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

**Eleventh Session**  
**Geneva, July 3 to 12, 2007**

THE PROTECTION OF TRADITIONAL KNOWLEDGE:  
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 knowledge (“TK”) through two processes:

- (i) consideration of an agreed list of Issues concerning the protection of TK; and
- (ii) consideration of a draft set of “Revised Objectives and Principles for the Protection of Traditional Knowledge” (“Objectives and Principles”).

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

- (i) WIPO/GRTKF/IC/11/5(a): a collation of the written comments on the List of Issues which were submitted between the tenth and eleventh sessions, in line with a commentary process agreed by the Committee at its tenth session;
- (ii) WIPO/GRTKF/IC/11/5(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 a commentary process agreed by the Committee at its ninth session and a format agreed at the tenth session;

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

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

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

## II. BACKGROUND

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

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

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

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/5 and an earlier draft WIPO/GRTKF/IC/7/6).

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

### III. THE COMMITTEE'S TENTH SESSION

8. At its tenth session (November 30 to December 8, 2006), the Committee decided as follows with respect to TK and Traditional Cultural Expressions/Expressions of Folklore ("TCEs/EoF"):

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

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

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

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

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

### IV. DOCUMENTS FOR THE ELEVENTH SESSION

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/11/5(a): a collation of the written comments submitted between the tenth and eleventh sessions on "Traditional Knowledge: List of Issues", as required in paragraph (iv) of the decision just quoted;

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

remain on the table in their existing form and existing positions in relation to them are noted” and that “The discussion on the issues is complementary to and without prejudice to existing positions in relation to the existing documents.”

#### 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/9/5 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/11/5(c) and the comments on the List of Issues annexed to WIPO/GRTKF/IC/11/5(a);*

*(ii) consider possibilities for advancing its work on the protection of TK, 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*

*(ii) continue to review and comment on the draft provisions contained in the Annex to WIPO/GRTKF/IC/11/5(c).*

[Annex follows]

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<i>ISSUES</i>	<i>COMMENTS</i>
<b>I. GENERAL COMMENTS</b>	
<p>General Comments from American Bioindustry Alliance (ABIA) on Document WIPO/GRTKF/IC/9/5</p>	<p>The American BioIndustry Alliance (ABIA) members strongly support WIPO's work and believe that continued focused efforts in WIPO will bring greater clarity to the needs of biodiverse developing countries that seek both social and economic benefits from the sustainable use of genetic resources and associated traditional knowledge. Traditional Knowledge Digital Libraries (TKDL), databases, and registries are an area of particular promise where the work of WIPO has already been helpful. Much more, however, needs to be done.</p> <p>To that end, the ABIA urges WIPO to expand the work program on traditional knowledge (TK) of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) both to develop a universal system to harmonize existing TK databases and digital libraries and also to ensure that their benefits reach the smaller developing country members of WIPO.</p> <p>The ABIA was established in September 2005 as a non-profit, non-government organization to provide focused advocacy in support of the full patentability of biotechnology inventions and seeks enabling conditions for biotechnology in developed and developing countries through sustainable, mutually beneficial Access and Benefit Sharing policies.</p> <p>The ABIA believes that WIPO's program to protect traditional knowledge (TK) should support measures that simultaneously (i) help all stakeholders achieve their Access and Benefit Sharing (ABS) objectives and (ii) provide incentives for research in provider countries. Countries as varied as Australia and Costa Rica have used this approach in developing measures that serve to leverage their rich biodiversity into a recognized capacity for innovation based on their GR and related TK assets.</p> <p>(Note by WIPO Secretariat: ABIA's comments continue with information regarding ABS Enforcement and the Patent System. This information is contained in the compilation of comments in document WIPO/GRTKF/IC/10/INF/2).</p>
<p>General Comments from Australia on document WIPO/GRTKF/IC/9/5</p>	<p>Australia welcomes the opportunity to comment on WIPO/GRTKF/IC/9/5 'The Protection of Traditional Knowledge: Revised Objectives and Principles'.</p> <p>Australia is strongly of the view that the key initial step in the development of any regime or approach to the protection of traditional knowledge is to first determine the relevant policy objectives and general guiding principles. It is only once the objectives and principles are developed in a way that clearly outlines the intended purpose of the protection of traditional knowledge that the Committee will be able to focus on a possible outcome.</p> <p>This is why Australia considers it critical to a successful outcome that further discussion on the draft policy objectives and general guiding principles for the protection of traditional knowledge be undertaken. We have stated previously, and continue in our belief, that it is premature to consider draft negotiating text given that there is no consensus yet among Committee members on these initial objectives and principles. Nor is there consensus on the appropriate vehicle to give effect to any substantive outcomes. We therefore welcome discussion on an</p>

	<p>appropriate process for further reviewing and commenting on parts I and II of document WIPO/GRTKF/IC/9/5 to enable consensus to be reached on the appropriate policy objectives and guiding principles. Such consensus would be a major step towards an achievable and practical outcome on this important issue. Our comments below are therefore limited to the provisions in Parts I and II of document WIPO/GRTKF/IC/9/5.</p>
<p>General Comments from Brazil on document WIPO/GRTKF/IC/9/5</p>	<p>Brazil is of the view that protection of TK is not contingent upon the consent by the interested communities and that it has a mandatory nature.</p> <p>The draft instrument on TK should clearly incorporate a provision requiring PIC and benefit-sharing as a condition for access to TK.</p> <p>The draft instrument must contain a provision whereby intellectual property applications should disclose the origin of the TKs, any associated genetic resources, as well as evidence of compliance of PIC and benefit-sharing from the country of origin.</p>
<p>General Comments from the International Chamber of Commerce (ICC) on document WIPO/GRTKF/IC/9/5</p>	<p>ICC supports initiatives to explore options for the protection of traditional knowledge, whether within the existing intellectual property framework or through development of new types of rights. However, ICC believes it is premature to take definitive positions on TK protection before having a clearer idea of what is included in this concept and how it is defined. Only when these points are clarified can an informed judgement be made as to whether there is a need for TK protection at an international level and what the scope of any such protection should be. To date, ICC has not reached any conclusion on these questions. ICC has raised a number of questions about TK protection in its paper “Protecting Traditional Knowledge”(12 January 2006) . These questions for the most part have not yet been adequately addressed by the IGC.</p> <p>ICC’s view is that objectives, principles, policy options and legal mechanisms form a natural hierarchy. Objectives must be broadly agreed before principles are settled: from these flow the policy and laws to implement them. In ICC’s view, more discussion of objectives and a much greater measure of agreement about them is required before progress can be made. As ICC has maintained since the Committee was set up, the objectives to be reached must largely determine the form of the laws to implement them. Until consensus is reached on objectives, it is vain to expect progress. For these reasons, ICC limits its comments to the policy objectives of document WIPO/GRTKF/IC/9/5, and feels it is premature to update other sections of the document.</p>
<p>General Comments from Japan on Document WIPO/GRTKF/IC/9/5</p>	<p>Traditional knowledge ( TK ) is an important issue for many members, and we welcome the work based on the document WIPO/GRTKF/IC/9/5. Before continuing this work, we would like to mention that no consensus has been reached on the legal status of the outcome of this work; in other words, whether the outcome should be internationally legally binding.</p> <p>Regarding the discussion on traditional knowledge, even the definition of the term “traditional knowledge” has not been clarified in international fora, and although the initial discussion on TK should be concerned with the current status</p>



	<p>of respecting, preserving, and maintaining TK 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 TK.</p> <p>Regarding the present version of the working document or WIPO/GRTKF/IC/9/5, the drafting of SUBSTANTIVE PROVISIONS has been started without consensus and sufficient understanding of POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES, and it seems that there is some inconsistency between GENERAL GUIDING PRINCIPLES and SUBSTANTIVE PROVISIONS. On the one hand, the principle of flexibility has been adopted as part of the GENERAL GUIDING PRINCIPLES (paragraph (d)), and on the other hand, Prior Informed Consent ( PIC ), on which international consensus has not yet been reached, is required for any access to traditional knowledge as stated in the SUBSTANTIVE PROVISIONS (ARTICLE 7 ).</p> <p>In order to conduct TK-related discussions in a more structured manner and thereby avoid such inconsistency, 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 TK 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>General Comments from Norway on document WIPO/GRTKF/IC/9/5</p>	<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 continue with information regarding the disclosure of origin of Genetic Resources and TK. This information is contained in the compilation of comments in document WIPO/GRTKF/IC/10/INF/2).</p>

<p>General Comments from the Russian Federation on document WIPO/GRTKF/IC/9/5</p>	<p>The Russian Federation supports the development by the Secretariat of the draft provisions on the protection of Traditional Knowledge (TK), political objectives and general guiding principles of protection. 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 TK within the Committee.</p> <p>In general, the document WIPO/GRTKF/IC/9/5 containing main text and Annex is built on the model and the basis of the document WIPO/GRTKF/IC/8/5. The main text of the document WIPO/GRTKF/IC/9/5 contains brief statement of the activities of the Committee on the issue of protection of traditional knowledge. We consider to be important the provision mentioned in Section III (p. 14) of the main text of the document WIPO/GRTKF/IC/9/5 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 14 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 knowledge are broadened.</p> <p>The Annex to the main text of the document WIPO/GRTKF/IC/9/5 - Revised Provisions for the Protection of Traditional Knowledge: 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>We suppose that the protection of the traditional knowledge must be, among others, aimed at:</p> <ul style="list-style-type: none"> <li>- recognition the holistic nature of TK and its social, spiritual, economic, intellectual, educational and cultural value,</li> <li>- promotion respect for traditional knowledge systems for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders,</li> <li>- meet the actual needs of holders of traditional knowledge,</li> <li>- promote conservation and preservation of traditional knowledge,</li> <li>- support traditional knowledge systems,</li> <li>- repress unfair and inequitable uses</li> <li>- respect for and cooperation with relevant international agreements and processes promote equitable benefit-sharing</li> <li>- curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources,</li> <li>- enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct and the principles of free and prior informed consent;</li> </ul> <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 communities of the Russian Federation by means of protection and stimulation, provided for in</p>

