) is seen by many Maori groups as a priority. Such a process to establish a framework is one of the objectives of the Wai 262 claim currently being heard by the Waitangi Tribunal but progress in this regard has been slow, partly due to the length of time it has taken to complete the hearings of the Wai 262 claim.¹² In the meantime, there has been reluctance on the part of the Crown to engage with Maori over the development of such a framework or to consult with Maori on the issues raised by the claim. An exception in this regard is the background policy work being developed by the Ministry of Economic Development on TK and IPRs and how these developments may impact on Maori. In general, most other government departments have not been proactive or helpful in assisting Maori to develop processes or structures for the better protection of their matauranga and biological and cultural rights and obligations.

3.3 Because of the current vacuum of legal protection generally available for TK, at the national or international levels, it is the author’s opinion that, despite its rather narrow IP focus for protecting TK/TCEs, there is much content within the WIPO Objectives and Principles that could be of use to Maori in elaborating a local *sui generis* system of protection for their cultural and intellectual property rights. However, from a Maori perspective, such a framework would need to have as its starting point, Te Tiriti o Waitangi, and be adapted in a manner that takes account of customary law and practices. This is referred to in this paper as a ‘The Tikanga Maori Framework’ and which is explained in more detail at Appendix 2. Any such framework would need to take into account the existing legal framework in New Zealand and customary international laws and conventions such as the Declaration on the Rights of Indigenous Peoples, ILO Convention 169, CBD and WIPO draft proposals etc.

3.4 Flexibility is going to be important in the elaboration of any new regime for protecting Matauranga *me o ratou taonga katoa*. For example, the summaries of both documents 8/4 and 8/5 make it clear that the provisions are intended to provide the content of international standards for the protection of collectively held TK against misappropriation. They do this without requiring the assertion of new exclusive property rights over TK but leave this option open should TK holders desire to do so.¹³ This acknowledges that many indigenous peoples, including Maori, are highly sceptical of ‘hard’ property rights as an appropriate set of tools for protecting their knowledge. Many consider that these developments will only lead to greater commercial exploitation with little benefits back to the knowledge holders themselves. However, there are indigenous people including some Maori who are not opposed to seeking IP protection for the TK and TCEs as evidenced by Toi Iho: Maori Made trademark for protecting authentic Maori produced artworks.¹⁴

3.5 Maori people, as with indigenous peoples elsewhere, have expressed concern about the perceived need to register trademarks, patents or other intellectual property rights over aspects of their traditional knowledge in order to protect it against misappropriation. The argument is that the knowledge does not belong to any single individual or corporate entity but is collective and inter-generational. Moreover, IP rights are for a limited duration and the costs of obtaining and enforcing these rights are often prohibitive.¹⁵ The elaboration of international standards, guidelines and principles that have a powerful ‘moral’ (and political) force behind them, could provide an effective tool to persuade potential ‘pirates’ of TK to either stop illicit use or conform to appropriate international standards of conduct.

3.6 In the author’s opinion, had such an international regime existed at the time the LEGO Bionicle Toys case and Playstation: Mark of Kri game both which involved the misuse of Maori names (Lego) and designs, names and images (Playstation) occurred, Maori could have called upon these companies to conform with international standards or codes of conduct. These draft standards require consultation and consent to be given by traditional knowledge holders to the use of their symbols, names and images on commercial products. As it happened, all the complainants could do was appeal to the moral conscience of the companies concerned, which in the case of LEGO was eventually successful but not so in the case of Sony Playstation. Both companies initially responded to say that they were not doing anything ‘illegal’ (as opposed to being unethical or culturally offensive) and furthermore that Maori should be ‘grateful’ that their culture was being ‘promoted’ to a worldwide audience. There are numerous other examples that would have benefited from an international regime that aims at preventing (and penalising) misappropriation in situations where legal rights are not necessarily being sought by the appropriators.¹⁶

3.7 In the author’s view, an internationally sanctioned regime for protecting TK is a vital and necessary adjunct to any domestic *sui generis* framework of protection, in order to ensure the effective compliance and enforcement of acts of misappropriation of TK by foreign

⁹ The Wai 262 claim (colloquially known as such because it was the 262nd claim to be registered with the Waitangi Tribunal), has arguably been the single biggest factor in raising awareness in New Zealand over the past decade about the importance of Maori gaining a measure of ownership and control over their own traditional knowledge, associated genetic resources and intellectual property.

¹⁰ The Mataatua Declaration 1993 has been signed by over 150 indigenous peoples’ organisations from around the world.

¹¹ Maori knowledge.

¹² The claim is scheduled to be completed in March 2007 and then an estimated further 12 months for the report to be written and published.

¹³ WIPO/GRTKF/IC/8/4 and 8/5, p2, Para 3.

¹⁴ <http://www.toiio.com> However, as discussed further below, this example of Maori using IP to protect their TCEs is an exceptional case because of the process followed and the fact it was only seen as an interim protection measure until a more comprehensive framework for protecting Maori TK was developed.

¹⁵ One of the considerations for Moana Maniapoto not pursuing legal redress in Germany for the trade marking of her name ‘Moana’ by a German company was the significant costs that would have ensued and the uncertainty of the outcome (per comm., 2006.).

¹⁶ Examples include: the Austrian Ski company, Fischer Skis, using Maori names on skis; a Dutch restaurant using ‘moko’ to promote their restaurant, and; a UK magazine promoting sale of home security systems using an image of Tame Iti.

based entities. Although New Zealand cannot legislate for other countries, it can nevertheless advocate more strongly in various international fora (including WIPO and the CBD) for adequate protections as part of its obligations to 'actively protect' Maori interests and taonga under the Treaty of Waitangi.

TREATY OF WAITANGI RESPONSIBILITIES

3.8 The following discussion will consider how the Treaty and its principles are relevant to the development of the WIPO proposals. While the Treaty of Waitangi and its principles are mostly relevant to the unique relationship the New Zealand Government has with its Maori Treaty partners, parallels can be made with obligations under international and human rights laws which say that states have a duty to protect the rights of indigenous peoples and in particular to recognise the right of self-determination. This right of self-determination is analogous to the right of Maori to exercise their 'tino rangatiratanga' as guaranteed under Article 2 of Te Tiriti o Waitangi.

3.9 From a Maori perspective, the Treaty of Waitangi (and its evolving principles) contains a charter for protecting rights and kaitiaki obligations of Maori, including, matauranga Maori *me o ratou taonga katoa*. Thus any set of principles and policies being elaborated at the international level needs to ensure that the capacity of the Crown to honour the terms and principles of the Treaty of Waitangi is preserved. This would include the capacity to remedy any proven breaches of the Treaty and ensure related findings and recommendations of the Waitangi Tribunal, for example, in the Wai 262 claim and other claims relating to indigenous flora and fauna, are also considered in this broader context.

3.10 Over the past 20 years, the courts and the Waitangi Tribunal have developed a series of Treaty principles based on the Maori and English versions of the Treaty of Waitangi¹⁷. There is, however, a good deal of dispute and debate over what the Treaty principles are and how they should be applied in any given circumstances. The matter has become highly politicised in recent years. In 1989 the Labour Government issued its own set of Treaty principles¹⁸. However, since that time there has been considerable debate in New Zealand about the application, meaning and inclusion of Treaty principles in domestic legislation. This debate has increased in recent years following the speech by the Leader of the opposition National party at Orewa in 2004, where he advocated a policy of "one law for all New Zealanders" and that so-called Maori 'privileges' and references to the Treaty should be removed from legislation.¹⁹

3.11 Many Maori, partly due to the ambiguity around what comprises principles of the Treaty, would prefer to rely on the express terms and articles of the Treaty itself.²⁰

3.12 Both the Waitangi Tribunal and the courts in New Zealand (and the Privy Council in London) have declared that the terms and background to the Treaty are to be considered in any interpretation of the principles of the Treaty and that the "*principles enlarge the terms [of the Treaty], enabling the Treaty to be applied in situations that were not foreseen or discussed at the time*"²¹ and further, according to the Privy Council, "*the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intention of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty ... with the passage of time; the "principles" which underlie the Treaty have become much more important than its precise terms*".²²

3.13 The emphasis on Treaty principles in New Zealand law is reflected in the fact that over 30 pieces of legislation in New Zealand require decision makers to take account of Treaty principles when making their decisions.²³ In addition some legislation such as the Resource Management Act 1991 requires decision makers to have explicitly recognise "*a number of elements of Maori cultural knowledge*"²⁴ including *tikanga Maori, tangata whenua, mana whenua, kaitiakitanga, iwi, hapu, taonga, waahi tapu, tauranga waka, maataitai* and *taonga*

¹⁷ The Waitangi Tribunal, established in 1975, is charged with the responsibility under the Treaty of Waitangi Act 1975, of determining whether any actions or omissions of the Crown are in breach of the principles of the Treaty of Waitangi and in doing so are obliged to have regard to both the English and Maori versions of the Treaty. The New Zealand courts, and in particular the Court of Appeal, has been involved in developing Treaty principles as a matter of statutory interpretation where relevant legislation refers to a requirement to "give effect to", "take into account", "have regard to", and "not act inconsistently with principles of the Treaty". The high-water mark for elaborating judicial interpretation of Treaty principles was in the case of *The New Zealand Maori Council v The Attorney-General* [1987] 1 NZLR 164 (commonly known as the *Lands* case). In addition, statutory bodies such as the Environmental Risk Management Authority (section 8 of the Hazardous Substances and New Organisms Act 1996) and The Foundation for Research, Science and Technology, Ministry for the Environment (section 8, Resource Management Act 1991), Local Authorities (section 4 of the Local Government Act 2002) and others are required to take into account or have regard to principles of the Treaty when making decisions under their relevant legislation.

¹⁸ The 'Principles for Crown Action on the Treaty of Waitangi 1989'. These principles are listed as follows: Rangatiratanga; Kawanatanga; active protection; good faith; partnership; redress; reciprocity; reasonableness.

¹⁹ In an ironic twist on this theme of 'one law for all' the New Zealand Government in 2005, passed legislation called the Foreshore and Seabed Act 2005 that effectively denied Maori access to the courts to contest their claims to customary aboriginal title of the foreshore and seabed. This notwithstanding, the New Zealand Court of Appeal had ruled in *Ngati Apa versus The Attorney General and Ors*, that Maori had the right to be heard on these issues.

²⁰ For example, the Wai 262 claim by Ngati Kuri, Te Rarawa and Ngati Wai places reliance on the guarantee in Article 2 of the Maori version of Te Tiriti to protect for the chiefs, tribes and all their people their *te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa*, which translated means "protection over their lands, villages and all their treasures". It may also rely on Article 2 of the English version of the Treaty which "*confirms and guarantees to the chiefs and tribes of New Zealand to the respective families and individuals thereof the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively and individually possess so long as it is their wish and desire to retain the same in their possession ...*". The claim goes on to outline in Part B the manner in which the Crown has breached the principles of the Treaty of Waitangi as it relates to the guarantee to protect their taonga. For the purposes of the claim, taonga refers to "*all elements of the claimants' estates, both material and non-material, tangible and intangible*" (Second Amended Statement of Claim on behalf of Ngati Kuri, Te Rarawa and Ngati Wai, Para 3.1, document 1.1(a), Wai 262 Record of Inquiry).

²¹ Muriwhenua Land Report (1997) p 386.

²² *Broadcasting Assets* case (PC) [1994] per Lord Woolf at 513.

²³ David Williams, 'Crown Policy Affecting Maori Knowledge Systems and Cultural Practices', Waitangi Tribunal Publication 2001, page 106.

²⁴ *Ibid*, page 106.

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raranga. Section 6 (e) of that Act also recognises that the connection of Maori, and their culture and traditions, with their ancestral lands, water, sites, waahi tapu and other taonga are listed as ‘matters of national importance’.²⁵

3.14 Thus the express terms of the Treaty and its principles are important to any review and commentary on the WIPO/TK Objectives and Principles, within the New Zealand context.

RELEVANT TREATY PRINCIPLES

3.15 The principles of the Treaty of Waitangi first came up for consideration before the courts in New Zealand in the now famous case of the New Zealand Maori Council v. Attorney General [1987] 1 NZLR 641, in which the President of the Court of Appeal, Cooke P,²⁶ observed as the opening remarks in his landmark decision; “*This case is perhaps as important for the future of our country as any that has come before a New Zealand Court*” (page 651). With these prescient words and the following judgements of this court and subsequent decisions of the Court of Appeal, Cooke P ushered a new era of legal and Treaty jurisprudence into New Zealand. He noted that the “*Treaty is a document of fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty*” (page 656).

3.16 These principles have been elaborated upon in subsequent decisions of the Court of Appeal and the Judicial Committee of the Privy Council in London.²⁷ There has been much written about the principles and what they mean or don’t mean in law, practice and politics. However, the most clearly articulated and authoritative judicial adumbration of the Treaty is that delivered by Cooke P and his fellow judges in the New Zealand Maori Council case, and any reader of this report is encouraged to read the judgements in their entirety.

3.17 The following have been identified as the most relevant Treaty principles²⁸ in the context of this review:

Relevant Treaty Principles		
Principle	Explanation	Relevance to WIPO Objectives/Principles
Tino Rangatiratanga	Some consider that guarantee of tino rangatiratanga in the Treaty of Waitangi preserved to Maori their full sovereignty over themselves and their resources. However, rangatiratanga did not have its genesis in the Treaty. The Treaty is merely declaratory of this pre-existing customary right. A widely accepted interpretation of rangatiratanga is that it preserved to Maori “ <i>the unqualified exercise of their chieftainship over their lands, over their villages and over their treasures all ...</i> ”. ²⁹ As a minimum, rangatiratanga guaranteed to Maori <i>tribal control of tribal resources</i> ³⁰ . Two points are worthy of note in relation to Sir Hugh Kawharu’s interpretation. Firstly, that unqualified exercise of chieftainship gives to Maori control in accordance with <i>their</i> customs. Secondly, taonga or treasures refers to all dimensions of a tribal group’s estate, material and non-material ³¹ . The guarantee of rangatiratanga requires “ <i>a high priority for Maori interests when proposed works may impact on Maori taonga</i> ” ³²	As interpreted by the Waitangi Tribunal, this principle provides an assurance of a degree of Maori control over Maori resources and taonga. As noted by the tribunal in the Waipareira Report, “ <i>...the principle of rangatiratanga may be applied to a variety of Maori activities each with the goal of promoting a Maori responsibility for Maori affairs</i> ” ³³ As a minimum, therefore, this principle requires that Maori should have control over the development and implementation of any international and national regime affecting <i>their</i> taonga (treasures) which in a contemporary context would include cultural and intellectual rights and responsibilities.
Kawanatanga	There is a tension and conflict between the guarantee of tino rangatiratanga on the one hand and the granting of ‘kawanatanga’ (generally understood to mean governance) on the other. The English version of the Treaty purports to grant absolute sovereignty to the Crown, whilst the Maori version of the Treaty gives to the Queen of England kawanatanga or governance over	The Crown exercising its kawanatanga functions has the right to negotiate and enter into international treaties and other instruments but must do so in a way that acknowledges and actively protects Maori rights as guaranteed under Article 2 of the Treaty. Where it directly affects Maori rights such as traditional knowledge and genetic resources, Maori argue that the

²⁵ Although there has been a tendency in recent times by some politicians to down play or even ridicule the inclusion of references to the Treaty of Waitangi and Maori cultural values in New Zealand legislation and government policy, this has more to do with political posturing than it has to do with good faith, partnership and fairness which the courts have determined are essential characters of the Treaty.

²⁶ Lord Cooke of Thorndon, as he was later to become known after having a Peerage bestowed upon him and became the first New Zealand Judge to sit in the House of Lords in London, passed away in August of 2006. He is widely acknowledged as the best jurist this country has ever produced. At his tangi (funeral) all the Maori gathered in St Paul’s Cathedral in Wellington spontaneously gathered around his coffin after the eulogy delivered by the Rt. Honourable Chief Justice Dame Sian Elias, and sung a Maori waiata (song of respect) for this great man of the law. It was a fitting tribute to a man whose personal crest bore the Latin legend ‘Speak for Fairness’ and who gave the legal ‘breath of life’ to the Treaty of Waitangi in modern day New Zealand society – Tihēi Mauri ora!

²⁷ See for example the *NZ Maori Council and Others versus Attorney General and Others* Judicial Committee of the Privy Council, Appeal no 14/1993, 13 December 1993, (Lords Templeton, Mustill, Woolf, Lloyd of Berwick, of Chief Justice Sir Thomas Eichelbaum).

²⁸ There is no single source for these principles but they have been drawn together by the author from various sources including reports of the Waitangi Tribunal, Court of Appeal decisions and other case law, publications and the author’s own knowledge.

²⁹ I. H. Kawharu. (Edited by I.H. Kawharu) ‘Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi 1989’, p 319. As Kawharu notes at footnote 8 of the Appendix, “treasures” refers to taonga and that “taonga” in turn “refers to all dimensions of a tribal group’s estate, material and non-material – heirlooms and waahi tapu, ancestral lore and whakapapa, etc”

³⁰ Quoted from I. H. Kawharu in the introduction to Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi 1989, XVIII.

³¹ Maori Language and Radio Spectrum Waitangi Tribunal Reports.

³² Ngawha Geothermal resources Report 1993, page 102

³³ Te Whanau o Waipareira Report 1998, page 22.