	<p>the federal governmental programs.</p> <p>We also consider important the general guiding principles stated in Section 2 of the Annex to the document WIPO/GRTKF/IC/9/5, 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 TK, the principle of Effectiveness and accessibility of measures for protection.</p> <p>We also consider important the general guiding principles stated in Section 2 of the Annex to the document WIPO/GRTKF/IC/9/5, such as the principle of responsiveness to the needs and expectations of traditional knowledge holders, principle of effectiveness and accessibility of protection, principle of respect for and cooperation with other international and regional instruments and processes, principle of flexibility and comprehensiveness, principle of recognition of the specific characteristics of traditional knowledge, principle of providing assistance to address the needs of traditional knowledge holders.</p> <p>Given the above mentioned, we consider the provisions concerning the objectives and the general guiding principles, in general acceptable.</p> <p>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/9/5 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, taking into account, that as it was already mentioned at the sessions of the Committee the rights of the TK holders must not have advantages over the already existing intellectual property rights.</p> <p>We consider worthy further study the proposal of Norway concerning the use of the provisions of Article 10-bis [Unfair competition] of the Paris Convention on the Protection of Industrial Property as a model in respect to the protection of TK.</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/9/5 require a more detailed study and clarification.</p>
<p>General Comments from the Saami Council on Document WIPO/GRTKF/IC/9/5</p>	<p>The Saami Council has previously commented extensively on the Policy Objectives and Core Principles contained in the Annex to Document 9/5, 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 the Guidelines.</p> <p>Generally speaking, we believe that the Traditional Knowledge (TK) draft Policy Objectives and Core Principles have improved during the course of the IGC. We particularly appreciate the fact that some 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 elements that – if adopted and implemented – could prove very useful for the protection of</p>

	indigenous peoples' TK. Still, a number of improvements are necessary for the Guidelines to be acceptable.
<p>General Comments from Secretariat of the Permanent Forum on Indigenous Issues on Document WIPO/GRTKF/IC/9/5</p>	<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 (DSPD/DESA).</p> <p>SPFII's main role is to:</p> <ul style="list-style-type: none"> <li>– prepare for the annual sessions of the Permanent Forum each May. The secretariat</li> <li>– also provides support to the Members of the UNPFII throughout the year;</li> <li>– advocate for, facilitate and promote coordination and implementation within the UN system of the recommendations that emerge from each annual session;</li> <li>– promote awareness of indigenous issues within the UN system, governments, and the broad public; and</li> <li>– 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.</li> </ul> <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> <hr/> <p>Conclusion</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>
<p>General Comments from South Africa on document WIPO/GRTKF/IC/9/5</p>	<p>There are a number of comments that have relevance to the whole document and instead of repeating them through out the document we have discussed them here in the preamble.</p> <ol style="list-style-type: none"> <li>1. The use of the phrase “Traditional Knowledge” The South African policy document prefers the use of Indigenous Knowledge and Indigenous Knowledge Systems to Traditional Knowledge and Traditional Knowledge Systems.  After much debate within the South African policy development on IKS context the Minister of Science and Technology ruled in favour of the use of the concept “Indigenous Knowledge and Indigenous Knowledge Systems” against “Traditional Knowledge and Traditional Knowledge Systems”. The argument took cognizance of the genesis of the use of traditional as against modern. It rejects the dichotomy that was created to diminish the significance of indigenous knowledge system when counter-posed against modernity. The South African delegation choice of Indigenous Knowledge to Traditional Knowledge would the apply to the whole document. However, the change has not been effected in the document.</li> <li>2. Expansion of the phrase of “traditional knowledge holders” This is a proposal that whenever the phrase “traditional knowledge holders” is used it should be expanded to read “traditional knowledge holders and practitioners”. This has been effected in the document and rack change has been utilized to assist with tracking the changes.</li> <li>3. Expansion of the phrase “recognize value”  This is another proposal that requests that whenever the phrase recognize value appear in the document it should be expanded to read as “recognize and affirm value”.</li> <li>4. Expansion of the use of the concept of misappropriation The proposal is that the word misappropriation when used in this document it leaves out some other meanings. It is proposed that it should be expanded to read “misappropriation, misuse and exploitation.</li> <li>5. The use of the phrase “Traditional context” should be changed It is suggested that the use of the phrase “traditional context” in the document be changed and be replaced by the following phrase “customary and local context”.</li> </ol> <p>Comments on the Document 9-5</p> <p>The specific comments on document WIPO GRTKF 9-5 are imbedded in the text. The changes were made with track changes so that they could be visible. Do not accept the changes. The document should be sent with the track changes and comments.</p>

	<p>Conclusion</p> <p>The changes made to the text are consistent with the submissions/addresses by the African Group and the South African Delegation.</p> <p>Note by WIPO Secretariat: for reasons of space, the revised version of document WIPO/GRTKF/IC/9/5 provided by South Africa is attached as an Appendix to document WIPO/GRTKF/IC/10/INF/2.</p>
<p>General Comments from Switzerland on Document WIPO/GRTKF/IC/9/5</p>	<p>\$In the view of Switzerland,</p> <ol style="list-style-type: none"> <li>1. agreeing on the policy objectives and general guiding principles of the protection of traditional knowledge and of traditional cultural expressions (TCEs), and</li> <li>2. establishing a working definition of the terms “traditional knowledge” and “TCEs”,</li> </ol> <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>Switzerland considers the revised policy objectives and the general guiding principles as contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 to take the work of the Committee on the protection of traditional knowledge and TCEs one important step ahead.</p>

	<p>In the context of databases on traditional knowledge, Switzerland refers to its proposals for the establishment of an international internet portal for traditional knowledge. This portal would link electronically existing local and national databases on traditional knowledge, and could facilitate access by patent authorities to traditional knowledge stored in such databases. For more details on this proposal, reference is made to paras. 30 to 32 of WTO-document IP/C//W/400 Rev.1</p>
<b>II. COMMENTS ON OBJECTIVES</b>	
<p>General Comments on Objectives</p>	<p>It is not in every case clear from the titles alone what is meant by each objective, but each is further elaborated subsequently - still, it may be said, not always fully clarifying what is meant. The listed objectives are not of equal weight: they overlap in some degree, but they may also conflict. The commentary says “The listed objectives are not mutually exclusive but rather complementary to each other. The list of objectives is non exhaustive... the Committee members may supplement the current list with additional objectives.. “( 2nd paragraph, page 6). It is not clear to what extent they are generally accepted by members of the Committee. In ICC’s view, the list as it stands is unsatisfactory. It must be clarified, supplemented and, most importantly, prioritised. Without a substantial measure of agreement on the underlying objectives, further discussion will be fruitless.</p> <p>Priorities: The Intergovernmental Committee meets at WIPO because it recognizes that rights for TK, if implemented, will have strong affinities with existing intellectual property rights. WIPO’s expertise is in IP laws. This influences the objectives, and how they should be selected. Compare TRIPs, and in particular, Article 7 (Objectives).</p> <p>“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”</p> <p>As with IP rights, traditional knowledge rights cannot be absolute - they must balance the interests of holders with those of the rest of society. Knowledge has value, including, though not limited to, economic value. However, economic value depends on the balance of supply and demand- once knowledge is public, its supply is difficult to control. The presumption has to be that public knowledge is available to all unless made subject to specific prior rights of which the public have notice. Thus, if it were to be accepted that holders of traditional knowledge have the right to control its use, a balance of obligations requires holders to assume corresponding responsibilities. This may imply that holders have an obligation (like that of inventors who seek patents) to disclose their knowledge to the public, both so that the public know what is protected and how they may (subject to the holder’s rights) make use of and derive benefit from it.</p> <p>ICC believes that any implementation of TK rights must involve a balance of rights and obligations. This provides a criterion for organizing, prioritising, amending and supplementing the objectives suggested in document WIPO/GRTKF/IC/9/5.</p> <p>(INTERNATIONAL CHAMBER OF COMMERCE - ICC)</p> <hr/> <p>First of all, we would like to raise attention to the fact that the term “traditional</p>

	<p>knowledge” itself is not yet clear and may have diverse interpretations. This issue is specifically identified as one of “the recurring issues” in paragraph 12 of the document WIPO/GRTKF/IC/9/5 (p.5).</p> <p>The definition of “traditional knowledge” concerns not only this paragraph (i) (Annex, p. 3) but also every other paragraph which includes or refers to the term “traditional knowledge.”</p> <p>The term “right(s)” appears several times in the POLICY OBJECTIVE 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 OBJECTIVE section.</p> <p><i>Note: The use of the term “right(s)” in this POLICY OBJECTIVE 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>The Saami Council is largely in agreement with the Policy Objectives. We are concerned with, however, that the TK Policy Objectives are ambiguous as to who are actually the holders of TK, indeed considerably more ambiguous than the TCE Guidelines, that still also are far from perfect in this regard. For the Guidelines to be acceptable, we need to see it clarified that the right-holders to TK is the people from which the TK originates. Further, compared to the TCE Guidelines, the TK Policy Objectives place less emphasis on the importance of respecting the rights of the TK holders. We would need to see this corrected, as well.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>As previously stated, the policy objectives are broad statements and should typically form part of a preamble to law or other instrument.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p>
<p><b>i. Recognize value</b></p>	<p>Australia can give in principle support to this objective.</p> <p>(AUSTRALIA)</p> <hr/> <p>‘Recognising value’ should be understood as directed primarily to economic value, since other values are not directly influenced by IP laws. So limited, (i) is an important objective, with the potential (if fully realized) to improve the economic circumstances of indigenous peoples and promote development.</p> <p>(INTERNATIONAL CHAMBER OF COMMERCE - ICC)</p>