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Relevant Treaty Principles		
Principle	Explanation	Relevance to WIPO Objectives/Principles
	<p>their lands. Kawharu notes that Maori would not have understood this to mean the granting of sovereignty to the Queen as this concept had no parallel in Maori society at the time. Indeed, the closest concept to sovereignty in 1840 would have been ‘tino rangatiratanga’, which Article 2 of the Maori version had expressly preserved and guaranteed to the chiefs and tribes.</p> <p>In any event, the Waitangi Tribunal and courts have observed that Article 1 of the Treaty gives the right to the Crown to govern and to make laws for the good governance of New Zealand but that this right is fettered by the obligation to respect the Article 2 rights of Maori.</p>	<p>Crown cannot enter into any international instrument without the consent of its Treaty partner. As a minimum, Maori would legitimately expect to be involved in the process of negotiating any international instrument and that the Crown would provide adequate funding to enable this to occur.</p>
Partnership	<p>The partnership principle was first established by the Tribunal in the Report on the Manukau Claim where it was stated that the interests recognised by the Treaty gave rise to a partnership, “the precise terms of which have yet to be worked out”³⁴.</p> <p>The concept for partnership was founded in large part on the Maori acceptance of the Crown’s right of governance, or kawanatanga, and the Crown’s general recognition of a Maori rangatiratanga. The two are not in conflict but are indicative of the undertaking of mutual support, at the time and in the future³⁵.</p> <p>As was noted by the Tribunal in the Report on the Motunui-Waitara Claim the notion of partnership was conceived as a mutual exchange of gifts. “<i>The gift of the right to make laws, and the promise to do so as to accord the Maori interest in appropriate priority</i>”³⁶.</p>	<p>In this context, the Crown has the power to make laws at both the international and national levels regarding protection of Maori TK and IPR, but the Maori interest must be accorded a sufficient priority. There are numerous ways in which this could be conceived including the Crown sitting down with its Treaty partners to develop agreed positions to put before the IGC on key matters prior to meetings of the IGC. The development of adequate domestic processes and frameworks to ensure that Maori are fully involved at every stage of the implementation of policies and legislation giving effect to any international instrument or treaty. Also ensuring that any body or bodies established to develop and implement any policies and objectives at the domestic level fully involve Maori including hapu and Iwi. This should include Maori being involved in the design, management, decision making and administration of any such framework or protection/promotion mechanisms.</p>
Good faith	<p>The Treaty principles “<i>require that Pakeha and Maori Treaty partners act towards each other reasonably and with the utmost good faith</i>”.³⁷</p>	<p>In developing the WIPO objectives and principles, the Crown has an obligation of good faith to ensure that its Treaty partner is fully involved and informed in the process and that positions advocated at the international level are consistent with the spirit and ethos of the Treaty principles. So for example, the Crown having adopted a proactive stance in advocating stronger protection mechanisms under the WIPO proposals, would be acting in bad faith if it decided to adopt a contrary position in response to criticism from political opponents or as a response to the negative Treaty sentiment that has swept through the New Zealand political landscape in recent years.</p>
Active protection	<p>In the New Zealand Maori Council case, the Court of Appeal observed that the relationship between Maori and the Crown was one of a partnership “<i>analogous to fiduciary duties</i>” and that the duty of the Crown “<i>was not merely passive but extends to the active protection of Maori people in the use [in that case] of their lands and waters</i>”³⁸ The duty and principle of active protection stems from Article 3 which extends Her Majesty The Queen’s “royal protection” to Maori³⁹. The Tribunal considers protection to be a “<i>fundamental principle</i>” that “<i>was not intended to merely fossilise the status quo, but to provide a direction for future growth and development</i>”⁴⁰.</p>	<p>The Crown has a duty to actively protect Maori taonga and interests at the international level in the development of the WIPO proposals. This would include the full protection of traditional knowledge and expressions of that knowledge. This duty is more than merely passive particularly as Maori are directly affected by the outcome of the WIPO negotiations and are significantly under represented in this forum. Although the Crown has taken a step in this direction by involving individual Maori as independent “experts” attending with their delegations to meetings of the IGC, more can be done to ensure that Maori are <i>separately</i> represented in this forum and funded by the Crown to do so.</p>
Redress	<p>The <i>Maori Council case</i> established that the Crown has</p>	<p>The development of a framework for protecting and</p>

³⁴ Report of the Waitangi Tribunal on the Manukau Claim, s 8.3. This concept was also recognised by the Court of Appeal in the Maori Lands case where Cooke P stated that “the Treaty signified a partnership between the races” requiring that each partner should act towards the other with the utmost good faith.

³⁵ Waipareira Report, p 29.

³⁶ Report of the Waitangi Tribunal on the Motunui-Waitara Claim, sec 10.2(b).

³⁷ New Zealand Maori Council v. Attorney-General [1987] 1 NZLR 641, 667 (per Cooke P).

³⁸ New Zealand Maori Council case, per Cooke P, 664.

³⁹ Waipareira Report, p 21.

⁴⁰ Report of the Motunui-Waitara Claim, sec 10.3.

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Relevant Treaty Principles		
Principle	Explanation	Relevance to WIPO Objectives/Principles
	an obligation to provide effective redress in the case of established breaches of the treaty ⁴¹ . As yet, with the Wai 262 claim still in hearing, no breaches in relation to TK and associated IP rights have been established against the Crown. However, the Crown has an ongoing responsibility to ensure that it does not act in a manner that might exacerbate or worsen any claimed existing treaty breaches. Given that the Minister of Commerce delayed the introduction of the IP Law Reform Bill in 1994 pending completion of the Wai 262 claim, it is reasonable to expect that the Crown will preserve its options regarding providing redress should the IP related aspects of the claim be upheld ⁴² .	promoting the appropriate use and development of TK/TCEs at the national and international levels may itself be seen as a form of redress. What shape and content that redress assumes at the international level may have a significant influence on any domestic framework in the future. This merely reinforces the argument that Maori need to be more fully and effectively engaged in the WIPO processes at this stage and ongoing stages of its development.
Reciprocity	The treaty is not a one-way street and both partners have reciprocal responsibilities to each other. To act reasonably and in good faith is a mutual requirement of both the Crown and Maori. ⁴³	<p>In the spirit of reciprocity, it could be said that both Maori and the Crown have mutual obligations to ensure the fullest protection of taonga, including traditional knowledge and expressions of that knowledge</p> <p>In relation to the partnership principle, the treaty partnership in reality is not an equal one. The Crown has a significant power differential in its favour. As such, the Crown is more often than not in the position to 'call the shots'. However, where the Crown can demonstrate that it has acted in good faith and its conduct towards Maori reasonable, Maori in return are bound to acknowledge those actions and reciprocate with good faith and reasonable conduct of their own. In the case of the WIPO, IGC processes, the Crown could do more to advocate greater protection of matauranga Maori and recognition of the holistic relationship that Maori have with their taonga including bio-cultural and IPR's.</p>

SUMMARY ON TREATY PRINCIPLES

Although these Treaty principles have particular application to the relationship between Maori and the Crown in New Zealand and the Crowns' obligations to Maori in developing and implementing the WIPO objectives and principles, nevertheless, much of the spirit of these principles could be applied with equal relevance to the development of the WIPO proposals by the IGC. In particular the duties of "active protection", "good faith", "reasonableness", "redress" and "reciprocity".

NEW ZEALAND LEGAL FRAMEWORK

3.19 Under the current New Zealand legal framework, protection of Maori cultural and intellectual property is very limited. The principles and guarantees under the Treaty of Waitangi can only be invoked if specifically incorporated into domestic legislation. There are no intellectual property laws in New Zealand that currently require decision-makers to take into account the principles of the Treaty of Waitangi in granting IP rights. There has also been trend in recent years of having specific provisions dealing with Maori interests rather than inclusion of 'Treaty clauses' which are regarded by many politicians as giving the courts too much scope to 'interpret' the scope of the Crown's treaty obligations to Maori.

3.20 The only IP legislation to incorporate a "Maori" component is the Trademarks Act 2002. The provisions in this Act were partly in response to the Wai 262 claim.⁴⁴ Under section 17 of the Trademarks Act 2002, the Commissioner of Trademarks must not register a trademark the use or registration of which would likely to offend a significant section of the community, including Maori. Under s 177 of the Act, a Maori Trademarks Advisory Committee ("the Committee"), was established with the power to review the use or registration of a trademark that is, or appears to be, derivative of a Maori sign, including text or imagery that "*is, or is likely to be, offensive to Maori*". All new applications for trademarks identified as containing Maori signs are to be forwarded to the Committee and members of the Committee are required to have knowledge of te Ao Maori and tikanga Maori (s 179(2)).

3.21 Of 327 applications for trademarks considered by the Committee between November 2004 and June 2005, none were considered to be offensive. In November 2005, one application was considered "likely to be offensive" but is still currently going through the application process.⁴⁵

⁴¹ Ibid, p. 703

⁴² The Intellectual Property Law Reform Bill 1994 was split into several parts, including separate Bills for both trade marks and patent reform. Focus Groups were established for both these reforms including Maori representation. In addition there has been regular consultation with Maori interest groups particularly in regards to the Trade Marks Bill. However, consultation doesn't equate with agreement and most of the concerns expressed by Maori regarding the inadequacy of proposed measures of protection in the proposed trade marks Bill were overlooked in the final Act.

⁴³ New Zealand Maori Council case page 689

⁴⁴ See document submitted by the Delegation of New Zealand "Presentations on National Experiences with Specific Legislation for the Legal Protection of Traditional Cultural Experiences", presented to the WIPO IGC on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 4th Session, December 9-17, 2002, Geneva, p 8, paras 35 and 36 [WIPO/GRTK/IC/4/Inf2/Annex II]

⁴⁵ Pers comms with IPONZ office 22 December 2005.

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3.22 In relation to any “offensive” (by the standards of the new 2002 Act) trade marks that have been registered under the old Act, any person (including a person who is “culturally aggrieved”) can seek a “declaration of invalidity” under section 73 (1) of the 2002 Act. The Commissioner or the court has the power declare a trade mark invalid if it would not have been registerable under Part 2 of the new Act.

3.33 However, while the new provisions in the Trademarks Act 2002 are a step in the right direction, the ambit of protection remains limited. For example, these new measures do not prevent the offensive use (or non-offensive use) of Maori TK where the user does not seek to register a trademark. Thus, the case involving a major New Zealand apparel company, “Canterbury of New Zealand”, which put out a range of rugby boots with names such as “Rangatira”, “Moko” and “Tane-Toa” that were considered by many Maori to be offensive. Similarly, the Danish-owned LEGO Company, which used names such as “Tohunga” and “Tahu” initially, defended its right to use these names because it was not seeking IP rights over them. In both these instances (and many others examples of misuse of Maori TK that have occurred since) the new provisions in the Trademarks Act are of no assistance because the perpetrators are not seeking registration of the TK images or names.

3.34 Arguably, and in the absence of specific legislation in New Zealand, the WIPO Objectives and Principles would provide assistance in either preventing or challenging misappropriation/misuse of Maori TK/TCEs and provide a *limited* form of protection of knowledge in the public domain.

3.35 For example, under Objective (iv) of document 8/4 the aim is to:
Prevent the misappropriation of traditional cultural expressions/expressions of folklore ... [by providing]... indigenous peoples and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and derivatives therefrom, control ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;

3.36 Measures to prevent acts of misappropriation are further elaborated under Article 3 of document 8/4, which enables an aggrieved party to prevent the use of “words, signs, names and symbols” which “disparages, offends or falsely suggests a connection with the community concerns, or brings the community into contempt or disrepute”.⁴⁶ This would also include preventing the acquisition or exercise of IP rights over such TCEs. However, for the claimed protection to be successful, the particular words or names in question would need to have met the test of “of particular cultural or spiritual significance” and have been “registered or notified with a competent office or organisation by the relevant community” (Article 7(b)).

3.37 Although the policies and objectives make it clear that registration is optional, the commentary to Article 3 suggests that this may be an appropriate option to take “only in cases where communities wish to obtain strict, prior informed consent protection for TCEs/EoF which are already known and publicly available”.⁴⁷

3.38 In effect, this would provide a limited form of protection of Maori TCEs already in the public domain, but would require that the TCEs be recorded on a publicly available database. In addition, anyone seeking protection would need to establish that the use was disparaging, offensive or otherwise brought the community into contempt or disrepute. These are all subjective assessments that, presumably, would be made by the proposed Management Agency in consultation with the relevant community.⁴⁸

3.39 Where the words and names were not registered, a claimant seeking protection against misuse would need to invoke the protections in Article 3(b) that the use was a ‘distortion or mutilation’ of the TK or was ‘false or misleading’ in a way that suggested that it was either linked with or endorsed by the relevant community.⁴⁹

3.40 Any New Zealand legislation that adopted these principles and objectives would need to carefully consider the criteria under which such an agency was to operate. For example, in the case of unregistered Maori TK (as noted in the commentary to Article 3) the use would not be subject to prior authorisation but protection would concern *how* the TCE was used.⁵⁰

3.41 As noted above, while there is no IP legislation incorporating the principles of the Treaty of Waitangi or requiring decision-makers to take into account Maori customs and values⁵¹ there are nevertheless, a large number of statutes requiring decision-makers to have regard to Treaty principles and Maori values particularly in the area of environmental and resource management.⁵²

RELEVANCE TO DEVELOPMENT OF NEW ZEALAND GOVERNMENT POLICY

3.42 Recognition of the need to develop government policy in the area of protecting Maori TK and IP over the past decade has become topical due to a number of factors. The Wai 262 claim in particular, has been a major factor in several Government departments and other Crown agencies investigating policies for enhanced recognition of the importance and role of TK in the work of these bodies. International developments through the work of the Convention on Biological Diversity, WIPO and Draft Declaration on the Rights of Indigenous Peoples, and Maori advocacy here and overseas has also increased awareness of the importance of these matters for Maori and New Zealand as a whole. Unfortunately, this increased awareness of the need to ‘do something’ has not always translated into appropriate action and with one or two notable exceptions, most of the work that has been carried out by government departments has been done internally and largely without consultation with Maori. One of these notable exceptions is the work of the IP Division of the Ministry of Economic Development which has been tireless in their efforts to inform Maori, other government ministries and other interest groups of the work they are doing on TK and IP at the local and international levels in recent years. It is to be hoped that this momentum will be maintained and spread to other departments of government.

⁴⁶ WIPO/GRTKF/IC/8/4, Article 3(a) (ii) page 19.

⁴⁷ WIPO/GRTKF/IC/8/4, Annex p 21(a) (i).

⁴⁸ WIPO/GRTKF/IC/8/4, Article 4.

⁴⁹ WIPO/GRTKF/IC/8/4, Article 3(b) (ii) and (iii).

⁵⁰ WIPO/GRTKF/IC/8/4, Annex p 22(b).

⁵¹ With the exception of the Trademarks Act 2002 which has (and the draft Patents Bill which proposes to have) a Maori advisory committee to assist in determining whether or not an application is culturally offensive

⁵² See for example the Resource Management Act 1991, sections 6, 7 and 8, Conservation Act 1987, s 4, Hazardous Substances and New Organisms Act 1996, s 8, Crown Minerals Act 1991, s 4, Local Government Act 2002, s4, Fisheries Act 1996 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

3.43 This section will look at some of these internal policies and processes and consider the extent to which the WIPO proposals may be appropriate or relevant to the development of policies by some of these government and quasi-government bodies in New Zealand.

3.44 Various policy initiatives dealing with TK and IP matters affecting Maori, including the development of a *sui generis* system by Te Puni Kokiri, the Taonga Protection Bill 1996, the Moveable Cultural Heritage Bill (now replaced by the Protected Objects Act 2006), have either been deferred or have lapsed from the legislative timetable. In the case of the Intellectual Property Law Reform Bill 1994, this Bill was split into several Bills after the then Minister of Commerce, Honourable Phillip Burdon in response to complaints from the Wai 262 claimants, indicated that the Bill would be deferred pending the completion of the Wai 262 claim.⁵³

3.45 It appears that as early as 1994, the Government was considering the issue of *sui generis* mechanisms for protecting TK.⁵⁴ This was in response to a number of national and international developments including work on the Draft Declaration on the Rights of Indigenous Peoples, the Convention on Biological Diversity (CBD), the Mataatua Declaration 1993 and the Wai 262 claim. According to the Government submission made to the Fourth meeting of the IGC in December 2002, the Ministry of Maori Development together with Ministry of Commerce and Ministry of Foreign Affairs and Trade “were instructed to explore the possibility of using *sui generis* mechanisms to protect Maori traditional knowledge”.⁵⁵ Initial scoping work was carried out to look not just at IP but also matters of Maori self-determination, health, justice, cultural heritage and economic development.⁵⁶ The author has not been able to identify what further work (if any) has been carried out and if so the extent to which there has been any consultation with Maori.

3.46 Since 2002, the Intellectual Property Division of the MED has been involved in developing the ‘Intellectual Property and Traditional Knowledge Work Programme’ which is a three staged process focussed on capacity building and information sharing, identifying problems relating to the IP/TK interface in the NZ context and finally the development of options and a consultation process that will assist in developing policy in the area.⁵⁷ This process has included undertaking a series of seminars and workshops involving both domestic and international speakers and experts and discussion on a range of matters including TK and TCE’s – all of which provided very useful information. In addition MED has undertaken a series of consultation hui around the country on TK and IPRs and the WIPO process. MED propose to undertake further workshops on these matters throughout the early part of 2007.⁵⁸

3.47 Government submissions to the meetings of the IGC have consistently indicated that New Zealand supports the development of the WIPO Objectives and Principles as outlined in documents 8/4 and 8/5 (and the earlier Documents WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5).⁵⁹ These submissions also note that the “one size fits all” approach is unlikely to be suitable to protect TK comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of indigenous and local communities in all countries”.⁶⁰ It goes on to note that New Zealand favours a “menu of options approach” to ensure that each country maintains a “degree of flexibility to implement policies that best suit their domestic situation”.

3.48 From a Maori perspective, flexibility is desirable so as to ensure that domestic matters relevant to New Zealand such as, the Treaty of Waitangi and its principles, local tikanga, laws and protocols and the eventual outcomes of the Wai 262 claim can be taken into consideration as relevant factors in developing *sui generis* systems for the appropriate use, protection and promotion of TK/TCE. In addition, there are other international indigenous peoples’ declarations, codes of ethics and guidelines that should help shape the development of the WIPO Objectives and Principles. Some of these documents and their relevance are discussed later in this paper (see section 9 below).

3.49 In terms of general Government policy, as discussed above, a number of Government agencies (particularly the Crown Research Institutes) have been considering development of policies on TK over the past decade or so as a response to the Wai 262 claim and the increasing international focus on TK in relation to trade, biological diversity and intellectual property rights. TK or matauranga Maori has also become increasingly important in organisations such as universities, Wananga, polytechnics, technical institutes, regional and national museums, and the private sector etc. However, as also noted, the development of any effective policies and genuine engagement with Maori has been minimal at best.

3.50 Most universities, polytechnics and Wananga offer courses in matauranga Maori and cultural and intellectual property rights.⁶¹

3.51 The following is a summary of some of the organisations in New Zealand that have developed policies in the area of TK and IP. Most of the information presented in this section has been gleaned from relevant websites and is taken at face value. This is not a commentary on the appropriateness or otherwise of these policies for Maori but whether or not the WIPO proposals as developed to date might have some relevance for these bodies based on their stated policies on TK and IP related issues:

(i) *Maori Trademarks Advisory Committee* – established pursuant to sections 177-180 of the Trademarks Act 2002. This Committee has developed a set of criteria and guidelines for assessing whether or not applications for trademarks including Maori words/text or imagery are likely to be offensive to Maori.⁶²

⁵³ Letter from Minister of Commerce Hon. Phillip Burdon, to Wai 262 claimants, December 1995

⁵⁴ Government Delegation submission to WIPO/IGC 4th Session meeting December 9-17, 2002 “Presentations on National Experiences with Specific Legislation for the Legal Protection of Traditional Cultural Experiences”, p 15, Para 75.

⁵⁵ Ibid, Para 76.

⁵⁶ Ibid, Para 76.

⁵⁷ See www.med.govt.nz (“Traditional Knowledge” section)

⁵⁸ With the recommencement of the Wai 262 claim, this workshop may be put on hold.

⁵⁹ See New Zealand submission “New Zealand Response to WIPO IGC Meeting: Draft Documents on Principles and Policy Objectives”.

⁶⁰ Ibid, p 2, Para 9.

⁶¹ For example both Te Wananga o Raukawa and Te Wananga o Aotearoa both offer courses in matauranga Maori and intellectual property rights.

⁶² Refer Practice Guidelines, sections 177-180 of the Trademarks Act 2002, Maori Trademarks Advisory Committee and Maori Trademarks, Intellectual Property Office of New Zealand (on Ministry of Economic Development website www.med.govt.nz).

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The WIPO proposals would be of assistance to the Maori Trademarks Advisory Committee and its work. However, it is the author's opinion that this Committee and any other body dealing with traditional knowledge and IP related matters should eventually come under the auspices of a central Maori controlled body which relates to the role of an agency in the nature of that contemplated by Article 4 of document 8/4.

(ii) *Creative New Zealand* – in response to “calls made over more than 20 years for a mark of authenticity and quality”,⁶³ Creative New Zealand, with the assistance of 30-40 high profile Maori artists, established the ‘Toi Iho’ Maori Made brand. There are currently 130 artists who are registered to use these marks of the Toi Iho brand.

(iii) *Te Manatu Taonga: Ministry for Culture and Heritage* – while the Ministry does not appear to have any specific policies addressing traditional knowledge and IP related matters, they have undertaken various initiatives including the online encyclopaedia “Te Ara” which includes stories relating to the settlement of New Zealand including those of tribal groups.