	<p>The protection of traditional knowledge should aim to:</p> <p>Recognize <b><i>and affirm</i></b> value:</p> <p>Recognize <b><i>and affirm</i></b> the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, <b><i>cosmological</i></b>, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are fundamentally important for indigenous and local communities and have equal scientific value as other knowledge systems;</p> <p>(SOUTH AFRICA)</p>
<p><b>ii. Promote respect</b></p>	<p>Australia acknowledges the importance of traditional knowledge systems to traditional knowledge holders and respects the role that they play in society. We can therefore support this objective in principle.</p> <p>(AUSTRALIA)</p> <p>‘Promoting respect’ is more tenuous. This might be the happy result of legislation, but it is difficult to legislate directly for respect, particularly in laws of this kind.</p> <p>(INTERNATIONAL CHAMBER OF COMMERCE - ICC)</p> <p>Promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders and practitioners who conserve and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge holders <b><i>and practitioners</i></b>; and for the contribution which traditional knowledge holders <b><i>and practitioners</i></b> have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology;</p> <p>(SOUTH AFRICA)</p>
<p><b>iii. Meet the actual needs of traditional knowledge holders</b></p>	<p>Australia could support objective (iii) to the extent that it is consistent with current international law and national law and policies and would not affect the integrity of the current IP system. In this respect the provision would be improved by the following amendment: ‘respect <del>their rights</del> <i>Indigenous people</i> as holders and custodians of traditional knowledge...’</p> <p>We note that to meet the needs of traditional knowledge holders the objective provides for Member States to ‘contribute to their [TK holder’s] welfare and economic, cultural and social benefit...’. This provision would appear to extend well beyond the terms of reference of the Committee and thus its limits should be clearly delineated or the reference should be deleted.</p> <p>Objective (iii) seeks to ‘reward the contribution’ made by traditional knowledge holders to their communities and to scientific progress. Although Australia acknowledges that reward may play a role in the protection of traditional knowledge it notes that the very broad coverage of this item needs further discussion. Would such reward be provided for all traditional knowledge in use generally in the wider community today? If so, how would such used be identified and how would the recipients of such reward be identified? It is also clear that such rewards may take different forms depending on the particular situation. We therefore suggest the following amendment ‘reward <i>as appropriate</i> the contribution.’</p>

	<p>Australia acknowledges that the development of mechanisms to protect traditional knowledge should be the result of collaboration and consultation with the Indigenous communities.</p> <p>(AUSTRALIA)</p> <hr/> <p>'Meet the actual needs of traditional knowledge holders' is an irreproachable objective, but begs the question of what these needs are. Further explanation (document WIPO/GRTKF/IC/9/5 Annex, p3) indicates that these are seen as contributions to their welfare and reward for their contributions, together with respect for their rights as holders - and thus largely coincide with objectives (i) and (ii).</p> <p>(INTERNATIONAL CHAMBER OF COMMERCE - ICC)</p> <hr/> <p>This paragraph describes TK holders as having "rights as holders and custodians of traditional knowledge." Although this description might imply that a new type of right is to be given to holders and custodians, there is no consensus on creating such a right and that this issue has yet to be discussed. We understand that there are some existing rights, under customary laws or legal practices, which merit 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>Be guided by the aspirations and expectations expressed directly <i>and indirectly</i> by <i>traditional knowledge holders and practitioners</i>, respect their rights as holders and custodians of traditional knowledge, contribute to their welfare and economic, cultural and social benefit and reward the contribution made by them to their communities and <i>direct dependents and</i> to the progress of science and socially beneficial technology;</p> <p>(SOUTH AFRICA)</p>
<p><b>iv. Promote conservation and preservation of traditional knowledge</b></p>	<p>Australia acknowledges the importance of conserving and preserving traditional knowledge. However we query the reference to 'protecting' traditional knowledge systems, particularly where this would imply intellectual property protection that would adversely conflict with current intellectual property law rather than contribute to the preservation of traditional knowledge systems.</p> <p>The final element of objective (iv) also suggests 'providing incentives' and Australia acknowledges that since such incentives may take different forms depending on the situation and suggests that this objective should contain the following changes in italics 'providing incentives, <i>as appropriate</i>'</p> <p>(AUSTRALIA)</p> <hr/> <p>Add to the last part of this item the following: "... and promote measures aimed at conservation and protection of natural and cultural environments."</p> <p>(BRAZIL)</p> <hr/> <p>'Promote conservation and preservation of traditional knowledge' aligns closely with objectives (vi) 'Support traditional knowledge systems' and (vii) 'Contribute to safeguarding traditional knowledge', and must be considered a subsidiary objective, though important. It is subsidiary because the interest of the public at large is not in supporting TK systems as such, but only in supporting</p>

	<p>those that offer benefits capable of being generally shared.</p> <p>Switzerland supports the addition of policy objective roman 4 regarding the promotion of the conservation and preservation of traditional knowledge. It considers this to be a crucial aim of the protection of traditional knowledge and relevant to the work of the Committee, as far as it relates to intellectual property.</p> <p>(SWITZERLAND)</p> <hr/> <p>Promote and support the conservation and preservation of traditional knowledge by <i>affirming</i>, respecting, preserving, protecting and maintaining traditional knowledge systems and providing incentives to the custodians of those knowledge systems to maintain and safeguard their knowledge systems;</p> <p>(SOUTH AFRICA)</p>
<p>v. <b>Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems</b></p>	<p>Australia could not support this objective if its aim was to allow any right given over traditional knowledge to prevail over existing IP laws and principles or run counter to prevailing national or international laws and principles. Australia therefore suggests the following amendment in italics:</p> <p style="padding-left: 40px;">‘(v) be undertaken in a manner that empowers traditional knowledge holders to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and the need to tailor solutions that meet the distinctive nature of such systems, bearing in mind that such solutions should be <i>balanced and subject to international law and national laws and policies</i> and equitable,...’</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)</p> <hr/> <p>‘Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems’ comes in two parts: ‘Empowerment’ will follow from objective (i) ‘Recognising value’. As to ‘acknowledge the distinctive nature of traditional knowledge systems’, if this means defining enforceable legal rights while acknowledging the distinctive nature of TK, it is not so much an objective as a necessary restriction on the form rights can take.</p> <p>(INTERNATIONAL CHAMBER OF COMMERCE - ICC)</p> <hr/> <p>Line 6 after the sentence operate in a manner supportive of the protection of traditional knowledge, the words “and the sui generis systems” should be added.</p> <p>(IRAN, ISLAMIC REPUBLIC OF)</p> <hr/> <p>We are concerned that the language, “empower traditional knowledge holders to exercise due rights and authority,” seems to mean that a new type of right will be created and given to TK holders. There is no consensus on creating and giving to TK holders such a new type of right and this issue has yet to be discussed. We would like to propose that the word “empower” in this paragraph and in the title of this paragraph be replaced with the word, “facilitate.”</p> <p>The term “misappropriation” still needs to be clarified. We understand that the definition of “misappropriation” should be discussed at a later stage when we discuss SUBSTANTIVE PROVISIONS.</p>

	<p>(JAPAN)</p> <hr/> <p>Be undertaken in a manner that empowers <b><u>traditional knowledge holders and practitioners</u></b> 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 <b><u>traditional knowledge holders and practitioners</u></b> to exercise due rights and authority over their own knowledge; <b><u>Should the conventional IPR regime not be supportive of the protection of IKs new regimes should be developed for the said purpose. i.e sui generis protection.</u></b></p> <p>Comment: Is this rendering okay or should we be making more broader demands of changing the conventional intellectual property regimes to include the exercise of due rights.</p> <p>(SOUTH AFRICA)</p>
<p>vi. <b>Support traditional knowledge systems</b></p>	<p>Australia could not support this objective if it supported practices conflicting with international law and national laws and policies. We would therefore suggest that the objective be made subject to international law and national laws and policies, eg, through prefacing the objective with the words ‘<i>Consistent with international law and national laws and policies....</i>’</p> <p>(AUSTRALIA)</p> <hr/> <p>Brazil has concerns with the language found in this item as it could convey the idea, which is not acceptable for Brazil, that TK protection should seek to facilitate the transmission of the knowledge (“respect and facilitate...”).</p> <p>(BRAZIL)</p> <hr/> <p>There is however one issue that could be added to (vi) Support traditional knowledge systems; which includes the need to support the environment in which traditional knowledge is transmitted by and between traditional knowledge holders. SPFII is of the opinion that supporting the environment in which traditional knowledge is transmitted relates to wider issues of how traditional knowledge is carried, transmitted and maintained. For example, through language and speech, hence indigenous languages must be maintained as they play a critical role in keeping traditional knowledge alive. Also, practices that keep traditional knowledge alive must also be supported such as fishing, hunting, gathering, ceremony and a wide range of community activities. Hence, what is under threat of extinction is not traditional knowledge itself but the opportunities for young people to learn, practice and respect the knowledge production and practices of their elders.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>Respect and facilitate the continuing customary use, <b><u>practice</u></b>, development, exchange and transmission of traditional knowledge by and between <b><u>traditional knowledge holders and practitioners</u></b>; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the</p>

	<p>continued development of traditional knowledge systems;</p> <p>(SOUTH AFRICA)</p>
<p><b>vii. Contribute to safeguarding traditional knowledge</b></p>	<p>Australia agrees in principle provided such customary laws and practices do not conflict with established international law and national laws and policies.</p> <p>(AUSTRALIA)</p> <hr/> <p>This provision could benefit from language already set out by the CBD, article 10 (c), which elaborates the underlying idea from item (vii) in a clearer fashion.</p> <p>(BRAZIL)</p> <hr/> <p>Line 5 after direct the word “indirect” also should be added.</p> <p>(IRAN, ISLAMIC REPUBLIC OF)</p> <hr/> <p>Contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary practices, norms, laws and understandings of <u>traditional knowledge holders and practitioners</u>, for the primary and direct benefit of <u>traditional knowledge holders and practitioners</u> in particular, and for the benefit of humanity in general;</p> <p>(SOUTH AFRICA)</p>
<p><b>viii. Repress unfair and inequitable uses</b></p>	<p>Australia acknowledges the importance of measures to help prevent the misappropriation of traditional knowledge and the need for such approaches to be adaptable to ‘national and local needs.’</p> <p>We could therefore support this objective where it would not conflict with existing proprietary rights.</p> <p>However, as above, Australia notes that the meaning of the term ‘misappropriation’ has not been fully explored and considers that further analysis of the term by WIPO and Member States would be beneficial to discussions.</p> <p>(AUSTRALIA)</p> <hr/> <p>‘Repress unfair and inequitable uses’ goes with (xiv) ‘Preclude the grant of improper intellectual property rights to unauthorized parties’, both proper and important objectives, but requiring a common understanding of what constitutes unfairness, and when IP rights are to be considered improper. For example, it must be wrong to acquire patent rights claiming known uses of TK but there is sharp disagreement about whether patent rights may be claimed on improvements of such known uses (as ICC believes should generally be the case), or whether the permission of the holder is required. Such questions can only be resolved when there is agreement on the objectives. Thus, it is premature to address what constitutes unfair or inequitable uses, or improper intellectual property rights, before agreeing objectives.</p> <p>(INTERNATIONAL CHAMBER OF COMMERCE - ICC)</p>