The WIPO proposals would fit with the aims and objectives of the Ministry which include promoting the cultural wellbeing of communities. The role of the Ministry is to “provide advice to Government, monitor the work of Government-funded agencies in the cultural sector and initiate activities that support and promote the arts, history and heritage of New Zealand”⁶⁴.

(iv) *New Zealand Historic Places Trust* – The NZHPT is a statutory body set up New Zealand to protect and manage heritage including Maori heritage. Even though the definition of Maori ‘heritage’ is described as “*nga taonga tuku iho o nga tupuna*” – treasures handed down by the ancestors, excluded from this definition are expressions of that heritage including “*te reo, performing arts, most portable taonga, etc*”.⁶⁵

It would appear, therefore, that the WIPO proposals, which focus on IP related aspects of culture, would have no *direct* application to the policies and processes of the New Zealand Historic Places Trust. Nevertheless, the Principles and Objectives, particularly in relation to protection of TK, would be of some relevance to the work of the Trust. For example, the Policy Objectives in document 8/5 which deal with promoting conservation and preservation of traditional knowledge, supporting traditional knowledge systems etc, would be relevant to protecting and managing Maori heritage.

(v) *Crown Research Institutes* – several of the Crown Research Institutes (CRI's) such as Crop and Food Research Ltd, Manaaki Whenua Landcare Research and NIWA are increasingly involved in research involving Maori interests in relation to traditional knowledge and indigenous flora and fauna. For example, Crop and Food are actively seeking long-term research and commercialisation partnerships with Maori groups. They look to combine the scientific knowledge base of Crop and Food with the natural resource and cultural values base of Maori through a negotiating process known as “Te Putahi”. In particular, Te Putahi are focusing on developing partnerships with Maori in the area of traditional medicinal flora such as the research project involving plants traditionally used by Ngai Tuhoe. In this particular example, any IP rights arising from the research will be owned and controlled by Tuhoe and benefits flowing to that Iwi.⁶⁶

In relation to Landcare, their website contains detailed information and databases relating to traditional uses of all New Zealand native plants. As noted on the site:

“This valuable resource is now made available on the Web to anyone with an interest in New Zealand native plants and wanting to know more about their cultural uses”.⁶⁷

A search of the taonga species for Ngati Kuri, *Pupu Harakeke*, included a reference to the claims of Mrs Saana Murray on behalf of Ngati Kuri in the Wai 262 claim.

Clearly, from the perspective of the Wai 262 claimants, there would be major concern around their knowledge of their TK in relation to indigenous plants being so readily available online, notwithstanding that much of this information has been gleaned from publications written over the past 100 years.

However, it would appear from information on their websites, that Manaaki Whenua, as with Crop and Food, are involved in developing partnerships and research programmes with Maori that involve Treaty of Waitangi Maori-focused research programmes, biodiversity issues for Maori, forest ecology and customary harvest, indigenous knowledge and value systems, ecosystem services, modelling, and databases etc.⁶⁸

NIWA is also appears to be developing relationships with Maori groups in relation to marine-based research and the use of traditional knowledge.

The WIPO proposals, particularly document 8/5 on TK, may have particular relevance for CRI's especially in relation to Objectives and Principles regarding misappropriation of TK, benefit sharing, management rights, prior informed consent provisions and enforcement provisions.

(vi) *Foundation for Science, Research and Technology* – according to the draft FRST Maori Economic Innovation Strategy 2005-2012:

“This strategy is aligned with the Ministry of Research, Science and Technology's Vision Maturanga policy. This encourages the distinctive contribution of Maori knowledge, people and resources to innovation that benefits New Zealand. One distinctive element of this

⁶³ See Creative New Zealand website www.creativenz.govt.nz “*Creative New Zealand – Cultural Recovery*” article called “*Seriously Maori*”.

⁶⁴ www.mch.govt.nz/cwb/index.html - Cultural Well Being.

⁶⁵ www.historic.org.nz/heritage/maoriheritage_intro.html.

⁶⁶ www.crop.cri.nz/home/company-info/maori-partnerships.jsp (search as at 2 February 2006).

⁶⁷ <http://peopleplants.landcareresearch.co.nz/WebForms/peopleplantinformation.aspx> - *Nga Tipu Whakaoranga People Plants Database* (search as at 2 February 2006).

⁶⁸ www.landcareresearch.co.nz/services/Maori.asp - ‘*Working with Maori Organisations on Environment Issues*’ (search as at 2 February 2006).

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strategy is to encourage the development of collectively owned Maori resources for the benefit of the community as well as the exploration of innovation opportunities that arise from Maori knowledge”.⁶⁹

The WIPO proposals when finalised, will be of relevance to the work and programmes being implemented by FRST in so far as they relate to the individual and collective economic development of Maori with a view to gaining greater leverage and opportunity from capturing the benefits of IP that flow from their TK.

(vii) *Ministry of Research, Science and Technology (MORST)* – the WIPO proposals will be useful and relevant to the intellectual property guidelines developed by MORST in January 2004 in relation to IP produced from research performed for the Public Service that is required to be used for the “*greatest national benefit*”.⁷⁰

It will also have relevance to MORST’s new Vision Matauranga policy framework (2005) whose mission statement is:

“To unlock the innovation potential of Maori knowledge, resources and people to assist New Zealanders to create a better future”.⁷¹

According to the policy framework, it is concerned mostly with discovering the distinctive contributions to research, science and technology that arise from Maori knowledge and resources including people.

(vii) *National Archives of New Zealand* – under section 7 of the Public Records Act 2005 (which replaces the Archives Act 1957), there are requirements for: “appropriate account” to be had to the Treaty of Waitangi; the Chief Archivist to consult with Maori, and for at least two members of the Archive Council to have knowledge of tikanga Maori. It also recognises that Iwi/hapu based repositories may be approved as repositories where public archives may be deposited for safekeeping. These changes in the new legislation recognise the extensive body of Maori knowledge held in the Archives records and the importance of ensuring the Crown complies with its Treaty obligation to Maori in relation to the safekeeping of that material.

(viii) *The Museum of New Zealand Te Papa Tongarewa* – Te Papa has developed strong relationship, policies and processes with Iwi for the display, exhibition, protection, repatriation and general treatment and respect for taonga (the Corporate Principle of Mana Taonga).⁷² This has been the author’s personal experience and dealings with Te Papa concerning the care of Moriori taonga. Te Papa has set the standard for other museums to follow in working in collaborative partnerships with Iwi. Te Papa is increasingly aware of and sensitive to intellectual property matters confronting Iwi and themselves in the care and use of Taonga. In the author’s experience Te Papa will not display tribal taonga (including physical objects and images of those objects etc) unless they have obtained the prior informed consent of the Iwi concerned. Although Te Papa appears to have strong internal procedures and policies for protecting taonga and knowledge associated with those taonga, an international instrument containing mechanisms for enhancing protection of TK and TCE’s would lend weight to their own policies while perhaps also assisting in their dealings with foreign museums for the return and repatriation of taonga held by those museums on behalf of Iwi. However, there are Iwi such as Ngati Porou and others who are seeking to establish firmer relationships with museums which will include, in some cases, the return of Ngati Porou taonga to their rohe.⁷³

(ix) There are a range of other Government agencies such as the Environmental Risk Management Authority (ERMA), Ministry of Fisheries, Ministry of Forestry, Department of Conservation (Biodiversity Strategy Document) and others for whom matters of Maori TK and intellectual property rights and rights in relation to native flora and fauna are becoming increasingly relevant. That being so, any standards, objectives and guidelines being developed in this area by WIPO will have relevance to the work of these agencies also.

(x) The only current proposed law change in New Zealand relating to IP and TK is the proposed amendments to the Patents Act 1953 where it is proposed to create a body similar to that of the Maori Advisory Committee created under the Trademarks Act 2002. The establishment of this committee was prompted by recommendations of the Royal Commission on Genetic Modification 2001 because there were no protections or procedures in place to deal with Maori concerns in relation to patent applications which include indigenous flora and fauna and associated Maori TK.⁷⁴ WIPO has specific initiatives aimed at addressing the matter of misappropriation of TK as “prior art” that may be used in the development of patents for TK and plant based commercial products.⁷⁵

Summary on Development of Government Policies regarding TK

Although it would appear that many government agencies and Ministries have at least *some* policies in place dealing with the use and access to TK, these have been and continue to be largely developed in an ad hoc manner and without appropriate input or consultation with Maori groups. The risk of developing policies ‘on the hoof’, as it were and without effective involvement of Maori will mean not only a flawed process but ultimately policies which may not be acceptable to Maori, are likely to be inconsistent across the board and/or lack robustness.

MATAURANGA MAORI, TIKANGA, KAWA AND CUSTOMARY LAW PERSPECTIVE

3.53 From a *purely* tikanga Maori and customary law perspective, the WIPO Objectives and Principles would be regarded in many respects as *inappropriate*. This is because of the fragmented nature in which the protection of TK is treated separately from expressions of TK and the disconnected relationship between matters of ownership/control of biological and genetic resources. Maori, as with indigenous peoples elsewhere, do not necessarily consider that their language, art forms, images or designs etc can be regarded separately from the culture and knowledge base underpinning the TK and the resources associated with that knowledge. Traditional knowledge and expressions

⁶⁹ Available from the FRST website www.frst.govt.nz.

⁷⁰ www.morst.govt.nz/currentwork/ipguidelines.

⁷¹ www.morst.govt.nz/visionmatauranga.

⁷² Te Papa Acknowledges Mana Taonga Te Papa recognises the role of communities in enhancing the care and understanding of collections and taonga. E Tautoko Ana a Te Papa Tongarewa i te Mana Taonga - Kei tēnā nohonga tangata rātou tikanga tiaki me rātou māramatanga ki a rātou kohinga me a rātou taonga. www.tepapa.govt.nz

⁷³ Evidence of Ray Kohere to the Waitangi Tribunal, 28 August 2006, Pakirikiri Marae, Tokomaru Bay, East Coast (Wai 262 Claim, Record of Inquiry Doc #P24).

⁷⁴ Cabinet Paper on review of Patents Act 1953, Stage 3, Part 3, Maori Consultative Committee for the Intellectual Property Office of New Zealand (sourced from www.med.govt.nz/patents/review/part3 - as at 7 February 2006)

⁷⁵ See in particular WIPO/GRTKF/IC/9/5, Annex, page 2, ‘Protection Against Misappropriation’.

of that knowledge, as well as the resources upon which the TK and TCEs are based exist together as part of a seamless whole. For example, internationally renowned Maori Performing artist, Moana Maniapoto's music, is infused with cultural and political significance regarding the Treaty and the importance of maintaining cultural identity.⁷⁶ For example, her international award winning song, "Moko", makes the poignant statement that moko is more than just a facial tattoo; it represents one's identity and culture. The same can be said of many if not most Maori artists, carvers, weavers, writers and performers. Tikanga Maori, kawa and TK have a significant influence in the intellectual creations of many Maori artists.

3.54 Some of the Wai 262 claimants consider that it is necessary to start from first principles in developing a coherent process and framework of protection for Maori TK. This has been referred to by the author as a "Tikanga Maori Framework" for protecting and promoting the appropriate use of TK. This approach is preferred to one in which changes are made on an ad-hoc basis characterised by "tweaking" around the edges of existing IP legislation such as has occurred with the Trade Marks Act 2002 and proposed reforms of the Patents Act. Rather, it is important to establish a sound and robust process and framework to enable debate and discussion to occur between the Crown and Maori and also the wider community. The framework needs to enable options and solutions to develop over time in a manner which fully reflects and does justice to the diversity and complexity of the issues involved.

3.55 There are other Maori groups who advocate nothing less than full Maori sovereignty including control over their own natural resources and people.⁷⁷

3.56 However, there are also other Maori groups both national and tribally based, who, while also being committed and passionate about ensuring better protection for Matauranga Maori and related IP, nevertheless perceive a need to adopt a more pragmatic approach. While most of these groups support the ethos behind the Wai 262 claim, they are conscious that the claim has taken an inordinate amount of time to be resolved, whilst misappropriation and misuse of their TK continues to happen on a regular basis.

3.57 For example, the national group of Maori artists who were behind the conception and development of the *Toi Iho: Maori Made Mark* brands saw no difficulty in employing the use of an IP tool such as a trademark, to promote and sell authentic Maori art and craft and authenticate exhibitions and performances by Maori artists. Their aim was to provide Maori artists with a quality brand of authenticity to distinguish their products from cheap foreign made imports and to give assurance to consumers of the quality and authenticity of Maori arts and crafts. It was also an endeavour to ensure some limited control over their taonga.⁷⁸

3.58 However, there are a number of factors that made this a "safe" option for the collective of Maori artists. Firstly, the artists largely had control of the process (including the design of the imagery and words for the mark) and the process was facilitated by Te Waka Toi, the Maori Arts Board of Creative NZ. There was thus, a full and effective involvement of the people most affected by the mark. Secondly, the hui (meetings) leading up to the development of the mark acknowledged that until such time as there was a proper resolution of the Wai 262 claim, the registration of a trademark was the only legally effective option available to protect and distinguish authentic Maori art forms in the marketplace.⁷⁹ The *Toi Iho* mark was therefore seen as an interim measure pending a more comprehensive sui generis/tikanga Maori framework of protection coming into being. Thirdly, Creative NZ agreed that in due course, the proprietary rights in the mark would be assigned to a trust fully representative of and appointed by Maori artists. Finally, the process and associated costs were resourced by Creative NZ through Government grants.

RECENT MAORI APPROACHES AND ASPIRATIONS IN RELATION TO TK

3.59 In recent years many Maori groups and organisations, particularly those with commercial and research interests, have adopted a more proactive stance in pursuing commercial benefit and greater control over their traditional knowledge. Increasingly, many Maori are using a range of tools to assist them in protecting and promoting the use of their TK. These tools range from joint venture arrangements with research institutions, contracts and IP agreements, branding of products, joint research initiatives and use of IP such as trademark and copyright to protect their interests, just to name a few. The increased use of such tools is largely driven by pragmatic considerations and the fact that there currently exist no legally enforceable alternatives such as those sought by the Wai 262 claimants, the Mataatua Declaration 1993 and the Draft Declaration on the Rights of Indigenous Peoples.

3.60 The following are examples of recent Maori initiatives and aspirations relating to the use and application of their traditional knowledge in terms of research and potential for commercial application:

Cancer genetic research

3.61 A group of Maori from the Bay of Plenty have been working with a cancer genetic research team at the University of Otago to identify the source and, hopefully, the cure for a form of gastric cancer that has been recurring within the *whanau* for several generations. The local *whanau* from Rotorua have been recorded as having the largest gastric cancer pedigree in the world. The project involves over 10,000 Maori who have provided the Research Team with information about their whakapapa and medical information. The whanau have also set up a trust known as the Kimi Hauora Trust which has entered into a partnership with the University of Otago. In the event that any patent rights are obtained in respect of identifying the gene for developing a cure, this would be jointly owned. Any financial benefits would be directed towards further research on cancer.

3.62 The whanau have entered into a further research partnership agreement with the Molecular Bio Science Department of Massey University. The aim of the research is to investigate the harmful effects of the stomach bacteria "*helicobacter pylori*" which could be a

⁷⁶ Evidence and responses to questioning of Moana Maniapoto to the Waitangi Tribunal hearing Wai 262 claim, 25 September 2006, doc #P4

⁷⁷ For example the Confederation of United Tribes of Aotearoa and Ko Huiarau, both Maori sovereignty movements who claim that sovereignty was never ceded under the Treaty of Waitangi and was expressly preserved in the 1835 Declaration of Independence signed by many Northern tribes.

⁷⁸ *Background*, on Creative NZ website, Creative NZ, New Zealand Arts Council 2003 (online: www.toiio.com/aboutus/).

⁷⁹ Personal knowledge of the author who attended two of the early consultation Hui and provided legal advice to Creative NZ and the collective of Maori artists on the basis that this process was regarded as an interim step until a more robust system of protecting Maori TK and IP could be developed in the wake of completing the Wai 262 claim.

major factor in causing the stomach cancer. Now that the bacteria have been identified, the next stage of the project is to find a cure for the disease.⁸⁰

Road planning and Maori knowledge

3.63 Ngati Whatua has entered into a research partnership with the Foundation for Research, Science and Technology (FRST) that will help plan roading infrastructure in New Zealand. The partnership objective is to preserve sites of cultural significance in such a way that will also help reduce roading costs and infrastructure development.⁸¹

Management of aquatic ecosystems and TK

3.64 This research programme involves hapu from Nga Potiki, Ngati Pukenga and Ngati Hapu in partnership with New Zealand Landcare Trust. Its aim is to develop estuarine monitoring and management tools that incorporate Maori cultural values and endeavour to reconcile Maori TK and Western science. The programme is also designed to assist Maori human capital development through supervision of several Maori PhD students.⁸² The research programme is from 1 July 2003 to 1 July 2009.

Maori business branding

3.65 This FRST research programme involves a number of leading Maori businesses and examines the innovative use of Maori business branding to increase export sales; global market responsiveness to Maori branding; experience with Maori branding in existing markets; Maori traditional principles in the business approach. This programme is a partnership between leading Maori business organisations, researchers and Government agencies.⁸³ The research programme is 1 July 2003 to 30 June 2007.

Sustainable hapu development and TK

3.66 This research project involves hapu from the Gisborne-East Coast region to identify the contemporary role of matauranga Maori in sustainable hapu development. The research is intended to position hapu so that they may identify and explore new development opportunities.

Medicinal plant research

3.67 A project, led by Dr Meto Leach working in conjunction with a Tuhoe Maori elder who is an expert on rongoa Maori, was set up in 2001 to investigate traditional Maori use of native flora. The project, known as Te Kete Ra Rauhanga was established in 2001 to investigate traditional Maori use of native flora. The aim of the project is to identify bioactive compounds in traditional plants used for healing as identified by the Tuhoe elder. Crop and Food Research is also involved with the project in studying the potential for development of natural products that could be used to meet the particular health needs of Maori. According to Dr Leach, any IP rights arising from the research will be owned and controlled by Tuhoe with the financial benefits shared between the partners.

Use of trademarks

3.68 As discussed above, a group of prominent Maori artists worked in collaboration with Te Waka Toi from Creative NZ to develop the Toi Iho: Maori Made Mark trademark brand to differentiate their products and services in the marketplace. An important aspect of the development of this brand was that Maori were in control of the process and were provided with guarantees from Creative NZ that ownership of the IP rights would eventually be transferred into Maori ownership. The trademark development was also considered as an interim step pending the development of other options that may evolve from the resolution of the Wai 262 claim.

Computer games and TK

3.69 A number of Maori IT entrepreneurs are working on concepts for computer/play station games that involve Maori heroes and heroines doing battle with the forces of evil. These games draw from Maori TK and mythology and use distinctive Maori imagery, design and weaponry etc.⁸⁴ There are obligations upon these game designers to ensure that in the development of these games and concepts, that they consult with and obtain approval from appropriate elders and other authority figures concerning appropriate use of TK. In the author's opinion, just because an individual is Maori does not absolve that person of responsibility to consult and follow proper cultural protocols. If anything, the onus on the individual is even stronger because of the obligations one has to foster and maintain the integrity of ones' own culture and identity.

3.70 Invariably the initiatives discussed above are one-off situations with solutions developed by the parties to meet their needs. While there is merit in this kind of flexibility to develop solutions to accommodate particular needs, it does not diminish the need for a *sui generis* system in New Zealand or international standards including some of those that are elaborated in the WIPO Objectives and Principles. These initiatives could greatly benefit from a set of international standards and principles as a foundation for a coherent local framework that enables flexibility and creativity whilst providing greater certainty for all parties.