	<p>The word repress should be replaced by the word “prevent”</p> <p>(IRAN, ISLAMIC REPUBLIC OF)</p> <hr/> <p>This paragraph may be too substantive to be a policy objective.</p> <p>The difference between “misappropriation” of traditional knowledge and “other unfair commercial and non-commercial activities” is also not clear.</p> <p>(JAPAN)</p> <hr/> <p><del>Repress</del> <b><i>Eliminate</i></b> the misappropriation of traditional knowledge and other unfair commercial and non-commercial activities, recognizing the need to adapt approaches for the repression of misappropriation of traditional knowledge to national and local needs;</p> <p>Respect for and cooperation with relevant international, <b><i>regional and national</i></b> agreements and processes</p> <p>(SOUTH AFRICA)</p>
<p><b>ix. Concord with relevant international agreements and processes</b></p>	<p>Regarding objective (ix), the wording here refers to the need to ‘take account of and operate consistently with, other international and regional instruments and processes.’ However we believe that this wording has the potential to render the existing IP system subject to any possible mechanism for the protection for traditional knowledge.</p> <p>Australia notes that in paper WIPO/GRTKF/IC/7/5 there was reference to the need to ‘concord’ with said international and regional instruments and thus our preference would be for the use of this term in this objective.</p> <p>(AUSTRALIA)</p> <hr/> <p>The title of this provision should be changed in order to be in line with the title in the index of the Annex (“Concord with relevant international agreements and processes”)</p> <p>(BRAZIL)</p> <hr/> <p>Concord with relevant international agreements and processes’, like (v) (second part), is not an objective in itself but a limitation on the form protection might take. Certainly it is an important limitation. TK rights need to be consistent with obligations in widely adopted international conventions, including for example the CBD and TRIPs.</p> <p>(INTERNATIONAL CHAMBER OF COMMERCE - ICC)</p> <hr/> <p>The sentence should be amended as follows: “Operate consistently with and supportive of .....”</p> <p>(IRAN, ISLAMIC REPUBLIC OF)</p> <hr/> <p>This section discusses international and regional instruments and processes, making references to regimes that regulate access and benefit sharing. It does not specifically mention important instruments such as human rights instruments and the Declaration on the Rights of Indigenous peoples. SPFII suggests that these specific instruments and declaration be mentioned under this policy objective.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p>

<p><b>x. Promote innovation and creativity</b></p>	<p>Australia acknowledges the importance of rewarding and protecting tradition-based creativity and innovation because it helps promote the dissemination of knowledge.</p> <p>We can therefore give in principle support to this objective but would suggest the following amendment in italics ‘encourage, reward as appropriate....’.</p> <p>(AUSTRALIA)</p> <hr/> <p>‘Promote innovation and creativity’ is important because the whole of society - not just TK holders - benefit if this objective is achieved.</p> <p>(INTERNATIONAL CHAMBER OF COMMERCE - ICC)</p> <hr/> <p>Encourage, reward and protect tradition-based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous and traditional communities, including, subject to the consent of the <b><i>traditional knowledge holders and practitioners</i></b>, by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge;</p> <p><i>Comment: We favour the use of indigenous and local communities</i></p> <p>(SOUTH AFRICA)</p> <hr/>
<p><b>xi. Ensure prior informed consent and exchanges based on mutually agreed terms</b></p>	<p>Australia notes that the role of prior informed consent in any possible mechanism for the protection of traditional knowledge has yet to be determined and we would support further discussions on the contexts in which prior informed consent will be practicable, possible and desirable, consistent with national laws noting that there is no internationally recognized right or principle of prior informed consent. We therefore suggest that the term ‘ensure’ be replaced with ‘<i>promote</i>’.</p> <p>We can give in principle support to consultation and participation of Indigenous people in decisions that affect them.</p> <p>(AUSTRALIA)</p> <hr/> <p>The word “existing” should be deleted.</p> <p>(BRAZIL)</p> <hr/> <p>The remaining objectives (xi) to (xvi) are worthy but not perhaps fundamental to the project.</p> <p>(INTERNATIONAL CHAMBER OF COMMERCE - ICC)</p> <hr/> <p>The nuance of the language, “ensure prior informed consent,” is substantive and normative and not appropriate for POLICY OBJECTIVES. And we should also pay attention to the fact that Article 8(j) of the CBD does not directly require PIC concerning TK and that PIC is yet to be discussed. We would like to propose the</p>

	<p>following amendment using the phrases of Article 8 (j) of the CBD:</p> <p><i>(Draft amendment) Promote wider application of traditional knowledge with the approval and involvement of the holders of such knowledge</i></p> <p><i>(xi) Promote, as far as possible and as appropriate, wider application of traditional knowledge with the approval and involvement of the holders of such knowledge, in coordination with existing international and national regimes governing access to genetic resources;</i></p> <p>(JAPAN)</p>
<p><b>xii. Promote equitable benefit-sharing</b></p>	<p>The role of prior informed consent in any possible mechanism for the protection of traditional knowledge has not been determined. Therefore we would support further discussions about prior informed consent in particular, concerning its meaning, status, source and when it may be relevant and practicable.</p> <p>While Australia can give in principle support to the concept of encouraging the fair and equitable sharing of benefits as reflected in objective (xii), Australia believes that this objective is currently too prescriptive in its reference to when fair and equitable compensation can occur and believes that this is an area that requires more in-depth discussion.</p> <p>(AUSTRALIA)</p> <p>1. The verb “promote” should be replaced by “ensure”;</p> <p>2. The expression “other applicable international regimes” should be replaced by “relevant national and international regimes”;</p> <p>3. The final part of the provision (starting from “and including...”) should be suppressed.</p> <p>4. After the suppression proposed in number 3 above, the following expression should be inserted: “in particular the Convention on Biological Diversity”.</p> <p>(BRAZIL)</p> <p>PIC concerning TK has yet to be discussed.</p> <p>(JAPAN)</p> <p>Promote the fair and equitable <i>benefit</i>-sharing and distribution of monetary and non-monetary benefits arising from the use of traditional knowledge, in consistency with other applicable international regimes, the principle of prior informed consent and including through fair and equitable compensation in special cases where the individual holder is not identifiable or the knowledge has been disclosed;</p> <p><i>Comment: How do we introduce the concept of the community benefiting from the knowledge?</i></p> <p>(SOUTH AFRICA)</p>
<p><b>xiii. Promote community development and legitimate trading activities</b></p>	<p>Australia acknowledges the spirit of this objective and can give in principle support if the rights of traditional knowledge and local communities over their knowledge do not take precedence over any proprietary rights and if the concept of authenticity allows for more than one community to have the same traditional knowledge without providing the likelihood for conflict between relevant communities.</p> <p>We would therefore suggest the following amendments in italics:</p>



	<p>(xiii) if so desired by the holders of traditional knowledge, promote the use of traditional knowledge for community-based development, <del>recognizing the rights of traditional and local communities over their knowledge</del>; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where traditional knowledge holders seek such development and opportunities consistent with <del>the pursuit of their right to freely pursue</del> economic development;</p> <p>(AUSTRALIA)</p> <hr/> <p>1. The language of the provision should make clear that the expression “if so desired” assumes compliance with PIC;</p> <p>2. The following expression should be deleted: “...for, authentic products of traditional knowledge and associated community industries.”</p> <p>(BRAZIL)</p> <hr/> <p>There are such wordings as “the rights of traditional and local communities over their knowledge” and “their right to freely pursue economic development.” 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 that 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>If so desired by the holders of traditional knowledge, promote the use of traditional knowledge for community-based development, recognizing the rights of traditional and local communities over their knowledge; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where <b><u>traditional knowledge holders and practitioners</u></b> seek such development and opportunities consistent with their right to freely pursue economic development;</p> <p>(SOUTH AFRICA)</p>
<p><b>xiv. Preclude the grant of improper intellectual property rights to unauthorized parties</b></p>	<p>We oppose this policy objective including the reference here to the requirement that the disclosure in patent applications of the source and country of origin of traditional knowledge and associated genetic resources as well as evidence of prior informed consent and compliance with benefit sharing conditions be made a condition for the grant of a patent right. The issue of including such a disclosure requirement within the patent system is the subject of ongoing discussions which have not been finalised. The inclusion of such a specific and prescriptive requirement as an ‘objective’ is not consistent with the nature of the material in this section which is the enunciation of policy objectives rather than specific actions. This issue is in any case relevantly covered in general guiding principle (e).</p> <p>(AUSTRALIA)</p>

	<p>The sentence should be amended as follows: “Curtail the grant or exercise of, and facilitate nullification of Intellectual Property Rights over traditional knowledge” .....</p> <p>(IRAN, ISLAMIC REPUBLIC OF)</p> <hr/> <p>This paragraph requires disclosure of origin, evidence of PIC, and evidence of benefit-sharing (BS), and it is apparently normative. Moreover, there is no consensus on introducing disclosure of origin internationally. This paragraph should be deleted.</p> <p>(JAPAN)</p> <hr/> <p>Switzerland does not support the revised wording of policy objective roman 14. Instead, preference is given to the retention of the wording contained in the previous version of the policy objectives and principles, that is, document WIPO/GRTKF/IC/7/5.</p> <p>(SWITZERLAND)</p> <hr/> <p>Curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources, by requiring, in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit-sharing conditions <i><b>and agreement</b></i> have been complied with in the country of origin</p> <p>(SOUTH AFRICA)</p>
<p><b>xv. Enhance transparency and mutual confidence</b></p>	<p>Enhancing certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders and other users of traditional knowledge is important.</p> <p>However Australia queries the reference here to ‘the principles of free and prior informed consent’ as such a concept is not a universally agreed principle and many questions remain about the content and appropriate context for such a concept. Australia would therefore recommend its deletion from this objective while encouraging further discussion about its meaning, status and source. Australia suggests substituting the phrase with “<i>the approval and involvement of the holders of such knowledge</i>”.</p> <p>(AUSTRALIA)</p> <hr/> <p>Enhance certainty, transparency, mutual respect and understanding in relations between <i><b>traditional knowledge holders and practitioners</b></i> on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct and the principles of free and prior informed consent;</p> <p>(SOUTH AFRICA)</p>
<p><b>xvi. Complement protection of traditional cultural expressions</b></p>	<p>Australia can give in principle support to this objective.</p> <p>Given the close relationship, any protection of traditional knowledge or traditional cultural expressions and expressions of folklore needs to be closely</p>

aligned and complementary.

(AUSTRALIA)

ICC proposes adding two further objectives, as follows:

(xvii) Maintenance of the public domain  
Maintenance of the Public Domain  
ICC regards it as a vital part of any balanced TK protection system that the public domain should be preserved and not encroached upon. To remove existing public knowledge from the public domain requires strong justification. People are entitled to retain knowledge they already have, and to make appropriate use of it. In particular, it is both unjust and inconvenient to prevent or control existing uses begun in good faith, perhaps widespread and of many years' duration. Rights should therefore not be awarded or asserted retroactively.

(xviii) Proportionality to the ends to be achieved

The measures to be instituted must be proportional to the ends to be attained. The effect of this objective will not be clear until other objectives are agreed. But it could notably affect the way objectives are realized. For example, it has been suggested to implement objective (viii) 'Suppress unfair and inequitable uses' by a requirement that all patent applications should state the country of origin of genetic resources used in the invention. That requirement however would be disproportionate, given that in many cases the genetic resources are widely available, or are obtained in countries that allow free access to such resources: in such cases the requirement, though burdensome to the applicant, does nothing to promote the objective of suppressing unfair use.

Two pragmatic reasons may be advanced for protecting TK: its value to its holders and its value to society as a whole. The first is primarily the concern of the holders: the value of TK to right holders supports conserving TK, but not necessarily recognizing rights in it that limit its wider use. Its value to society may support limiting its use in order to provide benefits to the originators which encourage them to preserve and share it. Alternatively, starting with fundamental principle rights in TK may be proposed as a requirement of justice for those who hold them: but if so, such rights, like other IP rights, must still be balanced with those of the rest of society. This will require a proper respect for the principle of public domain. ICC suggests that the list of objectives should be pruned and amended with these points in mind, so as to establish a consensus. Unless there is consensus about the objectives, it is unrealistic to expect agreement about policies for implementing them, let alone detailed implementing provisions.

(INTERNATIONAL CHAMBER OF COMMERCE - ICC)

<b>III. COMMENTS ON GENERAL GUIDING PRINCIPLES</b>	
<b>General Comments on the General Guiding Principles</b>	<p>The terms “ measure(s)” and “ right(s)” 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)” and “ right(s)” in the COMMENTARY ON GENERAL GUIDING PRINCIPLES section do not prejudge the creation of a new type of right currently nonexistent under national and international laws.</i></p> <p>(JAPAN)</p> <hr/> <p>We are generally in agreement with the General Guiding Principles too. However, in para. (b), the phrase “of indigenous peoples and local communities and other traditional knowledge holders”, needs to be added at the end of the provision. Further, in para. (f), after the reference to “legal systems”, we want to see the inclusion of the term “including customary legal systems”.</p> <p>With regard to the Commentary to the General Guiding Principles, we agree with most parts of these as well, and particularly appreciate the highlighting of the importance of respecting the rights of TK holders, including the right to consent or not consent to access to TK as well as of indigenous customary laws pertaining to such issues.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>The substantive provisions set out in the next section are guided by and seek to give legal expression to certain general guiding principles which have underpinned much of the discussion within the Committee since its inception and in international debate and consultations before the Committee’s establishment.</p> <p>Elaboration and discussion of such principles is a key step in establishing a firm foundation for development of consensus on the more detailed aspects of protection. Legal and policy evolution is still fast-moving in this area, at the national and regional level, but also internationally. Equally, strong emphasis has been laid on the need for community consultation and involvement. Broad agreement on core principles could put international cooperation on a clearer, more solid footing, but also clarify what details should remain the province of domestic law and policy, and leave suitable scope for evolution and further development. It could build common ground, and promote consistency and harmony between national laws, without imposing a single, detailed legislative template.</p> <p>(SOUTH AFRICA)</p>
<b>a. Responsiveness to the needs and expectations of</b>	<p>Australia can give in principle support to this provision to the extent that such aspirations, expectations and needs of traditional knowledge holders are consistent with international and national laws and policies. For example,</p>

<p><b>traditional knowledge holders</b></p>	<p>Australia would not be able to support customary practices that are inconsistent with national laws.</p> <p>(AUSTRALIA)</p> <hr/> <p>Suppress the last sentence of the text, starting from “Measures for...”, taking into account that contrary to what is suggested, measures for protection of TK shall not be deemed voluntary nor have their applicability conditioned upon manifestation on the part of the holders of such rights.</p> <p>(BRAZIL)</p> <hr/> <p>We are not sure of the meaning of the wording, “measures for the legal protection of traditional knowledge.” Do such “measures” mean existing measures or measures which must be created to provide for the legal protection? In this regard, we would like to mention that so far a consensus has not been made in support of a sui generis IP protection system for TK.</p> <p>“Customary and traditional forms of protection” are mentioned in this paragraph, and we understand that there are some existing forms of protection under customary and traditional laws, which can deserve respect. However, even in the case that such an existing form of protection does merit respect, we would like to confirm that the customary laws and legal practices in some countries or regions do not necessarily have legal validity in foreign jurisdictions.</p> <p>(JAPAN)</p> <hr/> <p>Protection should reflect the actual aspirations, expectations and needs of <b><i>traditional knowledge holders and practitioners</i></b>; and in particular should: recognize and apply indigenous and customary practices, protocols and laws as far as possible and appropriate; address cultural and economic aspects of development; address insulting, derogatory and offensive acts; enable full and effective participation by all <b><i>traditional knowledge holders and practitioners</i></b>; and recognize the inseparable quality of traditional knowledge and cultural expressions for many communities. Measures for the legal protection of traditional knowledge should also be recognized as voluntary from the viewpoint of indigenous peoples and other traditional communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their traditional knowledge.</p> <p>(SOUTH AFRICA)</p>
<p><b>b. Recognition of rights</b></p>	<p>Australia gives in principle support to this provision. As discussed above, Australia considers there should be further consideration of the term ‘misappropriation’.</p> <p>(AUSTRALIA)</p> <hr/> <p>The term “right” in Paragraph (b) of the COMMENTARY ON GENERAL GUIDING PRINCIPLES might imply that a new type of right be created and given to holders and custodians, and we would like to confirm that there is no consensus on creating such a new type of right and that 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>We would like to repeat the aforementioned comments as they pertain to Paragraph (e) of the COMMENTARY ON GENERAL GUIDING PRINCIPLES</p>

	<p>(Annex, p.10) which mentions “the rights of traditional knowledge holders.”</p> <p>(JAPAN)</p> <hr/> <p>The rights of <u><i>traditional knowledge holders and practitioners</i></u> to the effective protection of their knowledge against misappropriation should be recognized and respected.</p> <p>(SOUTH AFRICA)</p> <hr/>
<p><b>c. Effectiveness and accessibility of protection</b></p>	<p>Australia acknowledges the importance of guiding principle (c) in any system of protection of traditional knowledge. However since the role of prior informed consent has yet to be determined Australia considers it should be deleted from this provision. This would not detract from the flexibility of implementation of this guiding principle and would be consistent with Australia’s comments on objectives (xii) and (xv). It would also promote consistency between guiding principles (c) and (d) as (d) provides for flexibility in implementation of any protection. Australia suggests the following amendments:</p> <p>‘Where measures for the protection of traditional knowledge are adopted, appropriate enforcement mechanisms should be developed, consistent with international law and national laws and policies, permitting effective action against misappropriation of traditional knowledge and supporting the broader principle of prior informed consent.’</p> <p>Again, Australia would support further discussion of the term ‘misappropriation’ to ensure that the term is given fully explored by Member States.</p> <p>(AUSTRALIA)</p> <hr/> <p>The last part of the comments on this item suggests that enforcement measures are optional. Brazil thus proposes to replace this last part of the comments for the following: “(c) Measures for protecting traditional knowledge should be effective in achieving the objectives of protection, and should be understandable, affordable, accessible and not unjustifiably burdensome for their intended beneficiaries , taking into account of the cultural, social and economic context of traditional knowledge holders. National and international measures should be available in order to provide appropriate enforcement procedures that permit action against misappropriation of traditional knowledge and violation of the principle of prior informed consent.”</p> <p>(BRAZIL)</p> <hr/> <p>The wording, “appropriate enforcement mechanisms should be developed permitting effective action against misappropriation of traditional knowledge and supporting the broader principle of prior informed consent,” appears to be too substantive to be mentioned in COMMENTARY ON GENERAL GUIDING PRINCIPLES.</p> <p>(JAPAN)</p> <hr/> <p>Measures for protecting traditional knowledge should be effective in achieving the objectives of protection, and should be understandable, affordable, accessible and not burdensome for their intended beneficiaries, taking account of the cultural, social and economic context of <u><i>traditional knowledge holders and practitioners</i></u>. Where measures for the protection of traditional knowledge are adopted, appropriate enforcement mechanisms should be developed permitting</p>