PRACTICAL EXAMPLES OF MISUSE OR MISAPPROPRIATION OF MAORI TK IN NEW ZEALAND AND ABROAD

3.71 A number of examples have already been given relating to the misuse or misappropriation of Maori TK both in New Zealand and internationally. These examples include:

- the misuse of Tame Iti's moko to promote the sale of home security systems;
- the use of Maori names and imagery by LEGO on toy products;
- the use of Maori names such as 'Rangatira' on rugby boots by Canterbury of New Zealand;
- the use of Maori names and imagery by Sony Playstation on PS2 game, 'Mark of Kri';

⁸⁰ [HTTP://www.kimihauora.net.nz](http://www.kimihauora.net.nz).

⁸¹ [HTTP://frst.govt.nz/research/downloads/maoriinn/research_involving_maori-may04.doc](http://frst.govt.nz/research/downloads/maoriinn/research_involving_maori-may04.doc).

⁸² Ibid page 8.

⁸³ Ibid page 11.

⁸⁴ Personal knowledge of the author. More specific details cannot be provided in order to protect confidentiality.

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- the use of Maori names such as ‘atua’ by Austrian ski company, Fischer Skis;
- the use of moko by Ford Motor Company on Hot-Rod trucks,
- the use of moko by a Danish restaurant to promote sale of “face food”; and
- the use of Maori TK to promote the sale by Phillips Morris International of cigarettes in Israel.

In most of these cases, there would appear to be a misappropriation or at the least an inappropriate use of Maori TK. In the case of words such as ‘atua’, ‘tohunga’ and ‘rangatira’, it is likely that had the user sought to register a trademark in New Zealand using these words that it would have faced a challenge on the basis that they were offensive to a significant number of Maori under the relatively new provisions of the Trademarks Act 2002. This is affirmed in the ‘*Practice Guidelines of the Maori Trade Marks Advisory Committee*’ in relation to a discussion of old trademarks that used Maori words and images to sell food products.⁸⁵

“Maori consider “rangatira (chief)” and “whakairo (carving)” to be tapu and “food” or “cigarettes” to be noa. Therefore the association of food and carving devices in relation to the specified goods namely, “Worcester sauce”, “pickles and chutney”, “butter”, “cigarettes” and “ale and stout”, may be considered culturally offensive and inappropriate to a significant number of Maori. That is, to associate something that is extremely tapu with something that is noa signifies an attempt to lift the tapu of the rangatira or whakairo – and therefore appear offensive”.

3.72 The fact that none of the above cases associated the words specifically with use of food is probably irrelevant. The use of “rangatira” in association with rugby boots, “atua” with snow skis and “moko” with a hot-rod truck, are all arguably culturally offensive. They would be likely, therefore, to fall foul of the new “*offensive to a significant section of the community including Maori*”, test under the Trade Marks Act 2002, if trademark registration was ever sought. The recent case involving the sale by Phillip Morris International of cigarettes in Israel branded as ‘Maori Mix’ would certainly be considered highly offensive by Maori as well a large sector of the non-Maori community if any registerable IP rights been sought in New Zealand.⁸⁶

3.73 The fact that trademark registration was not sought by the companies concerned in the above examples does not lessen the degree of offensiveness that is suffered. It is in this regard that the WIPO provisions would provide enhanced protection against misappropriation and culturally inappropriate use irrespective of whether or not formal IP rights were being sought by the user.

3.74 There are other instances where use of Maori TK and Maori words in particular may be more ambiguous. For example, the increasing use of Maori names by New Zealand wine companies. According to information provided by IPONZ office the types of things that are generally likely to cause offence include:⁸⁷

“An Atua or Tupuna name/image; or

An association with wahi tapu - a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense; or

An element that may be regarded by whānau/hapū/iwi as having mana;

- in relation to alcohol, genetic technologies, cigarettes, and some goods such as food vessels and items used around food.

3.75 On the basis of this prescription it might be assumed that, the promotion and sale by a New Zealand company⁸⁸ of some bathroom products with Maori names and designs such as ‘Adze (Toki)’ soap and ‘Koru soap’ would fall into the category of offensiveness if trademark registration was ever sought. This is because associating ‘Toki’ and ‘Koru’, both which have elements related to the concept of tapu, with cleaning products (noa) would likely offend many Maori.

3.76 Another less clear example involves Kapiti Cheeses Limited, which has developed a new cheese known as ‘Hipi Iti’ meaning “little sheep” in Maori. The branding of this cheese has been developed in response to moves by European cheese companies to reclaim IP rights over their traditional brands such as ‘Parmesan’ cheese named after the Parma area of Italy.

3.77 In this example, where new words are being created or combined with old ones, the issue of misappropriations becomes more complicated. This is further clouded by the fact that the word “Hipi” is a transliteration for the word “sheep”, not a traditional Maori word. Nevertheless, in the author’s opinion, where any new or old Maori words or phrases are being used to brand commercial products, there needs to be scrutiny of the context in which such words are being used and developed because offence can still be unwittingly caused. This applies when words or phrases are used either alone or in combination with other new or old Maori words. Advising on the appropriate or inappropriate use of Maori kupu (words) in association with commercial products could be a function undertaken by a specialist Maori Agency that was established as part of any ‘Tikanga Framework’.

3.78 However, any new Maori TK agency or body should be set up as an autonomous body controlled and run by Maori. It should also have significantly wide terms of reference to consider matters of misuse and misappropriation of TK in addition to any formal IP application process. For example, there is an increasing supply of Maori inspired products being sold in the ‘\$2 Shop’ including place mats and carving boards sporting Maori names and motifs such as “Tane Mahuta: Lord of the Forest” and “Rongomaitane: Keeper of Peace”, and plates and cups bearing kowhaiwhai patterns. These are offensive to many Maori because they mix the elements of tapu and noa. The same applies to

⁸⁵ *Practice Guidelines – Trade Marks Act 2002: Maori Trade Marks Advisory Committee and Maori Trade Marks.*

⁸⁶ In early December 2005 it was reported by the New Zealand media that a New Zealand tourist to Israel had bought a packet of cigarettes sold by Phillip Morris International Inc (PMI) called ‘Maori Mix’ that displayed Maori designs and a map of New Zealand. The tourist, who was shocked at this discovery, reported it to the NZ media. Subsequent enquiries by the media revealed that Phillip Morris had not appreciated that they would cause offence and that they had only intended a short run promotion of the cigarettes. A letter written on behalf of the Wai 262 claimants to PMI on 12 December 2005 seeking an apology, withdrawal of the cigarettes from the market and payment of a donation to the Maori Smoke Free Coalition, was replied to in late January 2006 advising that the offending brand would not be used again by PMI and expressing regret for any offence taken. No reference was made to the suggestion of a koha. (Source: personal comms with journalist from TVNZ, media reports and correspondence with PMI).

⁸⁷ Personal communications with Simon Gallagher from IPONZ 12 January 2006.

⁸⁸ ‘*Bath Culture New Zealand*’ website <http://www.bathculture.com/pages/Detailed/9.html>

the increasing use of the 'haka' and 'moko' to promote the sale of commercial products and services and used by sports stars and pop singers alike.⁸⁹ These activities need to be formally monitored by such an agency and action taken to both educate and regulate this industry.

4. To what extent could the Principles or Policy Objectives contribute to the development of effective protection for TK and traditional cultural expressions?

LIMITATIONS OF APPROACH

4.1 Before addressing the extent to which the current principles and objectives could contribute to an effective framework of protection, I propose to first consider some limitations of the draft proposals.

4.2 The main criticism of the WIPO Objectives and Principles is that they interpret and constrain protection of TK and TCEs entirely within an intellectual property based framework.⁹⁰ To that extent, the Objectives and Principles are not so much concerned with the protection of TK and TCEs per se but rather where TK/TCE intersects at the IP interface. This narrow focus is acknowledged by the Secretariat:

"... the bulk of the Committee's work and background documentation has focused on the legal protection of TCEs/EoF (protection in a sense generally described as an intellectual property approach, and that it provides for remedies against unauthorised use and misappropriation by third parties of the results of intellectual activity)".⁹¹

4.3 As previously noted, the IPR system in its current form is not adequate to protect TK in its widest context particularly with regard to the relationship between indigenous peoples and biological resources. As noted by the late Dr Darrell Posey:⁹²

"Intellectual Property Rights are inadequate and inappropriate for protection of traditional ecological knowledge and community of resources because they:

Recognise individual, not collective rights;

Require a specific act of invention;

Simplify ownership regimes;

Stimulate commercialisation [which may not always be negative];

Recognise only market values;

Are subject to economic powers and manipulation;

Are difficult to monitor and enforce;

Are expensive, complicated and time consuming."

To this list could be added the limited duration of IP rights which do not accord with the intergenerational and holistic nature of indigenous peoples' world views. These views are consistent with the views of many nation states, particularly from the so-called 'developing countries' such as India, Brazil, and the African States attending the IGC meetings.⁹³

4.4 However, the WIPO documents leave open, to the discretion of the IGC, the possibility of extending the scope of the protection offered. I would note that for this reason, this work should be regarded as complimentary to other forms of protection, promotion and safeguarding of TK, including strengthening of customary laws and practices, development of sui generis systems of protection and development of codes of practice and other legal and non-legal mechanisms for protecting TK and IP of indigenous peoples.

4.5 However, as a consequence of this narrow focus, TK is being largely considered separately from the holistic relationships that indigenous peoples have with their physical and spiritual environment. As Maori tradition records, Maori descend from Tane Mahuta, the God of the Forest, Tangaroa, the God of the Oceans, Ranginui, the Sky Father and Papatuanuku, the Earth Mother and so on. Therefore, all traditional knowledge is inextricably bound up with their relationship to the natural world, which in turn is determined and defined by whakapapa. The WIPO documents focus on the "intellectual activity" aspects of TK so will take into account biodiversity-related knowledge and medicinal knowledge. However they exclude from their ambit the various ownership/kaitiaki claims that Maori and other indigenous peoples make in relation to their traditional lands/territories and other natural resources. Indeed, the WIPO documents reinforce

⁸⁹ Examples include: the international road racer David Clinger having his face tattooed "in a traditional Maori war-mask" (www.cyclingnews.com/feature/?id=2005/webcorclinger) - he was ordered by his sponsor to have it removed; the 'Spice Girls' 'haka'; Robbie Williams and Mike Tyson Maori Inspired tattoos, and; The BBC One channel using the haka 'Ka Mate' performed by one Maori and 14 Welsh rugby players, to promote a new TV channel in Britain (http://thetvroom.com/p-bbc-one-2002_a.shtml)

⁹⁰ See, for example, the discussion on Nature of Protection in Document 8/4, p 5, paras 15, 16 and 17. See also WIPO FFM Report at p 25 "WIPO's description of the subject matter naturally reflects its IP focus. WIPO's activities are concerned with the possible protection of traditional knowledge that is "intellectual property" in the broad sense as described in the definition of "intellectual property". The definition of "intellectual property" referred to in this quote is as defined in the Convention Establishing the World Intellectual Property Organisation 1967, Article 2(viii).

⁹¹ Ibid p 6, Para 17.

⁹² Posey, D.A. Chapter One, 'Introduction: Culture and Nature-The Inextricable Link' in "Cultural and Spiritual Values of Biodiversity". 1999, page 12. *A Complimentary Contribution to the Global Biodiversity Assessment*. 1999. Edited by Darrell Addison Posey.

⁹³ For example, in a written statement by India to the Seventh Meeting of the IGC in November 2004, India states that "We believe that Traditional Knowledge, Genetic Resources and Folklore are closely interlinked. There is a need to deal with all aspects of IP relating to TK, GR and folklore holistically".

the notion, first given expression in the Convention of Biological Diversity (article 15) that sovereignty of genetic resources resides with Nation States.⁹⁴ Thus, from a Maori perspective (and indigenous peoples' views in general), the WIPO documents fall short of what they would consider necessary to enable a full and comprehensive protection of TK.

4.6 The focus on the intellectual aspects of TK only also means that important matters such as repatriation of human remains, protection in general for indigenous languages and other matters related to cultural heritage protection (e.g. sacred sites etc) are “*excluded from this description of TK*”.⁹⁵

4.7 Matters such as self-determination and control of their own affairs, are also fundamentally important to Maori in any consideration of protection for TK. This has been made amply clear by witnesses giving evidence in the Wai 262 claim.⁹⁶ Unless Maori have a reasonable degree of control (free of undue influence from Government) then any protection, as might be developed, could be regarded as seriously deficient. As a minimum requirement, the principle of rangatiratanga, as described by the Waitangi Tribunal, contemplates Maori control over Maori resources. Although the WIPO documents go some way towards acknowledging the rights of traditional communities and holders of TK,⁹⁷ they stop short of acknowledging that indigenous peoples are the *owners* of their own TK. For example, the *Principle of Recognition of Rights* acknowledges that:

“The rights of traditional knowledge holders to the effective protection of their knowledge against misappropriation should be recognised and respected”.⁹⁸

From a Maori perspective, this principle (or an additional principle/s) would be enhanced by an acknowledgement that traditional knowledge holders in their respective communities are the owners/custodians of their own knowledge.

4.8 Moreover, the use of discretionary wording such as, “*should reflect the actual aspirations, expectations and needs of traditional knowledge holders*” and “*as far as possible and appropriate*”, as used in the ‘Principle of Responsiveness to the needs and expectations of traditional knowledge holders’,⁹⁹ provide decision-makers (invariably non-indigenous bodies), the ability to ‘read down’ or apply a minimalist interpretation of such provisions. The problems caused by this kind of wording have been brought to IGC meetings since the WIPO Fact Finding Mission started in 1998. Indigenous peoples have advocated strongly during these meetings for a more holistic approach to protecting their TK, however, these submissions have largely been ignored.

MERITS OF PRINCIPLES AND OBJECTIVES FOR PROTECTING TK

4.9 Notwithstanding the limitations identified above, the following is a discussion on the extent to which the WIPO Objectives might contribute to the development of more effective measures of protection for TK/TCEs.

4.10 The starting point for this discussion is one of pragmatism. At present in New Zealand, there are minimal tools available for protecting TK other than through standard IP tools such as copyright and trademark. There is also a dearth of non-legal tools such as codes of ethics or guidelines. The preference expressed by some Maori in developing a system of protection, is to start from first principles and develop a bottom up framework based in tikanga Maori. A suggested outline of that Tikanga Maori framework is attached as Appendix 2.

4.11 Other initiatives including the proposed adoption by the UN General Assembly in 2006 of the Draft Declaration on the Rights of Indigenous Peoples, (which sets out a comprehensive framework for indigenous peoples including asserting their right to self determination, ownership and control over their resources including their cultural and intellectual property rights), is still the subject of opposition from a number of state parties including New Zealand, Australia, the United States and Canada.

4.12 In the meantime, Maori TK continues to be misappropriated on an alarming scale. For these reasons, the author considers that the current WIPO Objectives and Principles with appropriate amendments and refinements could provide a sound basis for contributing to the development of a limited form of protection for TK/TCE, albeit within a narrow IP focus. However, as noted by the WIPO Secretariat the scope of protection could be widened if the IGC so wished.¹⁰⁰

A CASE STUDY: TAME ITI'S MOKO

4.13 To illustrate the extent to which the draft WIPO objectives and principles might provide better protection for Maori TK, I have tested their practical application against a recently reported example of alleged misappropriation,

4.14 It was reported in the media in mid 2005 that a UK magazine advertising the sale of home security systems used a photographic image of well known Maori rights activist, Tame Iti, with full facial moko and taiaha (traditional weapon) in a challenging pose, with the words “*How do you warn off intruders?*” accompanying the image. Tame Iti reported that he was offended by the advertisement mainly because he had not been consulted about the use of his image in this context. Legally, he may have had an action for a breach of copyright because his moko might qualify as a copyright work and that any unauthorised use of it might constitute an infringement of copyright¹⁰¹. He may well succeed if he chose to issue a legal challenge but the legal costs of doing so would be a key factor to consider.

⁹⁴ Document 8/5 ‘Principle of consistency with existing legal systems governing access to associated genetic resources’ “The authority to determine access to genetic resources, whether associated with TK or not, rests with national governments and is subject to national legislation.” (Annex, page 10)

⁹⁵ WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) *Intellectual Property Needs and Expectations of Traditional Knowledge Holders* p 25.

⁹⁶ See for example evidence given by Saana Murray, Catherine Davis and Hori Parata at the Tai Tokerau Wai 262 hearings of updating evidence, Te Puea Marae, Mangare, Auckland, 21-23 August 2006.

⁹⁷ Document 8/5, Annex, p 3(iii), (v) and (vi). See also Commentary on General Guiding Principles, Annex, p 9(a) and (b).

⁹⁸ Document 8/5, Annex, p 9(b).

⁹⁹ Document 8/5, Annex, p 9(a).

¹⁰⁰ Document 8/4, p 5, Para 17.

¹⁰¹ Comments of Intellectual Property lawyer, Simon Fogarty from AJ Park and Son, reported in NZPA Herald, http://media.apn.co.nz/webcontent/image/jpg/ACFPEAY_aGjx.JPG

4.15 Under the WIPO provisions as currently drafted, Tame Iti's facial moko would likely qualify as a traditional cultural expression (TCE) because body-painting is the subject of protection under Article 1 doc 8/4.¹⁰² Moko is the subject of creative intellectual activity and individuals are entitled to benefit from such protection provided that their creative expression is "*characteristic of a community's cultural and social identity and heritage and was made by the individual having the right or responsibility to do so in accordance with the customary law and practices of that community*".¹⁰³

4.16 Tame Iti's moko would likely qualify for protection because it represents a symbol of his cultural, tribal and individual personality and identity. He could also point to the policy objective to promote respect for traditional knowledge systems and "*for the dignity, cultural integrity and intellectual and spiritual values of the knowledge holders who conserve and maintain those systems*".¹⁰⁴

4.17 More importantly, Tame Iti could invoke objective 1(iv) in document 8/4¹⁰⁵ to prevent the misappropriation of TCE. This objective is intended to:

"Provide indigenous peoples in traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and derivatives there from, control ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use".

4.18 The English magazine using Tame Iti's image without his consent has arguably misappropriated his traditional facial moko (a unique form of cultural design) for a purpose beyond its traditional context. Furthermore, in doing so without his consent and for the purpose of promoting the sale of their security systems, they stand to commercially benefit. There is no suggestion that such benefits will be shared with Mr Iti.

4.19 According to Tame Iti, he agreed some years ago that this particular photographic image could be used in a book on moko.¹⁰⁶ However, he did not agree or consent to its subsequent use by the magazine advertising security systems, which he found offensive. Mr Iti's principle concern appeared to be about the lack of consultation with him.

4.20 Presumably the original photographer to whom Mr Iti agreed could use his image either gave or sold the image to the magazine and in doing so, according to Mr Iti, was in breach of his obligation not to use the image beyond the purpose which had been authorised. Namely for use in the publication on *ta moko*.

4.21 The case is an interesting example of the interface between TK and IP. Potential remedies would be available under standard IP law as well as under any new mechanism based on the WIPO Objectives and Principles. In normal circumstances, the photographer would own copyright in the photographic image. But arguably Mr Iti retains copyright in the moko as a copyright work and therefore has control over how that photographic image is used beyond that which he has expressly authorised. Thus, Tame Iti might have legal recourse against both the photographer and the UK magazine for breach of his copyright in the image of his moko.