	<p>effective action against misappropriation of traditional knowledge and supporting the broader principle of prior informed consent.</p> <p>(SOUTH AFRICA)</p>
<p><b>d. Flexibility and comprehensiveness</b></p>	<p>Australia can support this provision in principle but would suggest that the final paragraph be made less prescriptive through the terms ‘as appropriate’ and/or ‘may’ rather than ‘should’.</p> <p>A flexible approach to the protection of traditional knowledge helps ensure that appropriate mechanisms are available to suit the range of needs of Indigenous people, and that an appropriate balance is achieved between those needs and the maintenance of a stable framework for investment. This flexibility should also extend to respect for the diversity of legal systems amongst member States.</p> <p>(AUSTRALIA)</p> <hr/> <p>The sentence “Protection should include defensive measures to curtail illegitimate acquisition of industrial property rights over traditional knowledge ... and positive measures establishing legal entitlement for traditional knowledge holders” appears to be too substantive, and the word “should” is prejudging outcomes.</p> <p>(JAPAN)</p> <hr/> <p>Protection should respect the diversity of traditional knowledge held by different peoples and communities in different sectors, should acknowledge differences in national circumstances and the legal context and heritage of national jurisdictions, and should allow sufficient flexibility for national authorities to determine the appropriate means of implementing these principles within existing and specific legislative mechanisms, adapting protection as necessary to take account of specific sectoral policy objectives, subject to international law, and respecting that effective and appropriate protection may be achieved by a wide variety of legal mechanisms and that too narrow or rigid an approach may preempt necessary consultation with <u>traditional knowledge holders and practitioners</u>.</p> <p>Protection may combine proprietary and non-proprietary measures, and use existing IP rights (including measures to improve the application and practical accessibility of such rights), <i>sui generis</i> extensions or adaptations of IP rights, and specific <i>sui generis</i> laws. Protection should include defensive measures to curtail illegitimate acquisition of industrial property rights over traditional knowledge or associated genetic resources, and positive measures establishing legal entitlements for <u>traditional knowledge holders and practitioners</u>.</p> <p>(SOUTH AFRICA)</p>
<p><b>e. Equity and benefit-sharing</b></p>	<p>Consistency with existing obligations under international law and national laws and policies is essential to Australia’s support for this provision. This is acknowledged in, eg, general guiding principle (g) which provides for consistency with national laws regarding access to genetic resources.</p> <p>Regarding the references in the first and third paragraphs to prior informed consent our earlier comments regarding objectives (xii) and (xv) would apply to this provision also. We would therefore recommend deleting “respect for prior informed consent” and substituting it with ‘<i>respect for appropriate consultative measures</i>’ and where appropriate consent should be encouraged.</p>

	<p>(AUSTRALIA)</p> <hr/> <p>First paragraph: delete the paragraph as it stands and, instead, rephrase it making it clear that the principle of equity may lead at time to treatment more favourable for the TK holders, as this idea does not seem clear enough from the language used in the last sentence of this paragraph (“In reflecting these needs...”).</p> <p>Second Paragraph: Replace the paragraph by the following: “As a means of ensuring that the intellectual property regime is equitable and responsive to broader societal interests, the rights of TK holders over their knowledge should be fully recognized and safeguarded. Respect for prior informed consent should be ensured, and holders of TK should be entitled to the fair and equitable sharing of benefits from the use of their traditional knowledge. Where traditional knowledge is associated with genetic resources, the distribution of benefits should be consistent with measures established in accordance with the Convention on Biological Diversity, providing for the sharing of benefits arising from the utilization of genetic resources.”</p> <p>(BRAZIL)</p> <hr/> <p>Protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and maintain traditional knowledge, namely <b><i>traditional knowledge holders and practitioners</i></b>, and of those who use and benefit from traditional knowledge; the need to reconcile diverse policy concerns; and the need for specific protection measures to be proportionate to the objectives of protection and the maintenance of an equitable balance of interests. In reflecting these needs, traditional knowledge protection should respect the right of <b><i>traditional knowledge holders and practitioners</i></b> to consent or not to consent to access to their traditional knowledge and should take into account the principle of prior informed consent.</p> <p>The rights of <b><i>traditional knowledge holders and practitioners</i></b> over their knowledge should be recognized and safeguarded. Respect for prior informed consent should be ensured, and holders of traditional knowledge should be entitled to fair and equitable sharing of benefits arising from the use of their traditional knowledge. Where traditional knowledge is associated with genetic resources, the distribution of benefits should be consistent with measures, established in accordance with the Convention on Biological Diversity, providing for sharing of benefits arising from the utilization of the genetic resources.</p> <p>Protection which applies the principle of equity should not be limited to benefit-sharing, but should ensure that the rights of <b><i>traditional knowledge holders and practitioners</i></b> are duly recognized and should, in particular, respect the right of <b><i>traditional knowledge holders and practitioners</i></b> to consent or not to consent to access to their traditional knowledge.</p> <p>(SOUTH AFRICA)</p> <hr/>
<p><b>f. Consistency with existing legal systems governing access to associated genetic resources</b></p>	<p>Australia agrees that consistency with the applicable law governing access to genetic resources and benefit sharing is essential to prevent any conflict between obligations and can therefore give in principle support to this provision.</p> <p>(AUSTRALIA)</p> <hr/> <ol style="list-style-type: none"> <li>1. Suppress the final part of the title starting from “...governing...”;</li> <li>2. Replace “the applicable law” for “national and international regimes”;</li> <li>3. Add a second paragraph, as previously proposed by Brazil, in the following terms: “Measures should be adopted with a view to ensuring that existing intellectual property systems operate in a manner that is consistent and does not run counter to the objectives of traditional knowledge protection.”</li> </ol>



	<p>(BRAZIL)</p> <p>As we have done repeatedly, the Saami Council reiterates our strong objection to para. (f) of the Commentary. Section (f) simply misrepresents international law, and would, if implemented, violate e.g. the UN Charter, which both WIPO and its member states obviously are bound to respect. We underline that we do not challenge the fact that states - as sovereigns – do have rights to genetic and other natural resources within their national borders. Equally firmly established under international law is, however, the existence of competing rights to such natural resources, such as indigenous peoples’ right to self-determination and our land and resource rights. Moreover, as human rights, these rights do not only compete with, but actually often precedent over the principle of state sovereignty. It is consequently simply a misrepresentation of international law to single out one right (state sovereignty) that pertain to genetic resources, without any reference whatsoever to the competing rights that also apply to such resources. There are two options. Either section (f) is altogether deleted from the Objectives and Core Principles. Alternatively, the provision is redrafted to accurately reflect international law on the area, i.e. references are included to all rights that compete with – and sometimes take precedent over - state sovereignty. We repeat that this is a deal-breaker for us. The Saami Council would denounce any Guidelines that include the language currently contained in section (f), in isolation. And so would, we believe, almost all other indigenous peoples’ representatives.</p> <p>(SAAMI COUNCIL)</p> <p>The authority to determine access to genetic resources, whether associated with traditional knowledge or not, rests with the national governments and is subject to national legislation. The protection of traditional knowledge associated with genetic resources shall be consistent with the applicable law governing access to those resources and the sharing of benefits arising from their use. Nothing in these Principles shall be interpreted to limit the sovereign rights of States over their natural resources and the authority of governments to determine access to genetic resources, whether or not those resources are associated with protected traditional knowledge.</p> <p>(SOUTH AFRICA)</p>
<p><b>g. Respect for and cooperation with other international and regional instruments and processes</b></p>	<p>Australia can give in principle support acknowledging that consultation and cooperation with other international fora is important and consistency with relevant provisions of existing international instruments is critical to ensure their continued and effective operation. Australia stresses that it can only recognise customary law where it does not conflict with international law and national laws and policies.</p> <p>(AUSTRALIA)</p> <hr/> <p>Delete the first paragraph of the comments.</p> <p>(BRAZIL)</p> <p>Traditional knowledge shall be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already codified in or established under binding legal instruments and international customary law.</p> <p><i>Comment: Does this mean that you cannot change anything in the international law in relation to the protection of TK?</i></p> <p>Nothing in these Principles shall be interpreted to affect the interpretation of</p>

	<p>other instruments or the work of other processes which address the role of traditional knowledge in related policy areas, including the role of traditional knowledge in the conservation of biological diversity, the combating of drought and desertification, or the implementation of farmers' rights as recognized by relevant international instruments and subject to national legislation.</p> <p>(SOUTH AFRICA)</p>
<p><b>h. Respect for customary use and transmission of traditional knowledge</b></p>	<p>Australia can support this provision in principle, where customary law does not conflict with current international law and national laws and policies, including human rights.</p> <p>(AUSTRALIA)</p> <hr/> <p>Brazil would appreciate clarification as to the part of the text starting from "if so desired...".</p> <p>(BRAZIL)</p> <hr/> <p>Further, the Saami Council strongly objects to para. (h), suggesting that indigenous peoples' customary laws should be recognized only subject to national legislation. This must be a drafting mistake, since obviously the recognition of the laws of one people cannot be dependent on the will of another. Any language suggesting otherwise would violate the fundamental principle of non-discrimination, a norm that constitutes jus cogens – a pre-emptory norm. It is outside the mandate of WIPO to adopt any language with legal implications that contradicts pre-emptory norms.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>The above statement about supporting the environment in which traditional knowledge is transmitted is also relevant in sections (h) and (i).</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>Customary use, practices and norms shall be respected and given due account in the protection of traditional knowledge, subject to national law and policy. Protection beyond the traditional context should not conflict with customary access to, and use and transmission of, traditional knowledge, and should respect and bolster this customary framework. If so desired by the <i>raditional knowledge holders and practitioners</i>, protection should promote the use, development, exchange, transmission and dissemination of traditional knowledge by the communities concerned in accordance with their customary laws and practices, taking into account the diversity of national experiences. No innovative or modified use of traditional knowledge within the community which has developed and maintained that knowledge should be regarded as offensive use if that community identifies itself with that use of the knowledge and any modifications entailed by that use.</p> <p>(SOUTH AFRICA)</p>
<p><b>i. Recognition of the specific characteristics of traditional knowledge</b></p>	<p>Australia notes the broad nature of this principle and the difficulty that member States may have in ensuring that specific characteristics of a community's traditional knowledge which may be unknown are considered in developing mechanisms for protection.</p> <p>In principle, Australia would support a provision which focuses on considering the general characteristics of Indigenous communities' treatment of traditional</p>