4.22 In this instance, it would appear at least on the face of the WIPO Objectives and Principles, that they provide a clearer and potentially less expensive form of protection against misuse and misappropriation.¹⁰⁷ However, unless the particular moko design was registered or notified under Article 7 (doc 8/4), Mr Iti would need to rely on Article 3(b) for protection as an unregistered form of TCE. These provisions appear to extend protection for unregistered TCE to the "*relevant community*" as opposed to the individual. This is reinforced by the background discussion of Article 2, which places the emphasis for protection on the 'cultural community' as opposed to the individual.¹⁰⁸ However, an individual's TCEs may be protected:

"provided it is characteristic of a community's cultural and social identity and heritage and was made by the individual having the right or responsibility to do so in accordance with the customary law and practices of that community." (8/4 Article 1, Annex, page 13).

4.23 Otherwise Mr Iti's tribal community would need to take an action to ensure his rights were adequately protected, though that seems cumbersome and unnecessary in this case.

4.24 Assuming Mr Iti's individual rights are protected under Article 3(b), he could draw upon the references in (ii) and (iii) (8/4, Annex, page 20) that the misuse of his image was either a "*distortion*" or "*other derogatory action*", false, confusing or misleading, and where, in this case, it also relates to the sale of commercial services, Mr Iti could either stop the company from using the image or take civil or criminal action.

4.25 Alternatively, Article 3(b) (iv) would allow him to seek equitable remuneration or to share in any commercial benefits that the security company had derived from using his image to promote the sale of their product. Such benefits would need to be determined by the "Agency" as contemplated by Article 4 in doc 8/4. However this Agency is not a mandatory body and it will be for the local community to decide if such a body is necessary.

4.26 This case study illustrates an interesting tension between alleged misappropriations of TK on the one hand and willingness, to exploit that TK for commercial gain, on the other. The two scenarios are not necessarily mutually exclusive. Where the line is to be drawn in any particular situation will sometimes be a fine one and will come down to the judgment of the relevant community and/or individuals concerned. Where the moral and cultural integrity of a community (or individual) is at stake given the manner in which the TK is being used by a third party, it is unlikely that use or commercial use would be permitted. This may not always be the case, and nor does it appear to be

¹⁰² The expression "body-painting" may need to be either elaborated upon or another term chosen which expressly includes "moko" or "body marking/tattoo" to avoid any confusion on whether or not it is form of "body painting" or "body piercing" etc

¹⁰³ WIPO/GRTKF/IC/8/4, annex p 13.

¹⁰⁴ See doc WIPO/GRTKF/IC/8/5, annex p 3, (ii) and doc WIPO/GRTKF/IC/8/4, annex p 3, (ii).

¹⁰⁵ WIPO/GRTKF/IC/8/4.

¹⁰⁶ Interview with Tame Iti on Mana News, Friday 25 November 2005.

¹⁰⁷ However, the degree of protection would largely depend on the format and legally binding nature of the principles and objectives as finally adopted at the international level and implemented at the domestic level in NZ and by foreign states.

¹⁰⁸ WIPO/GRTKF/IC/8/4 Article 2, Annex page 17.

the intention of the Objectives and Principles to prescribe how these judgement calls are made. These are matters which are quite rightly left to the moral judgements of the communities and the individuals concerned.

SUMMARY OF EXTENT TO WHICH THE PROPOSALS MAY CONTRIBUTE TO EFFECTIVE PROTECTION OF TK AND TCE'S

4.27 Some key *positive* aspects of the Objectives and Principles include:

- They fill a current void at the international level relating to protection of TK;
- An international instrument or regime would significantly raise awareness among current and potential users and abusers of TK/TCE;
- They would provide an international framework within which indigenous peoples would be better able to prevent or stop misappropriation and misuse of their TK without necessarily resorting to expensive enforcement and other legal measures. In other words the mere fact of an international instrument of some kind could, in itself, be a powerful deterrent against misuse of TK;
- They offer flexibility enabling countries to adopt and adapt aspects of the regime that would best suit their own national circumstances. For Aotearoa New Zealand, that is important in order to ensure matters such as the Treaty of Waitangi and eventual findings of the Waitangi Tribunal on the Wai 262 claim can be factored into any local framework of protection;
- Protection is not necessarily dependent upon prior registration of the TK/TCE, thus overcoming a major concern of many indigenous peoples that their knowledge will be recorded in databases and that this might facilitate increased public access to that knowledge. However, that option is available to indigenous peoples if, in the appropriate circumstances, public access can be effectively controlled. For example, by the use of 'silent files' in which only the knowledge holders themselves or a duly authorised agency has access to that information for purposes of assessing whether or not a misappropriation has or is likely to occur.
- By seeking to prevent misappropriation of TK and TCEs, rather than creating new property rights over TK, they address a fundamental concern of many indigenous peoples that their knowledge should not be commodified. However, some indigenous peoples (including Maori), may, for whatever reasons, wish to pursue a property rights approach. This option is open to those individuals and groups under the current draft objectives and principles. This aspect is discussed in more detail later in this paper.

4.28 Some key negative aspects of the WIPO Objectives and Principles include:

- they are based solely within an IP framework of legal protection;
- the matter of protecting TK and TCE in the public domain remains problematic;
- to be truly "effective" from a Maori (and indigenous peoples' viewpoints generally), there would need to be a stronger element of self-determination in any regime to ensure that indigenous peoples have clear ownership and control over their own TK;¹⁰⁹
- the documents maintain the status quo regarding acknowledging that nation states have sovereignty over their biological resources.¹¹⁰ From an indigenous peoples' perspective this remains a significant issue given the claims from many if not all indigenous peoples to ownership of lands, waters and other natural resources within their traditional territory;
- the fragmented way in which the IGC is dealing with TK and TCEs in separate but parallel processes;
- they do not adequately reflect or incorporate international human rights norms and customary laws which have increasingly recognised the rights of indigenous peoples to their lands and other resources, culture, heritage, traditional knowledge and rights of self determination (e.g. as set out in the Draft Declaration on the Rights of Indigenous Peoples).

A SINGLE DOCUMENT?

4.29 The author considers that one single document on TK/TCEs, would be more user-friendly than two separate documents as currently proposed. There is considerable commonality and repetition between the two documents and it makes more sense to have just one document. Where there were any significant differences, these could be clearly identified either within the text of the document or, for example, TCEs could be attached as a separate annex. It would also avoid unintended conflicts/inconsistency in the language of the two separate texts.

5. Provide views on the focus on misappropriation and misuse (and the actions of third parties) without requiring the assertion of new property rights over TK, but accommodating that option should TK holders so wish?

5.1 Given the collective and inter-generational character of TK and the concerns expressed by many Maori (and other indigenous peoples) about the commodification and privatisation of TK, the focus on misappropriation and of misuse without requiring assertion of new property rights, appears to be on the right track. The option remains open for those TK holders who wish to utilise existing IP tools (or develop a new set of property rights) as for example, the Toi Iho trademark and the Kimi Hauora Trust (potential for seeking patent protection).¹¹¹

5.2 On the other hand, there are some Maori and indigenous peoples' groups who remain sceptical about the use and adaptation of IP tools as a form of protecting TK.

5.3 Concern has also been expressed by some of the Wai 262 claimants about the ability of the IP system to provide adequate protection. On the other hand, some commentators (including the author) have noted that aspects of the IP system could be adapted in

¹⁰⁹ See for example FFM Report (to the South Pacific), p 76 77 where it was noted during a roundtable discussion in Australia that "... TK should be understood and dealt with within the context of indigenous peoples' needs in other domains, such as self-determination, health, justice and cultural heritage. In other words, some informants pointed out, the IP needs of TK holders cannot be dealt with in isolation from their other needs".

¹¹⁰ WIPO/GRTKF/IC/8/5, Annex, page 10 "Principle of consistency with existing legal systems governing access to associated genetic resources"

¹¹¹ FFM Report, page 76. According to this report, the Kimi Hauora Trust and joint venture partners intend to patent any rights obtained in respect of the processes for identifying the mutant gene and any financial benefits that flow from the patent will go towards further research.

developing a sui generis system to protect aspects of TK¹¹² but that any new framework of protection should have as its fundamental basis, tikanga Maori values and principles.

5.4 Had the WIPO Objectives and Principles been in place at the time of the Ford Motor company, Fischer Ski's, Sony Playstation, and other examples of TK misuse referred to above there is a high probability that Maori objections to such misuse would have been more successful. In the cases cited registration of IP rights were not being sought, so no objections could be made on the basis of breach of moral or other strictly legal rights. However, under Article 3 (document WIPO/GRTKF/IC/8/4), the onus would be on the complainants to not only establish that the offending words and names (as in the LEGO and Canterbury of New Zealand examples) were disparaging, offensive or "*falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute*", but would also have to demonstrate that such words had been registered or notified under Article 7.

5.5 Alternatively, where no registration or notification had occurred, the claimants would need to establish that the use was a "*distortion, mutilation or other derogatory action*" in relation to a TCE or was false, confusing or misleading in relation to goods or services that drew upon the TCE of a community.¹¹³

5.6 In relation to the use of specific words such as "Tohunga" (Bionicle), "Rangitira" and "Moko" (Canterbury) and "Atua" (Fischer Skis) there is a likelihood that Maori claimants could show that the use was offensive (under Part B of Article 3 (assuming the words were not registered or notified)) because these words/names have special cultural (and spiritual) significance to Maori.

5.7 However, the test may be more difficult to satisfy in the case of words such as "Kehua", "Rangi" and "Riu" (Fischer Skis), "Pohatu", "Whenua", "Toa" and "Kanohi" (LEGO) and possibly "Tane-Toa" (Canterbury). Irrespective of whether or not these words were registered, the claimants would still need to establish an element of offensiveness by their use. In the example of "Pohatu" (stone) and "Toa" (warrior), it may be difficult to establish offensiveness. In the case of "Whenua" (which can mean either land or placenta), the matter is less clear. The same may be said of "Rangi" (Sky Father but also a Maori name in common usage). What may be offensive for some may be inoffensive to others. No doubt expert evidence would be needed in many cases where words had several meanings.

5.8 Perhaps the major benefit of an international framework would arise from its utility as an educative tool and potential deterrent to would-be TK pirates. To the author's knowledge, several of the companies who have used traditional names and designs on their products have done so unaware that they have caused offensive (e.g. LEGO, Sony Playstation, Ford Motor Company).¹¹⁴ Canterbury of New Zealand had endeavoured to follow a process to obtain permission, although no formal process was in place at the time. In the case of Ford, they had enlisted the advice of a Maori individual living in the USA who advised them on aspects of moko and its importance in Maori culture. The very existence of an international framework for protecting TK from misuse and misappropriation would not only enhance protection but also act as a catalyst for engagement between indigenous peoples and third parties who wish to gain access to their knowledge for commercial purposes.

5.9 In conclusion, the focus on preventing misappropriation without the necessity of creating (but allowing the flexibility to create) new property rights in TK, appears to be a pragmatic and balanced approach to a complex situation.

6. Are there any Principles that are particularly important? What are these and why? Could improvements or changes be made? What are these?

6.1 As might be expected, there is considerable overlap and duplication between the Policy Objectives in documents 8/4 and 8/5. However, there are also instances where the objective appears to be the same but the wording is different. In general, all of the objectives in both documents appear to be relevant and important. The following discussion attempts to highlight areas where they may be strengthened and/or inconsistencies between the two documents identified and reconciled.

6.2 Gaps and suggestions for additional Policy Objectives and Principles are discussed under a subsequent heading.
[WIPO/GRTKF/IC/8/5: Policy Objectives]

'RECOGNISE VALUE AND PROMOTE RESPECT'

6.3 Both of these Policy Objectives are particularly important because they recognise the holistic nature and intrinsic value of TK and its equal scientific value with other knowledge systems. Objective (ii) recognises the contribution that TK has made to conservation of the environment, food security and to science and technology generally. This acknowledgment is important as a means to overcome long-held beliefs that TK and TK holders were somehow inferior to modern science and scientists. Acknowledging or recognising the worth of TK to not only traditional communities but to humanity in general will be a step towards achieving a greater understanding and acceptance of its relevance and importance in a world increasingly focused on new technologies and materialism.

6.4 There appears to be no valid reason for the difference in Policy Objective (i) (Recognise Value) in either document.

Recommended that Objective (i) be harmonised in line with 8/5 (i).

6.5 Similar comments apply in relation to Policy Objective (ii) (Promote Respect). For example 8/4(ii) reads "*Promote respect for traditional cultures and folklore ...*" Whereas 8/5(ii) reads "*Promote respect for traditional knowledge systems ...*" Objective 8/5(ii) reads "*For the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems ...*" Whereas Objective 8/4(ii) reads "*For the dignity, cultural integrity, and the **philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore***" (bold added).

¹¹² M. Solomon, 'Who Owns Traditional Knowledge', a paper (soon to be published) presented to the International Bar Association, Auckland, October 2004 page 7.

¹¹³ Document 8/4, Annex, p 20(b) (ii) and (iii).

¹¹⁴ Personal comms with Moana Maniapoto who interviewed representatives from these companies during the making of the documentary "New Zealand Up For Grabs" screened on NZ television in October 2005.

6.6 While it seems apparent that some of the language is aimed at addressing the different approaches between TK and TCEs, there does not appear to be any rationale for the change in wording or language between one and the other. For example, the addition of the word “*philosophical*” in 8/4(ii) and the substitution of “*peoples and communities that preserve and maintain*” in 8/4(ii) for the wording “*traditional knowledge holders who conserve and maintain*” appears to be arbitrary.

6.7 Another general comment is the inconsistent way in which the terms “*traditional knowledge holders*”, “*indigenous and local communities*” and “*cultural communities*” are used interchangeably throughout the two sets of Policy Objectives. Unless there is good reason for doing so these terms should be brought into harmony. Alternatively, common terms could be adopted with an accompanying explanation that they are inclusive of additional interpretations of the commonly referred to term. For example the term ‘indigenous, local and traditional communities’ would appear to cover all of the terms used

Recommended that the wording and language of Policy Objective (ii) be harmonised.

‘PREVENTING MISAPPROPRIATION OF TRADITIONAL KNOWLEDGE’

6.8 Clearly, preventing misappropriation of TK is central to achieving the purpose of the Objectives and Principles. For this reason, these provisions are of particular importance.

Recommendation – that a specific Policy Objective be added to document 8/5 on misappropriation similar to Objective (iv) in document 8/4. This could read as follows:

“Prevent the misappropriation of traditional knowledge

Provide indigenous peoples in traditional and other cultural communities with the legal and practical means, including effective enforcement measures, as a means to:

prevent the misappropriation and inappropriate use of TK

control the ways in which traditional knowledge is used beyond its customary and traditional context;

And promote the equitable sharing of any benefits arising from its use”.

The wording of this proposed Objective is consistent with the wording and intent of Objective (iv) in document 8/4 and Article 1 (Protection Against Misappropriation) in document 8/5.

6.9 Article 1 (document 8/5) and Article 3 (document 8/4) both emphasise the misappropriation of TK and TCEs in relation to commercial imperatives and draw upon IP principles of unfair competition (Paris Convention Article 10 *bis*) and equitable sharing of benefits. Policy Objective (viii) of document 8/5 (Annex page 4), aims to “*repress the misappropriation of traditional knowledge and other unfair commercial and non-commercial activities...*” To a much lesser extent the provisions provide more limited protection against culturally offensive or derogatory use of TK. The threshold for non-commercial misappropriation appears to be set higher than for commercial misappropriation. For example Article 1 provides:

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

6.10 Anyone seeking to invoke a legal protection under this limb of misappropriation has the onus upon them to prove that the user acted “wilfully” or with *intent* to cause offence. It should be sufficient that the *effect* or consequence of the use is offensive, rather than that was the *intended* consequence. This is because many users of TK are often ignorant of the offence they have caused to the community concerned.¹¹⁵ This higher threshold for non-commercial misuse as against commercial misuse of TK is further highlighted by the qualifying words such as “*particular*” and “*clearly*” in Article 1, 3(v).

Recommendation – that the words *wilful*, *particular* and *clearly* be deleted from 3(v).

6.11 Article 1 commences with the positive statement that “*Traditional knowledge shall be protected against misappropriation*”. Misappropriation implies that it may include both commercial and non-commercial uses. This provision focuses on commercial misappropriation. Often, for indigenous peoples, it is the non-commercial unauthorised use of their TK that is problematic. These non-commercial uses may also be culturally offensive. For these reasons it is **recommended** – that an acknowledgement of non-commercial misappropriation be identified as a separate category in Article 1.

6.12 In relation to Article 3 (TCEs) the distinctions between commercial and non-commercial aspects of misappropriation appear to be more evenly balanced. The requirement that TCEs of *particular* cultural or spiritual value or significance be registered or notified appears justified where that information is already in the public domain and for which knowledge holders are seeking prior informed consent to its use (see commentary p 21(a) (i)). This appears to be a move in the right direction towards protecting TCEs (query whether TK can be similarly protected) that are already publicly known.

6.13 Both the moko and the haka “Ka mate Ka mate” (written by Ngati Toa Chief Te Rauparaha to celebrate his escape from being captured and made famous by the New Zealand All Blacks), would both potentially qualify as TCEs of particular cultural or spiritual significance and as cultural icons that are well known publicly and often the subject of misappropriation.¹¹⁶

¹¹⁵ This has been the experience of the author in dealings involving Phillip Morris International, LEGO and Sony Playstation cases and the use by Ford Motor Company of a moko design on a Ford hotrod truck.

¹¹⁶ For example “moko” has in recent years been: used by Dutch restaurants to promote their food, tattooed on rock stars and sports peoples (Robbie Williams, Mike Tyson and Ben Harper),

6.14 However, there would be among many Maori, an intuitive reluctance to register such cultural icons. There would also be the matters of existing usage (for example the All Blacks haka) and where companies claim to have received prior authorisation from an individual Maori (e.g. Ford Motor Company's use of moko and the BBC rugby team use of the haka to promote its new channel). How a particular TCE was identified and described would thus be of primary importance. In the examples given of moko and haka which have a great diversity of uses and applications, there would be justification for a generic description of these TCEs to be notified or registered with a competent agency as contemplated by Article 7, document 8/4.

6.15 The words "*as far as possible and appropriate*" as used in 8/5, Article 1, Para 5, give too much scope for customary practices and laws to be read down or sidelined in the application, interpretation and enforcement of protection against misappropriation of TK. For this reason, these words should be deleted.

6.16 Where TCEs are not registered or notified and a misappropriation is to be determined by *how* the TCE is used, difficulties could be encountered in deciding whether such use is "*in furtherance of creativity and artistic freedom*". In this case Article 3(b) applies (commentary, Article 3, doc 8/4 (b), page 22) or is used in some other way which amounts to a misappropriation. For example both LEGO and Sony Playstation had claimed in their defence that they had been "creatively inspired" by Maori TK and were not seeking to claim any IP rights over it. The commentary states that determining the "how" TK was used "*would be regulated, drawing mainly upon moral rights and unfair competition principles ...*" with payment of equitable remuneration. Reliance on a strict IP approach as outlined here would not address the underlying concerns that Maori expressed regarding the inappropriate use of names such as "tohunga" and "Tahu"(LEGO), "atua" and "Rangi" (Fischer skis) and images/weapon (moko and taiaha) (Sony) and association with Maori culture (Phillips cigarettes). It is recommended, that the commentary should reflect that determining how TK is used (when not registered or notified) should be done in accordance with relevant cultural norms, values, protocols, laws and practices as well as IP regulations such as moral rights and unfair competition.

"RESPONSIVENESS TO ASPIRATIONS AND EXPECTATIONS OF TK HOLDERS"

[Document 8/5, General Guiding Principle (a) and document 8/4 General Guiding Principles II(a).]

6.17 This Principle is important because it acknowledges the significance of the aspirations and expectations of TK holders and that measures for protection of TK/TCE may be voluntary and comprise both customary and non-customary/legal forms of protection.

6.18 However, one cannot help being a little cynical given the fact that the WIPO Report on Fact-Finding Missions refers in its title to the "*needs and expectations of traditional knowledge holders*". It then proceeds to outline at some length what these needs and expectations are of indigenous peoples around the world, but in many major respects ignores what indigenous peoples have asked for. For example, greater self-determination, a holistic relationship between TK, TCEs and claims in relation to natural resources, etc. This pattern has, in general terms, been continued through the IGC process where indigenous peoples' voice and aspirations have often been marginalised.

6.19 Although the commentary to this Principle is constructively worded, it could be improved and strengthened. The use of the term "*as far as possible and appropriate*" (8/5 Guiding Principles (a)) and "*as far as possible*" (8/4 General Guiding Principles (a)), should be deleted because, from a Maori perspective, the addition of these words weakens the intent of the Principle. For instance, almost without exception, it will be nation states who will be determining what is "*possible and appropriate*" rather than indigenous peoples.

[Refer also to documents 8/5 Policy Objective (iii) "*meet the actual needs of holders of traditional knowledge*" and document 8/4 Objective (iii) "*meet the actual needs of communities*".]

"PRINCIPLE OF FLEXIBILITY AND COMPREHENSIVENESS"

[Document 8/5 Principle (f) and document 8/4 Principle (d).]

6.20 This Principle is of particular importance because it takes into account the diverse nature of indigenous and traditional communities around the world and their respective customs and laws, and also the diverse range of national, regional and international legal and political systems. This Principle also acknowledges that there will be a range of both "*proprietary and non-proprietary measures*" to protect TK/TCEs. However, little attention is given in the respective commentaries to this Principle for using customary laws, systems and protocols for protecting these rights.

Recommendation - that the commentary should be redrafted to specifically refer to enhancing, promoting and strengthening customary laws as a means of protecting TK and TCEs in conjunction with proprietary and non-proprietary measures.

6.21 The Principle of flexibility also recognises that TK and TCEs are dynamic and continuing to evolve. Thus, measures to enhance protection and promote appropriate use should also continue to evolve. This is also consistent with the Court of Appeals' view of the Treaty in the *New Zealand Maori Council case* that:

used to promote the sale of Ford Motor Company Hot Rod trucks,
to sell home security alarm systems in England, and;
used on animated figures in computer (Microsoft) and Playstation (Sony: Mark of Kri) games.

In the case of the haka, there are various examples including:
misuse by the "Spice Girls",

UK rugby team to promote the sale of alcohol, and;
in 2006 the haka was used by Italian sports company Fiat, to promote the sale of a new fiat model. In this last example the haka was performed by women which caused greater offence (Maori women traditionally perform the haka but were specially trained to do so). When Maori raised objections to Fiat, they responded by saying that they had sought advice from a Maori tohunga moko (expert) Derek Lardelli who advised them not to do it but they had ignored his advice. Eventually, Fiat agreed to withdraw the advertisement and apologised to Maori.

“...it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms...”¹¹⁷

NEED FOR ADEQUATE RESOURCES

6.22 In order to achieve appropriate protection and access to regulation and enforcement measures, TK holders need to be appropriately resourced. There is a need for a specific Objective and Principle committed to adequately resourcing TK holders for the development, implementation and enforcement of these Objectives and Principles. See in regards to these comments the Policy Objectives on empowering and supporting traditional knowledge systems and the Guiding Principles (h), (i) and (j) in document 8/5, p 11.

EMPOWERING HOLDERS OF TK/SUPPORTING TK SYSTEMS AND PROMOTING/CONTRIBUTING TO PRESERVATION AND SAFEGUARDING OF TK

[Document 8/5, Policy Objectives (iv), (v), (vi) and (vii).]

6.23 These Policy Objectives are considered together because they all relate to the ways in which indigenous and traditional communities are to be empowered to exercise their rights over and in respect of TK and TCEs, in accordance with their own systems. This sentiment is perhaps best expressed in Policy Objective (v) in document 8/5:

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

[The protection of traditional knowledge should aim to:]

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

6.24 Similarly, in document 8/4 Policy Objective (v):

“Empower communities

(v) [The protection of traditional cultural expressions, or expressions of folklore, should aim to:]

(b) be achieved in a manner that is balanced and equitable but yet **effectively empowers indigenous peoples** and traditional and other cultural communities **to exercise rights and authority** over their own traditional cultural expressions/ expressions of folklore”. [bold added]

6.25 Although these policies purport to express worthy and strong sentiments for empowering indigenous peoples (e.g. particularly the words highlighted in the above quotes) they are somewhat “watered down” in the subsequent Guiding and Substantive Principles sections of both documents 8/4 and 8/5.

6.26 For example, respect for customary laws and protection of TK is made subject to “national law and policy” (document 8/5, Principle (h)); enforcement of protection against misappropriation of TK is to be guided “as far as possible and appropriate” by respect for customary law (document 8/5, Article 1, 5); TK related to biological and genetic resources are subject to national laws governing ownership and access to these resources (document 8/5, General Principle (f) and Substantive Principles, Article 12, 1).

6.27 Moreover, although the above Policy Objectives speak of tailoring solutions to meet the distinctive nature of TK systems ensuring that a balanced approach is adopted, the following Principles appear to place significantly greater weight on the application of national regulatory laws and IP tools, rather than enhancing and promoting the use of customary laws and protocols for the protection of TK.

6.28 For example, in Article 13 of document 8/5 dealing with administration and enforcement provisions no reference is made to the use, development or promotion of customary laws and protocols for the enforcement of protection of TK. There is only an indirect reference in Article 13, 1(a) (vi) to assisting holders of TK “where possible and appropriate” to exercise and enforce their rights over their own TK.

6.29 If TK holders are to be effectively empowered for the use, protection, promotion and safeguarding of their TK, it is important that systems of administration, regulation and enforcement give greater weight to strengthening and promoting the use of customary laws and protocols as a means for enhancing protection of TK.

Recommendation - that the words “where possible and appropriate” in Article 13, 1(a) be deleted and that the words “in accordance with their customary laws and protocols/practices” be added to the end of that provision.

Recommended further that Article 13, 2 be redrafted as follows:

“Measures and procedures developed by national and regional authorities to give effect to protection in accordance with these Principles should be fair and equitable, **take into account customary laws and practices of the relevant indigenous, traditional and local communities**, should be accessible, appropriate and not burdensome for holders of traditional knowledge, and should provide safeguards for legitimate third party interests and the public interest”. [bold added]

6.30 Similarly in relation to protection of TCEs in document 8/4, Article 10 (Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion) should be amended to refer specifically to the use of customary laws and practices as a means of protecting TCEs in addition to IP laws. (See tracked amendments to Article 10 in the annex.)

6.31 This would be consistent with the reference in the commentary to Article 10 on relationship with non-IP measures, to “customary and indigenous laws and protocols” as measures complementing IP protection.

6.32 There is a paucity of references to the role of customary law and the protection of TK/TCEs in the current Objectives and Principles, however, the author acknowledges that there is currently work in progress being undertaken by the IGC Secretariat to seek input from States,

¹¹⁷ New Zealand Maori Council v. The Attorney General [1987] 1 NZLR 641, 656 (per Cooke P).

NGO's and indigenous peoples on the relationship of customary laws and protocols with the intellectual property system.¹¹⁸ As noted in a submission by the Informal Indigenous Consultative Forum at the Eighth Session of the IGC, "this work on indigenous customary law is absolutely integral to the further developments of both the TCE and TK provisions".¹¹⁹

6.33 Additional Principles and Objectives that are particularly important include:

Sanctions, Remedies and Exercise of Rights (Article 8, doc 8/4);

Management of Rights (TK and TCEs), (Article 4, doc 8/4 and Administration and Enforcement of Protection (Article 13, doc 8/5);

Beneficiaries of protection (TK and TCEs), (Article 2, doc 8/4 and Article 5 doc 8/5);

Fair and equitable benefit sharing (TK), (Article 6, doc 8/5);

Principle of prior informed consent (TK), (Article 7, doc 8/5);

Duration of protection (TK), (Article 9, doc 8/5).

LEGAL FORM OF PROTECTION

6.34 In addition to the purely legal and IP related mechanisms for protection of TK as outlined in Article 2 of document 8/5, there also needs to be measures for promoting and supporting the use of customary laws and measures to provide better protection. These should be complementary to and co-exist with newly developed legal forms of protection.

Recommendation - that a new paragraph 3 be added to Article 2 in document 8/5 as follows:

"3. The development of legal measures to strengthen, enhance and promote the use of customary laws, protocols and practices to protect traditional knowledge in ways that are complementary with existing and newly developed legal measures".

6.35 Similarly in relation to document 8/4, Article 8 (Sanctions, Remedies and Exercise of Rights), could be amended to ensure that the Agency proposed to assist communities in managing the administration and protection system, should be specifically tasked with assisting communities to develop their own means of protecting their TCEs and TK using local dispute resolution mechanisms etc.

6.36 Legal and local community mechanisms for protecting TK and TCEs will only be effective if TK holders have adequate legal aid assistance and resources to ensure that national, regional and international mechanisms of protecting TK can be properly accessed, implemented and enforced.

MANAGEMENT AUTHORITY AND MANAGEMENT RIGHTS

6.37 The establishment of an appropriate agency to work with local communities and TK holders at a national and regional level will be critically important to the success of any Tikanga Framework for protection and appropriate use of TK/TCE. Although the Policies and Principles appropriately note that such an agency should be optional and established at the request of indigenous peoples, such an agency in Aotearoa/New Zealand could play an important role for the following reasons:

- the large and diverse range of tribes and associated traditional knowledge/TCEs;
- the need for a principal point of contact for third parties (both national and international) wishing to access and use TK/TCEs;
- as a point of referral to local hapu and iwi who would be supported and empowered under any Tikanga Framework to provide their own systems of kaitiakitanga and rangatiratanga in relation to the protection and use of their own taonga;
- as a national advocacy and policy development agency on behalf of all Maori;
- liaising with Government agencies and private sector on matters relating to Bio-cultural, TK and IP rights etc.¹²⁰

6.38 Such an agency could be established following appropriate national and regional consultation with Maori. One of its functions might include acting as a referral point where matters affected particular marae, hapu or Iwi in order to enable those local communities to either deal with the matter themselves or instruct the agency to do so. It might also deal with matters that affected Maori on a national basis, where, for example, a third party wanted to use names and images that have generic application among Maori tribes.

6.39 A common complaint by third parties wishing to use TK is that they do not know who to speak to or who has the appropriate mandate to speak on behalf of Maori. A national and/or regional agency would perform a crucial role in becoming known as the main point of reference for such enquiries and for putting a third party into direct contact with the traditional knowledge holders. Where the matter is one of generic application, it could then deal with it at a national level. So, for example, where a domestic or international company wanted to use Maori TK to promote products or services, a national agency could decide whether such use was culturally appropriate, then enter into consultation with Maori groups (including whanau, hapu or Iwi) and, if appropriate, recommend appropriate equitable benefit sharing mechanisms. The agency could also be responsible for establishing a national putea (fund) to be used for a range of initiatives including developing the capacity of local communities, assistance with enforcement and compliance issues, developing educational and resource information for local communities, the private and public sectors and the general public.

¹¹⁸ See for details of the draft papers prepared by the Secretariat www.wipo-int/tk/en/consultations/customary_law/index.html

¹¹⁹ See joint statement by participants of the Informal Indigenous Consultative Forum to the Eighth Session of the IGC, Geneva, June 6, 2005 at Para 9.0.

¹²⁰ See also additional functions such a body could perform on behalf of Maori in the 'Tikanga Maori Framework of Protection' attached as Appendix 2.

7. Are there any gaps in the Principles or Policy Objectives important from a Maori or New Zealand perspective? What are these? Please suggest what amendments or changes should be made.

7.1 Several gaps in the Principles and Policy Objectives have already been identified in the above commentary, together with suggested amendments. This section will expand on some of those gaps and identify further key areas where, from a Maori perspective, the Principles and Objectives may be strengthened.

RESPECT FOR EXISTING INTERNATIONAL HUMAN RIGHTS AND SELF DETERMINATION

[Document 8/4 General Guiding Principle (g) 'Principle of respect for rights of and obligations towards indigenous peoples and other traditional communities'.

Document 8/5 General Guiding Principles (g) 'Principle of respect for and cooperation with other international and regional instruments and processes'.]

7.2 The above two principles, particularly in document 8/4, appear to suggest that the WIPO Objectives and Principles are without prejudice to existing international human rights of indigenous peoples. However, as with other Principles and Objectives, the wording of these Principles is inconsistent and needs to be harmonised. For example, the reference to "*international human rights*" in Principle (g) of 8/4 would appear to be more relevant in Principle (g) of 8/5, whereas some of the wording in Principle (g) of 8/5 would appear to be more applicable in Principle (g) of 8/4.

7.3 However, the linkage made between these Objectives and Principles and international human rights standards and norms¹²¹ is important because of the emphasis that Maori and other indigenous peoples place upon matters of self-determination in particular.¹²² The principle of self determination was first elaborated by the Charter of the United Nations 1945¹²³ and further elaborated in the International Covenant on Economic, Social and Cultural Rights 1966¹²⁴ and International Covenant on Civil and Political Rights 1966.¹²⁵ The issue of self determination is currently the subject of ongoing debate between indigenous peoples and some states in relation to the Declaration on the Rights of Indigenous Peoples which was adopted by the Human Rights Council in June 2006.

7.4 Although the WIPO proposals acknowledge that documents 8/4 and 8/5 are to be considered complementary with provisions contained in other international instruments containing provisions for protection of indigenous peoples' rights (e.g. UNESCO, ILO Convention 169 etc), for example on heritage protection, indigenous peoples consider that cultural and intellectual property rights are *indistinguishable* from their heritage rights and obligations. For example, the Wai 262 statement of claim for Ngati Kuri, Ngati Wai and Te Rarawa states that:

"The claim relates to te tino rangatiratanga of Ngati Kuri, Te Rarawa and Ngati Wai in respect of indigenous flora and fauna me o ratou taonga katoa (and all their treasures) within their respective tribal rohe, including but not limited to te reo, matauranga, knowledge systems, laws, customs and values, whakairo, waahi tapu, biodiversity, natural resources, genetics and genetic derivatives, Maori symbols, images, designs, and their use and development and associated indigenous, **cultural and customary heritage rights (including intellectual property and property rights)** in relation to such taonga. 'Taonga' in this claim refers to all elements of the claimants' estates, material and non-material, tangible and intangible".¹²⁶

7.5 Similarly, Janke comments in relation to Aboriginal heritage:

"Indigenous Cultural and Intellectual Property Rights" refers to Indigenous Australians' **rights to their heritage**. Such rights are also known as "Indigenous Heritage Rights".

¹²¹ This is also consistent with the Court of Appeals observations in the New Zealand Maori Council case, that the Treaty of Waitangi "is a document relating to fundamental rights: that it should be interpreted widely and effectively and as a living instrument taking account of subsequent developments of human rights norms" per Cooke P at page 656.

¹²² See for example the submission of Tebtebba (Indigenous Peoples International Centre for Policy, Research and Education) to the UN Working Group on Indigenous Populations, July 21-25, 2003 on "*Standard Setting and Protection of Indigenous Peoples' Heritage and Traditional Knowledge*" regarding the importance indigenous peoples attach to the right of self-determination in the context of culture, heritage and intellectual property rights:

"Indigenous peoples have consistently underlined the urgent need for international dialogue about the protection of traditional knowledge which is holistic, inter-disciplinary and cross-sectorial, and grounded on respect and self-determination of indigenous peoples as the subjects and rights-bearers over our knowledge and cultural heritage. In this regard, the Final Report of Mrs Erica-Irene Dies on the Protection of the Heritage of Indigenous Peoples (E/CN.4/Sub.2/1996/26) including Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples was an important contribution to this theme.

Bodies such as WIPO with its focus on intellectual property rights, WTO with its trade focus, CBD with its biodiversity focus have their limitations in relation to this theme as they are not rights-based bodies for standard-setting on indigenous peoples' rights. Unfortunately, standard-setting by the UN human rights bodies on the theme of traditional knowledge is lagging behind the activities in these other fora with the danger for indigenous peoples that these bodies set the standards on the subject of traditional knowledge. In these bodies, indigenous peoples are reduced to defensive strategies to prevent further encroachment and extraction of indigenous resources and knowledge by states and private corporations".

¹²³ See Article 1.2 of the Charter of the United Nations.

¹²⁴ Article 1.1 of the International Covenant on Economic, Social and Cultural Rights 1966 states that: "**All peoples have the right of self-determination**. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"

¹²⁵ Article 1.1 of the International Covenant on the Civil and Political Rights contains exactly the same wording as Article 1.1 of the International Covenant on Economic, Social and Cultural Rights 1966

¹²⁶ First Amended Statement of Wai 262 Claim for Ngati Kuri, Te Rarawa and Ngati Wai paragraph 3.1.

Heritage consists of the intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous people and passed on by them as part of expressing their cultural identity".¹²⁷

7.6 A representative of the African Indigenous Women's Organisation puts it this way:

The right of self-determination and free prior informed consent needs to be acknowledged if indigenous people are to be empowered to protect traditional knowledge.

The **holistic nature of traditional knowledge must be understood and promoted instead of its breakdown and compartmentalization into discrete components**, such as traditional Environmental Knowledge, Traditional Forest Related Knowledge, or Traditional Cultural Expressions.

A holistic understanding as well as coordination and harmonization among the various UN agencies and multi-lateral bodies active on Traditional Knowledge should be encouraged.¹²⁸

7.7 The Special Rapporteur of the Sub commission on Prevention of Discrimination and Protection Minorities has noted in relation to protection of the heritage of indigenous people that:

"1. The effective protection of the heritage of indigenous peoples of the world benefits all humanity. Cultural diversity is essential to the adaptability and creativity of the human species as a whole.

2. To be effective, the protection of indigenous peoples, heritage should be based broadly on the **principle of self-determination**, which includes the right and the duty of indigenous peoples to develop their own cultures and knowledge systems, and forms of social organisation ...

6. The discovery, use and teaching of indigenous peoples, knowledge, arts and culture is inextricably connected with the traditional lands and territories of each peoples ...

11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation ... the heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.

12. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance and burial; and documentation of indigenous peoples, heritage on film, photographs, videotape, or audiotape".¹²⁹

Recommendation - that the WIPO Objectives and Principles more fully reflect and incorporate the importance of the *holistic relationship* existing between indigenous peoples and their heritage rights and obligations (including TCEs/TK and IP) and making *practical linkages* between protection of TK/TCEs through the WIPO process and the continuing elaboration and protection of human rights standards and norms for Indigenous Peoples within other international fora such as the Working Group on Indigenous Populations, the Permanent Forum on Indigenous Peoples etc.