	<p>knowledge.</p> <p>(AUSTRALIA)</p> <hr/> <p>The above statement about supporting the environment in which traditional knowledge is transmitted is also relevant in sections (h) and (i).</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p>
<p><b>j. Providing assistance to address the needs of traditional knowledge holders</b></p>	<p>Australia can give in principle support to this provision where collective management is appropriate, with the understanding that the assistance in setting up collective management systems would be in the form of ‘principles’ or ‘guidelines’ and not the development of specific laws.</p> <p>(AUSTRALIA)</p> <hr/> <p>Delete the part of the text starting from “including, for example...”</p> <p>(BRAZIL)</p> <hr/> <p><u><i>Traditional knowledge holders and practitioners</i></u> should be assisted in building the legal-technical capacity and establishing the institutional infrastructure which they require in order to effectively utilize and enjoy the protection available under these Principles, including, for example, in the setting up of collective management systems for their rights, the keeping of records of their traditional knowledge and other such needs.</p> <p>(SOUTH AFRICA)</p>

IV. COMMENTS ON SUBSTANTIVE PRINCIPLES	
<b>General Comments on the Substantive Principles</b>	
<b>Article 1. Protection Against Misappropriation</b>	<p>Paragraph 2:</p> <ul style="list-style-type: none"> <li>- add “or illicit” between “unfair” and “means” (second last sentence of the draft provision);</li> <li>- replace, all along the paragraph, the terms “acquisition” and “acquired” for other that does not convey the idea of “appropriation”</li> </ul> <p>Paragraph 3:</p> <ul style="list-style-type: none"> <li>- In the heading: Replace “prevent” for “suppress”;</li> <li>- (iv): delete the expression “if the traditional knowledge has been accessed”</li> <li>- (iv): replace “compensation” for “benefit-sharing”;</li> <li>- (iv): delete the last part, starting from “when such use” until “knowledge”;</li> <li>- (iv): add “according to the national and international regimes” as the final part of the provision;</li> <li>- (v): delete the word “willful”.</li> <li>- Add the following as small roman (vi): “The granting of patent rights for inventions involving traditional knowledge and associated genetic resources without the disclosure of the country of origin of the knowledge and resources, as well as evidence that prior informed consent and benefit-sharing conditions have been complied with in the country of origin.”</li> </ul> <p>(BRAZIL)</p> <hr/> <p>Turning to the Substantive Principles, we would like to register our concern with the drafting of Article 1 – “Protection against Misappropriation”. Generally speaking, we think the scope of protection is too limited, as it will leave a substantial part of traditional knowledge that conventional IPR-regimes consider to be in the so called public domain continuously without protection.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>SPFII agrees to the addition of 3 (v) because legal measures should prevent mutilation, distortion or derogatory modification of traditional knowledge which is of moral or spiritual value to traditional knowledge holders.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>1. Traditional knowledge shall be protected against misappropriation.</p> <p><i>Comment: Is protection only against misappropriation?</i></p> <p>2. Any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.</p> <p>3. In particular, legal means should be provided to prevent:</p> <p style="text-align: center;">[ ... ]</p>

	<p>willful offensive use of traditional knowledge of particular moral, <del>or</del>-spiritual <b><i>or cosmological</i></b> 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.</p> <p>4. <b><i>Traditional knowledge holders and practitioners</i></b> should also be effectively protected against other acts of unfair competition, including acts specified in Article 10bis of the Paris Convention. This includes false or misleading representations that a product or service is produced or provided with the involvement or endorsement of <b><i>traditional knowledge holders and practitioners</i></b>, or that the commercial exploitation of products or services benefits holders of traditional knowledge. It also includes acts of such a nature as to create confusion with a product or service of <b><i>traditional knowledge holders and practitioners</i></b>; and false allegations in the course of trade which discredit the products or services of <b><i>traditional knowledge holders and practitioners</i></b>.</p> <p>5. The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.</p> <p>(SOUTH AFRICA)</p>
<p><b>Article 2. Legal Form of Protection</b></p>	<p>Add in any one of the paragraphs explicit reference to the possibility of a “sui generis” system, as it is mentioned among the General Guiding Principles.</p> <p>(BRAZIL)</p> <p>We are fine with Article 2 – “Legal form of Protection”, Article 3 - “General Scope of Subject Matter”, Article 4 - “Eligibility for Protection” and Article 5 – “Beneficiaries of Protection”.</p> <p>(SAAMI COUNCIL)</p> <p>1. The protection of traditional knowledge against misappropriation may be implemented through a range of legal measures, including: a special law on traditional knowledge; laws on intellectual property, including laws governing unfair competition and unjust enrichment; the law of contracts; the law of civil liability, including torts and liability for compensation; criminal law; laws concerning the interests of indigenous peoples; fisheries laws and environmental laws; regimes governing access and benefit-sharing; <b><i>customary law</i></b> or any other law or any combination of those laws. This paragraph is subject to Article 11(1).</p> <p>2. The form of protection need not be through exclusive property rights, although such rights may be made available, as appropriate, for the individual and collective holders of traditional knowledge, including through existing or adapted intellectual property rights systems, in accordance with the needs and the choices of the holders of the knowledge, national laws and policies, and international obligations.</p> <p>(SOUTH AFRICA)</p>
<p><b>Article 3. General Scope of Subject Matter</b></p>	<p>Paragraph 2 (last part): Replace “and knowledge associated with genetic resources” for “or any other knowledge associated with genetic resources”, as knowledge related to, inter alia, medicine, agriculture and environment are also comprised within TK associated to genetic resources.</p> <p>(BRAZIL)</p>

	<p>We are fine with Article 2 – “Legal form of Protection”, Article 3 - “General Scope of Subject Matter”, Article 4 - “Eligibility for Protection” and Article 5 – “Beneficiaries of Protection”.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>1. These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking externally to define the diverse and holistic conceptions of knowledge within the traditional context. These principles should be interpreted and applied in the light of the dynamic and evolving nature of traditional knowledge and the nature of traditional knowledge systems as frameworks of ongoing innovation and creativity.</p> <p><i>Comment: We prefer the use of customary and local context to traditional context. Recommend replacement.</i></p> <p>2. For the purpose of these principles only, the term “traditional knowledge” refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.</p> <p><i>Comment: The use of traditional knowledge has already been mentioned, South Africa prefers Indigenous Knowledge.</i></p> <p>(SOUTH AFRICA)</p>
<p><b>Article 4. Eligibility for Protection</b></p>	<p>(ii): Brazil would like to request clarification about the treatment to be accorded to any cases that might not fall under items (i) through (iii);</p> <p>(iii): replace “integral to the cultural identity” for “related to the cultural identity”.</p> <p>(BRAZIL)</p> <hr/> <p>We are fine with Article 2 – “Legal form of Protection”, Article 3 - “General Scope of Subject Matter”, Article 4 - “Eligibility for Protection” and Article 5 – “Beneficiaries of Protection”.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>Protection should be extended at least to that traditional knowledge which is: generated, preserved and transmitted in a traditional and intergenerational context;</p> <p>distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and</p> <p><i>Comment: Who does it refer to by “people” Clarification is sought.</i></p> <p>integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.</p>

	(SOUTH AFRICA)
<p><b>Article 5. Beneficiaries of Protection</b></p>	<p>It is suggested that, for the sake of clarity of the text, the provision be split into two.</p> <p>(BRAZIL)</p> <hr/> <p>We are fine with Article 2 – “Legal form of Protection”, Article 3 - “General Scope of Subject Matter”, Article 4 - “Eligibility for Protection” and Article 5 – “Beneficiaries of Protection”.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>Protection of traditional knowledge should benefit the communities who generate, preserve and transmit the knowledge in a traditional and intergenerational context, who are associated with it and who identify with it in accordance with Article 4. Protection should accordingly benefit the indigenous and traditional communities themselves that hold traditional knowledge in this manner, as well as recognized individuals within these communities and peoples.</p> <p><i>Comment: What does the reference to peoples refer to: clarification on definition of peoples is sought.</i></p> <p>Entitlement to the benefits of protection should, as far as possible and appropriate, take account of the customary protocols, understandings, laws and practices of these communities and peoples.</p> <p>(SOUTH AFRICA)</p>
<p><b>Article 6. Fair and Equitable Benefit-sharing and Recognition of Knowledge Holders</b></p>	<p>Paragraph 1: The provision should incorporate language indicating that the use of the TK requires, apart from compliance with PIC, respect for mutually agreed terms regarding benefit-sharing.</p> <p>Paragraph 1: Add “according to national legislation of countries of origin”, or the like, at the beginning of the paragraph.</p> <p>Paragraph 2: Replace “only give” for “mainly give” as TK holders should be free to require benefits of whatever kind as a condition for the use of the knowledge.</p> <p>(BRAZIL)</p> <hr/> <p>Akwe: Kon Guidelines on lands occupied by indigenous communities.</p> <p>[To recognise that DEVELOPMENTS proposed to take place on <u>LANDS</u> and <u>WATERS</u> traditionally occupied by indigenous and local communities are sensitive to their concerns since this has been a source of these communities environmental, agricultural, medicinal concerns and, because of the potential long term negative impacts on their lively hoods and traditional knowledge that could be associated with such developments. This should be part of impact assessment for development in areas traditionally used as a source of genetic resource for these communities.]</p> <p>(KENYA)</p> <hr/> <p>With regard to Article 6 on benefit sharing, we can accept this one too, provided that para. 1 is clarified to express that benefit sharing can only take place following a correct application of the principle of free, prior and informed consent. Further, in para. 2, we would like to see the insertion of “if appropriate”</p>