Some suggestions for making practical linkages might include:

recognising the importance within the WIPO documents that indigenous peoples attach to *self-determination* as a key to protecting themselves, their identities and their cultures;

include a separate statement within the body of the documents, which is prepared and written by indigenous peoples attending the IGC meetings which accurately reflects their aim and aspirations in relation to TK, TCEs and international human rights norms.

adopting a more *holistic* approach within the documents consistent with the views expressed by indigenous peoples for the recognition and protection of their cultural and intellectual rights and obligations;

including an appendix to the WIPO documents which contains a list of the relevant international instruments and other useful information (including indigenous peoples statements and declarations, codes of ethics etc) which contain measures for recognising and protecting rights and obligations of indigenous peoples;

ensuring that the WIPO Secretariat regularly attends meetings of the Permanent Forum, WGIP and other fora to monitor developments and report back to the IGC;

7.8 Other gaps in the WIPO principles and Objectives include:

Provisions needed to ensure adequate resourcing of indigenous peoples in the development and implementation of the proposals;

¹²⁷ Terri Janke, *Our Culture: Our Future* – Report on Australian Indigenous Cultural and Intellectual Property Rights, Part 1, Chapter 1, page XVII.

¹²⁸ Contribution by Haman Hajara, African Indigenous Women Organisation, Central Africa Network Yaoundé, Cameroon, to the *International Workshop On Traditional Knowledge*, Panama City, 21-23 September 2005, hosted by the Secretariat of the Permanent Forum on Indigenous Issues.

¹²⁹ Report of the Special Rapporteur of the Sub commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1995/26 (Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples), annex 1, 21 June 1995). [See also E/CN.4/Sub.2/2000/26 19 June 2000 which updates the 1995 version with some minor changes.]

Dispute resolution mechanisms including alternative dispute resolutions which include strengthening the use and application of indigenous customary practices, protocols and laws;

The fuller and more effective involvement and active participation/decision making of indigenous peoples in the development and implementation of the international regime for protecting their knowledge and expressions of knowledge;

8. Are there any Principles or Policy Objectives that are inappropriate? What are these and why? Suggest what amendments or changes should be made.

8.1 From a Maori perspective, Principle (f) of document 8/5 *Principle of Consistency with Existing Legal Systems Governing Access to Associated Genetic Resources*, is inappropriate because it provides that:
“The authority to determine access to genetic resources, whether associated with traditional knowledge or not, rests with national governments and is subject to national legislation.”¹³⁰

8.2 Maori, as with indigenous peoples worldwide, have strongly objected to the provision in the Convention on Biological Diversity that acknowledges that “sovereign rights” over natural resources belong to national governments (CBD, Article 15(1)). Similarly, Maori would be opposed to the inclusion of Principle (f) on the same basis, especially given their claims through the Waitangi Tribunal and other fora to the protection use, control and tino rangatiratanga of biological and genetic resources including those being made under the Wai 262 claim.

Recommended that Principle (f) be made specifically subject to domestic treaties and other constitutional arrangements with indigenous peoples regarding natural and genetic resources and traditional knowledge.

9. Codes of Ethics, Research Guidelines and Declarations

9.1 Over the past two decades, many Non-Governmental Organisations (NGO) and indigenous peoples’ organisations have developed codes of ethics, research guidelines and declarations in relation to ethno botanical research, bio-prospecting and for protection against “bio-piracy”. Many of these instruments also touch on the importance of protecting and preserving TK and IP of indigenous peoples. Most, if not all, focus on the holistic nature of TK rather than the narrower IT focus adopted by the IGC.

9.2 However, these codes of ethics and guidelines provide a useful background and a wealth of information and material relevant to the development of objectives and principles for protection of TK and TCEs. No doubt the WIPO Secretariat has drawn from some of these documents in developing their proposals and many of the concerns have been touched upon by member states, NGOs and indigenous groups in submissions and interventions to the IGC. However, from a Maori perspective, it is timely to remind the IGC that there is a large body of material available that has been developed over the last 20-odd years that is relevant to the work of the IGC and should be given careful consideration by it.¹³¹

9.3 The following is a list of some relevant documents and a brief description of each one. It is by no means an exhaustive list.

PROFESSIONAL CODES OF ETHICS AND ETHICAL GUIDELINES

International Society of Ethnobiology Code of Ethics – the ISE Code of Ethics has its origins in the Declaration of Belem that was passed at the founding of the ISE in Brazil in 1988. The Code is comprised in four parts : (i) Preamble, (ii) Purpose, (iii) Principles, and (iv) Practical Guidelines. One of the key objectives of the ISE Code of Ethics is to provide a framework for decision-making and conduct for ethnobiological research and related activities. As noted in the preamble to the Code of Ethics: “*much research has been undertaken in the past without the sanction or prior informed consent of indigenous peoples, traditional societies and local communities and that such research has caused harm and adversely impacted their rights and responsibilities related to biocultural heritage. The ISE is committed to working in genuine partnership and collaboration with Indigenous peoples, traditional societies and local communities to avoid perpetuating these past injustices and build towards developing positive, beneficial and harmonious relationships in the field of ethnobiology*”¹³²
The Principles of the Code of Ethics state that they embody established principles and practices of international law and customary practice and include the following Principles:

- Principle of Prior Rights and Responsibilities;
- Principle of Self-Determination;
- Principle of Inalienability (in relation to traditional territories and traditional knowledge);
- Principle of Traditional Guardianship;
- Principle of Active Participation (in relation to research programmes);
- Principle of Full Disclosure;
- Principle of Educated Prior Informed Consent (which includes the right to say “no”);
- Principle of Confidentiality (the right of indigenous peoples to keep certain TK confidential);
- Principle of Respect;
- Principle of Active Protection;
- Principle of Precaution;
- Principle of Reciprocity, Mutual Benefit and Equitable Sharing;
- Principle of Supporting Indigenous Research;
- Principle of the Dynamic Interactive Cycle (that research will only be undertaken if there is reasonable assurance that it will be completed);
- Principle of Remedial Action;
- Principle of Acknowledgement and Due Credit;

¹³⁰ WIPO/GRTKF/IC/8/5, annex p 10.

¹³¹ The Code of Ethics of the International Society of Ethnobiology was recently reviewed and updated at the Ninth Congress of the ISE held in Chiang Rai, Thailand, November 2006.

¹³² ISE Code of Ethics, ‘Preamble’, pages 1-2.

– Principle of Diligence.

The ISE Code of Ethics is unique in that it was co-developed by, and in collaboration with, scientific researchers, practitioners and representatives of indigenous peoples' organisations over a 10-year period. The code was adopted at the annual general meeting of the ISE held in Aotearoa/New Zealand in November 1998. The code is to be revised and updated at the next congress of the ISE being held in Chiang Rai, Thailand in November 2006. This revision will include finalising and adopting a set of research guidelines and protocols that will form part of the code of ethics.

The code has been used by a number of indigenous peoples since 1998 to help advocate for better protection of their traditional knowledge and resources, and inform more ethical and equitable research practices. For example, members of the Chiapas communities from Mexico represented by an NGO called COMPICH were actively opposed to the ethnobotanical research being undertaken in Chiapas communities by a collaborative research programme headed by University of Georgia in Athens, Georgia known as the Maya ICBG project. COMPICH were opposed to the research programme because they claimed that insufficient information was made available to the communities to enable them to provide their prior informed consent to the research being undertaken. For their part, the project leaders (Professors Brent and Elois-Ann Berlin), countered that they had consulted extensively with the Chiapas communities and had members of those communities actively involved in the project including receiving a share of any commercial returns that might emerge from the research programme.

COMPICH, in 2001 issued a lengthy public statement which set out in great detail how the Maya ICBG project violated the provisions of the ISE code of ethics. This was responded to by Maya ICBG in a similarly lengthy public statement countering the allegations and outlining in full how they had complied with the ISE code. Eventually, the project was cancelled by the funder because of the growing level of opposition and political agitation it was causing within the communities and increasingly at a national level. However, the fact that both parties referred to the ISE code to defend their positions showed that it is a useful tool for initiating some form of dialogue between conflicting groups in this complex area. It is hoped that the revised code may be used in the future as a tool to proactively resolve differences, rather than defend positions, before they become entrenched.

A full copy of the ISE Code of Ethics is attached as **Appendix 3** to this report and an electronic copy can be viewed at <http://guallart.dac.uga.edu/ISE/SocEth.html>.

A Covenant on Intellectual, Cultural, and Scientific Property: A Basic Code of Ethics and Conduct for Equitable Partnerships Between Responsible Corporations, Scientists or Institutions and Indigenous Groups (sourced from '*Intellectual Property Rights for Indigenous Peoples*', a source book by Darrell A. Posey, Appendix 1, Chapter 15).

This covenant contains a prologue, a preamble, principles and an outline of responsibilities and partnerships between indigenous groups, scientists and research institutions.

The prologue states that:

"This covenant should not be viewed as a finished product defining equitable partnerships, but rather a tool for redefining intellectual property rights through a process of consultation, debate, discussion, and creative thinking from the many peoples and groups concerned about establishing a new basis for sustainable development ..."

"The covenant is proposed as a mechanism to build upon IPR concepts utilising established "neighbouring rights" in the areas of:

labour law,

human rights laws and agreements,

economic and social agreements,

intellectual property and plant variety protection,

farmers' rights,

environmental conventions in law,

religious freedom acts,

customary law and traditional practices,

cultural property and heritage."

The preamble states that the covenant on IPR "*has nothing to do with short-term commercial exploitation, but everything to do with long-term partnership expressed through responsible trade and exchange for mutual benefit*".

Principles and Guidelines for the Protection of the Heritage of Indigenous People (E/CN.4/Sub.2/1996/26) – this report contains a set of Principles and Guidelines for the protection of the heritage of indigenous peoples. The report recognises the importance of the principle of self-determination to protection of indigenous peoples' heritage. It also recognises heritage is defined to include past and future objects, knowledge and literary or artistic works that are based upon heritage.

Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples 1993 – this declaration, the first by an indigenous peoples organisation on intellectual property rights, contains much of what is considered important from a Maori and indigenous perspective on protection for cultural and intellectual property rights. In particular:

"RECOMMENDATIONS TO STATES, NATIONAL AND INTERNATIONAL AGENCIES

In the development of policies and practices, States, National and International Agencies must

2.1 Recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.

2.2 Recognise that indigenous peoples also have the right to create new knowledge based on cultural traditions.

2.3 Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples Cultural and Intellectual Property Rights.

2.4 Accept that the cultural and intellectual property rights of indigenous peoples are vested with those who created them.

2.5 Develop in full co-operation with indigenous peoples an additional cultural and intellectual property rights regime incorporating the following:

collective (as well as individual) ownership and origin

retroactive coverage of historical as well as contemporary works

protection against debasement of culturally significant items

cooperative rather than competitive framework

first beneficiaries to be the direct descendants of the traditional guardians of that knowledge

*multi-generational coverage span*¹³³

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS ADDRESSING INTELLECTUAL PROPERTY AND CULTURAL HERITAGE RIGHTS OF INDIGENOUS PEOPLES

Universal Declaration of Human Rights (UDHR) (1948).

“Article 27:

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits;
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

International Covenant on Economic, Social and Cultural Rights 1966

“Article 15:

- (1) The State’s Parties to the present Covenant recognise the right of everyone.
 - (a) to take part in cultural life;
 - (b) to enjoy the benefits of scientific progress and its applications;
 - (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

Convention on Biological Diversity

“Article 8(j):

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.”

International Labour Organisation Convention Number 169

“Article 15(1):

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the rights of these peoples to participate in the use, management and conservation of these resources.”

Convention for the Safeguarding of Intangible Cultural Property 2003¹³⁴

Article 1 – Purposes of the Convention

The purposes of this Convention are:

- (a) *to safeguard the intangible cultural heritage;*
- (b) *to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;*
- (c) *to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;*
- (d) *to provide for international cooperation and assistance.*

Article 2 – Definitions

For the purposes of this Convention,

¹³³ The *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* The full text of the Declaration is available online at <http://aotearoa.wellington.net.nz/imp/mata.htm>.

¹³⁴ Source: <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>

1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.

3. “Safeguarding” means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

Declaration on the Rights of Indigenous Peoples¹³⁵

The Draft Declaration was adopted by the Human Rights Council of The United Nations on 29 June 2006. The HRC has recommended its adoption by the General Assembly of the United Nations being held later this year. New Zealand does not support its adoption because they are concerned, inter alia, that it may be a threat to New Zealand’s domestic sovereignty. There was divided opinion among Maori as to whether the revised text of the declaration watered down the original draft. In any event, Maori did not oppose its adoption as there were many indigenous people’s organisations from around the world that did support the revised draft.

The Declaration contains many important provisions that have a direct bearing on any system or framework for protecting matauranga Maori me o ratou taonga katoa. Some are as follows:

Article 3.

Indigenous people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Ka Mutu.

Me Rongo.

10. Appendix One

Terms of Reference for Review

The Consultant will peer review the latest draft of the WIPO documents:

The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles (WIPO/GRTKF/IC/8/4); and *The Protection of Traditional Knowledge: Revised Objectives and Principles* (WIPO/GRTKF/IC/8/5).

The Consultant will conduct the peer review from a New Zealand viewpoint and will include discussion and views on the following:

- To what extent are the principles or policy objectives in the documents appropriate to the New Zealand situation, and particularly from a Maori perspective? In considering the New Zealand situation the Consultant should include the Treaty of Waitangi, legal frameworks, government policy, matauranga Maori, tikanga, kawa, customary law and approaches, institutional or organisational practices and guidelines, more recent Maori approaches and aspirations in relation to traditional knowledge (“TK”), and practical examples of misuse or misappropriation of Maori TK in New Zealand or abroad.
- To what extent could the principles or policy objectives contribute to the development of effective protection for TK and traditional cultural expressions?
- Please provide your views on the focus on misappropriation and misuse (and the actions of third parties) without requiring the assertion of new property rights over TK, but accommodating that option should TK holders elect to take it up?

¹³⁵ The Declaration was adopted in by the Human Rights Council by a vote of 30 votes for, 2 against and 12 abstentions. Canada and Russia voted against it. See <http://www.ohchr.org/english/issues/indigenous/groups/groups-02.htm> for the full text of the Declaration.

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Appendix, page 31

- Are there any principles that are particularly important? What are these and why? Could improvements or changes be made? What are these?
- Are there any gaps in the principles or policy objectives important from a Maori or New Zealand perspective? What are these? Please suggest what amendments or changes should be made.
- Are there any principles or policy objectives that are inappropriate? What are these and why? Please suggest what amendments or changes should be made.
- Are there any principles or policy objectives that would be ineffective in contributing to the protection of TK and traditional cultural expressions?
- Are the suggested conditions, limitations or exceptions appropriate? Please explain why? Please suggest what changes should be made and the reasons for those changes.
- Are there any significant differences between the papers prepared for IGC seven (documents 7/3 and 7/5) and IGC eight (some of the principles and policy objectives have changed as a result of comments from other IGC participants)? What are these? Why is it important? What changes, if any, should be made?
- Provide comments on any other issues considered important.

11. Appendix Two

A 'Tikanga Maori Framework' for Protection, Use, Control and Ownership of Matauranga Maori me o Ratou Taonga Katoa ("The Tikanga Framework")

It is recommended that a framework and process should be developed for the protection, use, development, ownership and control of Maturanga Maori me o ratou taonga katoa (including biological and genetic-resources and intellectual property rights and obligations), that were guaranteed protection under Te Tiriti o Waitangi/Treaty of Waitangi. The Tikanga Framework and process should be developed by Maori in consultation with the Crown and other relevant interest groups in the public and private sectors.

Any Tikanga Framework should be based primarily on tikanga Maori values and Treaty principles but take into account the legal and statutory frameworks in Aotearoa/New Zealand and developments in international law. Any such framework would need to be incorporated into domestic law once developed.

A Tikanga Framework for Maturanga Maori me o ratou Taonga Katoa would have some or all of the following features or characteristics:

Developed by Maori after appropriate consultation with Iwi, hapu, whanau and urban Maori groups and other relevant Maori organisations. There would also be a need for consultation with Crown agencies and other relevant private sector stakeholders and interests groups (e.g. nursery groups, design groups, and intellectual property groups, Crown Research Institutes etc);

Based primarily in tikanga Maori, reflecting Maori cultural values and practices but also taking into account existing legislative and regulatory frameworks, international human rights norms and law and the interests and views of other interested parties including research institutions and the business community;

The Tikanga Framework may have one or more bodies or components at the local, regional and/or national levels depending on the needs and aspirations of Maori and the practicalities of putting such a framework in place and its ongoing administration. It would be important that such frameworks take into account and connect with Government policy;

Appointments to such a body or bodies would be made by Maori following an appropriate consultation and mandating process. Recommended that the original Wai 262 claimant groups should form the nucleus of any group to undertake a nationwide consultation process with Maori. The consultation process would provide background information on the issues and suggest possible options for debate and consideration among Maori;

Flexibility to take account of concerns that affect Maori at an Iwi, hapu, whanau, individual and national level (i.e. concerns that have generic application for many or all Iwi/hapu). The structure must also accommodate the rights of individuals such as Maori artists, carvers, rongoa practitioners, musicians and designers;

Mechanisms to enable effective compliance and enforcement measures to be implemented. This would require both legal and non-legal means of enforcement such as codes of ethics, guidelines and protocols containing rights and obligations designed to educate and persuade voluntary compliance with the Tikanga Framework.

Other Important considerations for a Tikanga Framework:

Implicit would be the expectation that the New Zealand legal and regulatory structures would need to be adapted to accommodate a Tikanga Framework. A series of options could evolve under this model including utilising, developing and strengthening existing tikanga models and customary laws, development of *sui generis* mechanisms and adapting existing laws, policies and processes;

Adequate Crown resourcing of the Tikanga Framework that would enable:

nationwide consultation with tribes, urban Maori groups and other Maori organisations to discuss the formation of an appropriate structure or structures;

funding to ensure the ongoing administration and proper functioning of the Tikanga Framework;

assistance with education, compliance and enforcement costs.

A Tikanga Framework could be responsible for some or all of the following:

Acting as a national/regional point of contact and referral body to *Iwi, hapu, whanau or individuals* (as the case may require), once it is determined at which level of Maori decision-making the relevant issue is most appropriately dealt with. Where it was obvious that certain matters affected particular tribes or other group or individual(s), they would be referred to that body to deal with. If it was a matter which affected all Maori at a national level, then a national body as contemplated above could deal with and take appropriate action at that level;

Developing mechanisms for protecting and promoting the use of Mātauranga Māori me o ratou taonga katoa taking into account:

Te Tiriti o Waitangi/Treaty of Waitangi
Tikanga, customary laws and values of whānau, hapu and iwi;
New Zealand legal system, statutory law, Government policy and regulations;
International human rights norms, customary laws, draft conventions (e.g. Draft Declaration on Rights of Indigenous Peoples, Mātauranga Declaration, WIPO draft objectives and guidelines, Convention on Biodiversity etc);
Relevant codes of ethics and research guidelines both national and international;
Needs and expectations of the private sector and business community;

Acting as a resource support body for tribes and organisations to help empower them in undertaking their own research over which they would have control;

Liaising with Government departments, private enterprise, local authorities and other bodies who have responsibility or decision making regarding Mātauranga Māori me o ratou taonga katoa;

Consultative body with Māori. This would be a key component of the Tikanga Framework. Hui and consultation with Māori would need to take place on a regular basis;

12. Appendix Three

INTERNATIONAL SOCIETY OF ETHNOBIOLOGY

CODE OF ETHICS*

*Discussed and adopted at the General Assembly of the International Society of Ethnobiology held during the tenth International Congress of Ethnobiology, Chiang Rai, Thailand, 8 November 2006 subject to addition of Executive Summary and Glossary of Terms

The Code of Ethics of the International Society of Ethnobiology (ISE) provides a framework for decision-making and conduct for ethnobiological research and related activities. This Code of Ethics has its origins in the Declaration of Belém agreed upon in 1988 at the Founding of the International Society of Ethnobiology (in Belém, Brazil). It has been developed over the course of more than a decade and is the culmination of a series of consensus-based discussion processes involving the ISE Membership.

Code of Ethics is comprised of four parts: (i) Preamble, (ii) Purpose, (iii) Principles, and (iv) Practical Guidelines. The Code of Ethics reflects the vision of the ISE as stated in Article 2.0:

The ISE is committed to achieving a greater understanding of the complex relationships, both past and present that exist within and between human societies and their environments. The Society endeavors to promote a harmonious existence between humankind and the Bios for the benefit of future generations. Ethnobiologists recognize that Indigenous peoples, traditional societies, and local communities are critical to the conservation of biological, cultural and linguistic diversity.

All Members of the ISE are bound in good faith to abide by the Code of Ethics as a condition of membership.

PREAMBLE

The concept of 'mindfulness' is an important value embedded in this Code, which invokes an obligation to be fully aware of ones knowing and unknowing, doing and undoing, action and inaction. It is acknowledged that much research has been undertaken in the past without the sanction or prior informed consent of Indigenous peoples, traditional societies and local communities and that such research has caused harm and adversely impacted their rights and responsibilities related to biocultural heritage.¹³⁶

The ISE is committed to working in genuine partnership and collaboration with Indigenous peoples, traditional societies and local communities to avoid perpetuating these past injustices and build towards developing positive, beneficial and harmonious relationships in the field of ethnobiology. The ISE recognises that culture and language are intrinsically connected to land and territory, and cultural and linguistic diversity are inextricably linked to biological diversity. Therefore, the ISE recognizes the responsibilities and rights of Indigenous, traditional and local peoples to the preservation and continued development of their cultures and languages and to the control of their lands, territories and traditional resources are key to the perpetuation of all forms of diversity on Earth.

PURPOSE

The Purpose of this Code of Ethics is to facilitate establishing ethical and equitable relationships:

- (i) to optimise the positive outcomes and reduce as much as possible the adverse effects of research (in all its forms, including applied research and development work) and related activities of ethnobiologists that can disrupt or disenfranchise Indigenous peoples, traditional societies and local communities from their customary and chosen lifestyles; and
- (ii) to provide a set of principles and practices to govern the conduct of all Members of the ISE who are involved in or proposing to be involved in research in all its forms, especially that concerning collation and use of traditional knowledge or collections of flora, fauna, or any other element of biocultural heritage found on community lands or territories.

¹³⁶ Biocultural heritage is the cultural heritage (both the tangible and intangible including customary law, folklore, spiritual values, knowledge, innovations and practices) and biological heritage (diversity of genes, varieties, species and ecosystem provisioning, regulating, and cultural services) of Indigenous peoples, traditional societies and local communities, which often are inextricably linked through the interaction between peoples and nature over time and shaped by their socio-ecological and economic context. This heritage includes the landscape as the spatial dimension in which the evolution of Indigenous biocultural heritage takes place. This heritage is passed on from generation to generation, developed, owned and administered collectively by stakeholder communities according to customary law.

The ISE recognises, supports and prioritises the efforts of Indigenous peoples, traditional societies and local communities to undertake and own their research, collections, images, recordings, databases and publications. This Code of Ethics is intended to enfranchise Indigenous peoples, traditional societies and local communities conducting research within their own society, for their own use.

This Code of Ethics also serves to guide ethnobiologists and other researchers, business leaders, policy makers, governments, non-government organisations, academic institutions, funding agencies and others seeking meaningful partnerships with Indigenous peoples, traditional societies and local communities and thus to avoid the perpetuation of past injustices to these peoples. The ISE recognises that, for such partnerships to succeed, all relevant research activities (i.e., planning, implementation, analysis, reporting, and application of results) must be collaborative. Consideration must be given to the needs of all humanity, and to the maintenance of robust scientific standards, whilst recognizing and respecting the cultural integrity of Indigenous peoples, traditional societies and local communities.

A commitment to meaningful collaboration and reciprocal responsibility by all parties is needed to achieve the purpose of this Code of Ethics and the objectives of the ISE.

This Code of Ethics recognizes and honors traditional and customary laws, protocols, and methodologies extant within the communities where collaborative research is proposed. It should enable but not over-ride such community-level processes and decision-making structures. It should facilitate the development of community-centered, mutually-negotiated research agreements that serve to strengthen community goals.

PRINCIPLES

The Principles of this Code embrace, support, and embody the concept and implementation of traditional resource rights¹³⁷ as articulated in established principles and practices of international instruments and declarations including, but not limited to, those documents referred to in Annex 2 of the ISE Constitution. The Principles also facilitate compliance with the standards set by national and international law and policy and customary practice. The following Principles are the fundamental assumptions that form this Code of Ethics.

1. Principle of Prior Rights and Responsibilities

This principle recognises that Indigenous peoples, traditional societies, and local communities have prior, proprietary rights over, interests in and cultural responsibilities for all air, land, and waterways, and the natural resources within them that these peoples have traditionally inhabited or used, together with all knowledge, intellectual property and traditional resource rights associated with such resources and their use.

2. Principle of Self-Determination

This principle recognises that Indigenous peoples, traditional societies and local communities have a right to self-determination (or local determination for traditional and local communities) and that researchers and associated organisations will acknowledge and respect such rights in their dealings with these peoples and their communities.

3. Principle of Inalienability

This principle recognises the inalienable rights of Indigenous peoples, traditional societies and local communities in relation to their traditional territories and the natural resources (including biological and genetic resources) within them and associated traditional knowledge. These rights are collective by nature but can include individual rights. It shall be for Indigenous peoples, traditional societies and local communities to determine for themselves the nature, scope and alienability of their respective resource rights regimes.

4. Principle of Traditional Guardianship

This principle recognises the holistic interconnectedness of humanity with the ecosystems of our Sacred Earth and the obligation and responsibility of Indigenous peoples, traditional societies and local communities to preserve and maintain their role as traditional guardians of these ecosystems through the maintenance of their cultures, identities, languages, mythologies, spiritual beliefs and customary laws and practices, according to the right of self-determination.

5. Principle of Active Participation

This principle recognises the crucial importance of Indigenous peoples, traditional societies and local communities to actively participate in all phases of research and related activities from inception to completion, as well as in application of research results. Active participation includes collaboration on research design to address local needs and priorities, and prior review of results before publication or dissemination to ensure accuracy of information and adherence to the standards represented by this Code of Ethics.

6. Principle of Full Disclosure

This principle recognises that Indigenous peoples, traditional societies and local communities are entitled to be fully informed about the nature, scope and ultimate purpose of the proposed research (including objective, methodology, data collection, and the dissemination and application of results). This information is to be given in forms that are understood and useful at a local level and in a manner that takes into consideration the body of knowledge, cultural preferences and modes of transmission of these peoples and communities.

7. Principle of Educated Prior Informed Consent

¹³⁷ Traditional resources rights is defined by Posey and Dutfield (1996:3) as follows: "The term 'traditional' refers to the cherished practices, beliefs, customs, knowledge and cultural heritage of indigenous and local communities who live in close association with the Earth; 'resource' is used in its broadest sense to mean all knowledge and technology, esthetic and spiritual qualities, tangible and intangible sources that together, are deemed by local communities to be necessary to ensure healthy and fulfilling lifestyles for present and future generations; and 'rights' refers to the basic inalienable guarantee to all human beings and the collective entities in which they choose to participate of the necessities to achieve and maintain the dignity and well-being of themselves, their predecessors, and their descendants."

Educated prior informed consent must be established before any research is undertaken, at individual and collective levels, as determined by community governance structures. Prior informed consent is recognised as an ongoing process that is based on relationship and maintained throughout all phases of research. This principle recognises that prior informed consent requires an educative process that employs bilingual and intercultural education methods and tools, as appropriate, to ensure understanding by all parties involved. Establishing prior informed consent also presumes that all directly affected communities will be provided complete information in an understandable form regarding the purpose and nature of the proposed programme, project, study or activities, the probable results and implications, including all reasonably foreseeable benefits and risks of harm (be they tangible or intangible) to the affected communities. Indigenous peoples, traditional societies and local communities have the right to make decisions on any programme, project, study or activities that directly affect them. In cases where the intentions of proposed research or related activities are not consistent with the interests of these peoples, societies or communities, they have a right to say no.

8. Principle of Confidentiality

This principle recognises that Indigenous peoples, traditional societies and local communities, at their sole discretion, have the right to exclude from publication and/or to have kept confidential any information concerning their culture, identity, language, traditions, mythologies, spiritual beliefs or genomics. Parties to the research have a responsibility to be aware of and comply with local systems for management of knowledge and local innovation, especially as related to sacred and secret knowledge. Furthermore, such confidentiality shall be guaranteed by researchers and other potential users. Indigenous peoples, traditional societies and local communities also have the rights to privacy and anonymity, at their discretion.

9. Principle of Respect

This principle recognises the necessity for researchers to respect the integrity, morality and spirituality of the culture, traditions and relationships of Indigenous peoples, traditional societies, and local communities with their worlds.

10. Principle of Active Protection

This principle recognises the importance of researchers taking active measures to protect and to enhance the relationships of Indigenous peoples, traditional societies and local communities with their environment and thereby promote the maintenance of cultural and biological diversity.

11. Principle of Precaution

This principle acknowledges the complexity of interactions between cultural and biological communities, and thus the inherent uncertainty of effects due to ethnobiological and other research. The precautionary principle advocates taking proactive, anticipatory action to identify and to prevent biological or cultural harms resulting from research activities or outcomes, even if cause-and-effect relationships have not yet been scientifically proven. The prediction and assessment of such biological and cultural harms must include local criteria and indicators, thus must fully involve indigenous peoples, traditional societies, and local communities. This also includes a responsibility to avoid the imposition of external or foreign conceptions and standards.

12. Principle of Reciprocity, Mutual Benefit and Equitable Sharing

This principle recognises that Indigenous peoples, traditional societies, and local communities are entitled to share in and benefit from tangible and intangible processes, results and outcomes that accrue directly or indirectly and over the shorter and longer term for ethnobiological research and related activities that involve their knowledge and resources. Mutual benefit and equitable sharing will occur in ways that are culturally appropriate and consistent with the wishes of the community involved.

13. Principle of Supporting Indigenous Research

This principle recognises and supports the efforts of Indigenous peoples, traditional societies, and local communities in undertaking their own research based on their own epistemologies and methodologies, in creating their own knowledge-sharing mechanisms, and in utilising their own collections and databases in accordance with their self-defined needs. Capacity-building, training exchanges and technology transfer for communities and local institutions to enable these activities should be included in research, development and co-management activities to the greatest extent possible.

14. Principle of The Dynamic Interactive Cycle

This principle recognises that research and related activities should not be initiated unless there is reasonable assurance that all stages can be completed from (a) preparation and evaluation, to (b) full implementation, to (c) evaluation, dissemination and return of results to the communities in comprehensible and locally appropriate forms, to (d) training and education as an integral part of the project, including practical application of results. Thus, all projects must be seen as cycles of continuous and on-going communication and interaction.

15. Principle of Remedial Action

This principle recognises that every effort will be made to avoid any adverse consequences to Indigenous peoples, traditional societies, and local communities from research and related activities and outcomes. Notwithstanding the application of standards set out by this Code of Ethics, should any such adverse consequence occur, discussion will be had with the local peoples or community concerned to decide on what remedial action may be necessary to redress or mitigate adverse consequences. Any such remedial action may include restitution, where appropriate and agreed.

16. Principle of Acknowledgement and Due Credit

This principle recognises that Indigenous peoples, traditional societies and local communities must be acknowledged in accordance with their preference and given due credit in all agreed publications and other forms of dissemination for their tangible and intangible contributions to research activities. Co-authorship should be considered when appropriate. Acknowledgement and due credit to Indigenous

peoples, traditional societies and local communities extend equally to secondary or downstream uses and applications and researchers will act in good faith to ensure the connections to original sources of knowledge and resources are maintained in the public record.

17. Principle of Diligence

This principle recognises that researchers are expected to have a working understanding of the local context prior to entering into research relationships with a community. This understanding includes knowledge of and willingness to comply with local governance systems, cultural laws and protocols, social customs and etiquette. Researchers are expected to conduct research in the local language to the degree possible, which may involve language fluency or employment of interpreters.

PRACTICAL GUIDELINES

The following guidelines are intended as a practical application of the preceding Principles.

Recognising that this Code of Ethics is a living document that needs to adapt over time to meet changing understandings and circumstances, if guidelines have not yet been articulated for a given situation, the Principles should be used as the reference point for developing appropriate practices. Similarly, it is recognized that Indigenous, traditional or local peoples conducting research within their own communities, for their own uses, may need to comply with their own cultural protocols and practices. In the event of inconsistency between such local requirements and these guidelines, all parties involved will commit to work collaboratively to develop appropriate practices.

The Practical Guidelines apply to any and all research, collections, databases, publications, images, audio or video recordings, or other products of research and related activities undertaken.

1. Prior to undertaking any research activities, a good understanding of the local community institution(s) with relevant authority and their interest in the research to be undertaken, as well as knowledge of cultural protocols of the community shall be developed. A thorough effort shall be made in good faith to enhance such understandings through ongoing communication and active participation throughout the duration of the research process.
2. Educated prior informed consent must be established prior to undertaking any research activities. Such consent is ideally represented in writing and/or tape recording, uses language and format that are clearly understood by all parties to the research, and is developed with the persons or deliberating bodies identified as the most representative authorities from each potentially affected community.
3. As a component of educated prior informed consent, there will be full disclosure to potentially affected communities and mechanisms to ensure mutual understanding of the following, based on the reasonably foreseeable effects:
 - (a) The full range of potential benefits (tangible and intangible) to the communities, researchers and any other parties involved;
 - (b) The extent of reasonably foreseeable harms (tangible and intangible) to such communities;
 - (c) All relevant affiliations of the individual(s) or organization(s) seeking to undertake the activities, including where appropriate the contact information of institutional research ethics boards and copies of ethics board approvals for research;
 - (d) All sponsors of the individual(s) or organization(s) involved in the undertaking of the activities;
 - (e) Any intent to commercialise outcomes of the activities, or foreseeable commercial potential that may be of interest to the parties involved in the project, and/or to third parties who may access project outcomes directly (e.g., by contacting researchers or communities) or indirectly (e.g., through the published literature).
4. Prior to undertaking research activities, the following must be ensured by research proponents:
 - (a) Full communication and consultation has been undertaken with potentially affected communities to develop the terms of the research in a way that complies with the Principles.
 - (b) Approval is granted in the manner defined by the local governance system of each affected community.
 - (c) Permissions and approvals have been granted from government as well as other local and national authorities, as required by local, national or international law and policy.
5. All persons and organizations undertaking research activities shall do so throughout in good faith, acting in accordance with, and with due respect for, the cultural norms and dignity of all potentially affected communities, and with a commitment that collecting specimens and information, whether of a zoological, botanical, mineral or cultural nature, and compiling data or publishing information thereon, means doing so only in the holistic context, respectful of norms and belief systems of the relevant communities. This includes supporting or creating provenance mechanisms to ensure collections are clearly traceable to their origins for purposes of due credit and acknowledgement, establishing "prior art" in the event of future ownership claims, and facilitating a re-consent process to develop new mutually-agreed terms for further use or applications of collections or derivatives of collections.

Researchers are encouraged to register collected information in local databases and registries where they exist, and explore mechanisms such as community certificates of origin linked to databases. Researchers are encouraged to support and build capacity for community-based data management systems to the extent possible. Any intellectual property ownership claim or application related to the knowledge or associated resources from the collaboration research should not work against the cultural integrity or livelihood of communities involved.

6. Mutually-agreed terms and conditions of the research shall be set out in an agreement that uses language and format clearly understandable to all parties. The agreement will address and adhere to the following standards:
 - (a) Will be represented in writing and/or tape recording if permitted by the community, using local language whenever possible. If writing or tape-recording are culturally prohibited, the parties shall work in collaboration to find an acceptable alternative form of documenting the terms of the agreement.
 - (b) Will be made with each potentially affected community after full disclosure, consultation, and establishment of educated prior informed consent regarding mutual benefit and equitable sharing, compensation, remedial action and any other issues arising between parties to the research.
 - (c) Will address the elements outlined in (6b) above as related to all foreseeable uses and property ownership issues of the research outcomes, including derivative forms they may take such as biological and other samples, photos, films, videotapes, audiotapes,

public broadcasts, translations, communications through the electronic media, including the internet. This includes clear agreement on rights and conditions related to who holds, maintains, uses, controls, owns, and has rights to the research processes, data, and outcomes (direct and indirect).

(d) Will specify attribution, credit, authorship, co-authorship, and due acknowledgement for all contributors to the research processes and outcomes, recognizing and valuing academic as well as cultural and local expertises;

(e) Will specify how and in what forms the resulting information and outcomes shall be shared with each affected community, and ensure that access and forms are appropriate and acceptable to that community. Community data and information management systems, such as local registries and databases, shall be supported to the greatest extent possible.

(f) Will represent what understandings have been reached regarding what is potentially sacred, secret or confidential and how such will be treated and communicated, if at all, within and beyond the direct parties to the research.

7. Objectives, conditions and mutually-agreed terms should be totally revealed and agreed to by all parties prior to the initiation of research activities. It is recognised that collaborative research, by design, may be iterative, emergent and require modifications or adaptations. When such is the case, these changes shall be brought to the attention of and agreed to by all parties to the research.

8. All members of the ISE or affiliated organizations of ISE shall respect and comply with moratoriums by communities and countries on collection of information or materials that they would otherwise intend to include in their research, unless such moratorium is lifted to allow the research.

9. All educational uses of research materials shall be consistent with a good faith respect for the cultural integrity of all affected communities, and, as much as practical, developed in collaboration with such communities for mutual use.

10. All existing project materials in the possession, custody or control of an ISE member or affiliated organization shall be treated in a manner consistent with this Code of Ethics. All affected communities shall be notified, to the extent possible, of the existence of such materials, and their right to equitable sharing, compensation, remedial action, ownership, repatriation or other entitlements, as appropriate. Prior informed consent shall not be presumed for uses of biocultural information in the "public domain" and diligence shall be used to ensure that provenance or original source(s) of the knowledge and associated resources are included and traceable, to the degree possible, in further publications, uses and other means of dissemination.

11. If during the cycle of a project it is determined that the practices of any parties to the research are harmful to components of an ecosystem, it shall be incumbent upon the parties to first bring such practices and the impacts thereof to the notice of the offenders and attempt to establish a mutually agreed conflict resolution process, prior to informing the local community and/or government authorities of such practices and impacts.

12. ISE members shall in good faith endeavour to consider and ensure that project proposals, planning, and budgets are appropriate to collaborative interdisciplinary and cross-cultural research that complies with the ISE Code of Ethics. This may require prior consideration of elements such as: extended timeframes to enable permissions, development of mutually-agreed terms and ongoing communication; additional budget categories; research ethics and intellectual property ownership considerations that are in addition to or even inconsistent with policies of sponsoring institutions; additional reporting requirements and sharing of outcomes; and mechanisms and forms of communication with parties to the research activities, including the potential need for language fluency and translation. ISE members shall also endeavour to raise awareness among funding bodies, academic institutions and others about the increased time and costs that may be involved in adhering to this Code of Ethics.

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