	<p>after the word “need”.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>This Article raises important issues in terms of commercialization of traditional knowledge and the possible benefits covering both monetary and non-monetary benefits as well as the development of contractual arrangements for the different uses as set out in the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization. While the discussion regarding this issue is still on-going and is still in the developmental stage, SPFII makes the suggestion that this section could include information that clarifies how these discussions are linked to the Convention on Biological Diversity’s (CDB) work on protecting Traditional Knowledge and its proposed international regime on access and benefit sharing. This section could also include the distinction between the CDB’s work on protecting genetic resources and WIPO’s interest in the inventions derived from genetic resources (which falls under the Patents Act).</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <ol style="list-style-type: none"> <li>1. The benefits of protection of traditional knowledge to which its holders are entitled include the fair and equitable sharing of benefits arising out of the commercial or industrial use of that traditional knowledge.</li> <li>2. Use of traditional knowledge for non-commercial purposes need only give rise to non-monetary benefits, such as <i>but not limited to</i> access to research outcomes and involvement of the source community in research and educational activities.</li> <li>3. Those using traditional knowledge beyond its traditional context should mention its source, acknowledge its holders, and use it in a manner that respects the cultural <i>and spiritual</i> values of its holders.</li> <li>4. Legal means should be available to provide remedies for <i>traditional knowledge holders and practitioners</i> in cases where the fair and equitable sharing of benefits as provided for in paragraphs 1 and 2 has not occurred, or where knowledge holders were not recognized as provided for by paragraph 3.</li> <li>5. Customary laws <i>and practices</i> within local communities may play an important role in sharing benefits that may arise from the use of traditional knowledge.</li> </ol> <p>(SOUTH AFRICA)</p>
<p><b>Article 7. Principle of Prior Informed Consent</b></p>	<p>Paragraph 1: delete “...from its traditional holders...”;</p> <p>Paragraph 3: add the word “unjustifiably” (or the like) before “burdensome”</p> <p>(BRAZIL)</p> <hr/> <p>As to Article 7 on prior and informed consent, the Saami Council can accept this Article only if the phrase “subject to these principle and relevant national laws” is deleted from para. 1 and the phrase “as provided by applicable national legislation” from para. 2. The concept of free, prior and informed can be described as a bundle of rights, many of them human rights, such as, again, indigenous peoples’ right to self-determination and our land and resource rights. Per definition, human rights can never be subject to national legislation. Consequently, Article 7, as currently drafted, contradicts a fundamental international legal principle, and must be corrected accordingly. In this context, it can be added that it is our understanding that the aspiration is that the</p>



	<p>international regime shall be legally binding. Obviously, to render provisions in a legally binding international legal instrument subject to national legislation, constitutes a contradiction in terms.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>The SPFII has always used the term free, prior and informed consent (FPIC) which is an integral component of indigenous peoples' rights to lands, territories and resources. Free, prior and informed consent also means that indigenous peoples should not only have the right to consent, but also the right to refuse consent. Contracts and agreements can be useful because they are flexible and enable all parties to an agreement with an opportunity to negotiate a range of terms and conditions. However, SPFII has concerns that contracts and agreements are often negotiated without any nationally consistent standards or guidelines. They can also have the potential to create a disincentive for governments to develop national laws on access and benefit sharing.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>3. Measures and mechanisms for implementing the principle of prior informed consent should be understandable, appropriate, and not burdensome for all relevant stakeholders, in particular for <u>traditional knowledge holders and practitioners</u>; should ensure clarity and legal certainty; and should provide for mutually agreed terms for the equitable sharing of benefits arising from any agreed use of that knowledge.</p> <p>(SOUTH AFRICA)</p>
<p><b>Article 8. Exceptions and Limitations</b></p>	<p>Paragraph 1(ii): Replace the expression "use in government hospitals" for "use by public health system", in order to accommodate national systems, such as the one in Brazil, in which private hospitals may be included in the public health system;</p> <p>Paragraph 2: suppress the paragraph, in view of the broad language used in it.</p> <p>(BRAZIL)</p> <hr/> <p>1. The application and implementation of protection of traditional knowledge should not adversely affect:</p> <p>(i) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders;</p> <p>(ii) the use of traditional medicine for household purposes; use in government hospitals, especially by traditional knowledge holders attached to such hospitals; or use for other public health purposes.</p> <p>2. In particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is already readily available to the general public, provided that users of that traditional knowledge provide equitable compensation for industrial and commercial uses of that traditional knowledge.</p> <p>General arguments for WIPO/GRTKF/IC/9/4 Article 5 apply here. The Tulalip Tribes would like to further elaborate on 8(2). Reiterating previous arguments:</p>

1. Indigenous peoples widely reject the legal concept that knowledge “already readily available to the general public” is in the public domain or can be exempted from their prior informed consent. They believe their knowledge and fundamental identity is regulated by customary law and tribal traditions. They are not only concerned about uncompensated use, or with the commercial/non-commercial use distinction. They are concerned with uses that deprive them of rights to self-identity and self-development. Indigenous peoples have repeatedly stressed that non-indigenous appropriation of knowledge can deprive them of identity and lead to moral offense and spiritual, physical harm if these uses violate their traditions.

They are also concerned that provisions protecting a public domain in “traditional knowledge readily available to the general public” goes too far in codifying a past history of injustice and non-recognition of prior rights. Indigenous peoples have not sought states to grant them these rights, but have consistently sought to have prior rights to traditional knowledge recognized by states. This approach has been formally recognized in a number of state constitutions and laws, and is the approach adopted in the current United Nations Draft Declaration on the Rights of Indigenous Peoples.

It also fails to provide scope for the repatriation of knowledge and the gradual removal of traditional knowledge from being “generally being available to the public”. Some states, for example Australia and New Zealand, have created special collections within university and national libraries that isolate published works containing knowledge of special concern to their indigenous peoples. Access to these materials requires permission from the original knowledge holders.

Knowledge accessible to a general public is also dependent on their opportunities for access. Most books have a short shelf life, and rapidly go out of publication. Indigenous and local communities may also become more circumspect with those who they share their knowledge. Voluntary and policy measures can supplement these processes through the use of federal policy guidance, the increasing use of voluntary ethical codes by non-governmental organizations, professional societies, publishers, and museums related to traditional knowledge. If these processes are reinforced, the result will be that over time traditional knowledge will become less available to the general public. This will, over time, reinforce indigenous and local communities’ rights to share their knowledge in a more controlled way, based on prior informed consent, and on more equitable terms.

In summary, the Tulalip Tribes believe WIPO needs to rethink its proposals for broad exemptions based on current intellectual property rights practices. A *sui generis* should be based on thorough respect for customary law and local traditions. In their right to self-determination, indigenous and local communities do not generally believe they are exempt from all national and international laws. Self-determination, for example, would not be supposed to give tribes the right to reproduce and market computer software protected under national intellectual property law and international treaty. But the Tulalip Tribes believe that existing national and international law demands reciprocity when addressing state obligations to respect traditional law related to indigenous traditional knowledge.

(TULALIP TRIBES)

Turning to Article 8, we have concerns with para. 1. (ii) and in particular with para. 2. Certainly, indigenous peoples generally are positive towards sharing our medical practices to the benefit of humanity. Still, we find it unbalanced that para. 1. (ii) grants an open-ended licence for all government hospitals to freely use and dispose over our traditional knowledge. Even more problematic is, however, para. 2, which allows states to exclude from the principle of prior and informed consent all traditional knowledge which conventional IPR-regimes

	<p>perceive to be in the so-called public domain. This provision is completely unacceptable, as it excludes from protection a substantial bulk of indigenous knowledge, and thus to a large extent renders the Guidelines meaningless. Para. 2 needs to be deleted –or at least seriously modified – for the Guidelines to be at all acceptable.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>1. The application and implementation of protection of traditional knowledge should not adversely affect:</p> <p style="padding-left: 40px;">(i) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by <b><i>traditional knowledge holders and practitioners</i></b>;</p> <p style="padding-left: 40px;">(ii) the use of traditional medicine for household purposes; use in government hospitals, especially by <b><i>traditional knowledge holders and practitioners</i></b> attached to such hospitals; or use for other public health purposes.</p> <p>2. In particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is already readily available to the general public, provided that users of that traditional knowledge provide <b><i>fair and</i></b> equitable compensation for industrial and commercial uses of that traditional knowledge.</p> <p>(SOUTH AFRICA)</p>
<p><b>Article 9. Duration of Protection</b></p>	<p>Paragraph 2: Replace “specify the duration of protection” for “prevail”, with the aim of ensuring that, under the case provided for under this paragraph, the national law is the one to be applied.</p> <p>(BRAZIL)</p> <hr/> <p>We are fine with Article 9 – “Duration of Protection”.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>Given the transgenerational nature of traditional knowledge, SPFII supports the view that the period for protecting traditional knowledge against misappropriation should be unlimited.</p> <p>(SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES)</p> <hr/> <p>1. Protection of traditional knowledge against misappropriation should last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 4</p> <p><i>Comment: The duration of protection is not clearly stated. The South African position prefers the duration of protection to be held in perpetuity</i></p> <p>(SOUTH AFRICA)</p>

<p><b>Article 10. Transitional Measures</b></p>	<p>Delete the word “acquisition” (second and third lines);</p> <p>Add, after “good faith”, the following: “as well as fair and equitable benefit-sharing with traditional knowledge holders, according to national legislation of countries of origin.”</p> <p>(BRAZIL)</p> <hr/> <p>We can support Article 10 – “Transitional Measures”, provided that the last sentence is deleted.</p> <p>(SAAMI COUNCIL)</p>
<p><b>Article 11. Formalities</b></p>	<p>Paragraph 2: Replace “in the interests of” for “to enhance...”, considering that registration is only one of the measures that can ensure transparency, certainty and conservation of TK.</p> <p>(BRAZIL)</p> <hr/> <p>With regard to Article 11 – “Formalities”, we support para. 1. Para. 2, however, need to be modified to clarify that no registration may take place without the consent of the TK holders. We believe this to be in line with international law on the area, including a recent similar decision by the CBD COP 8.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>1. Eligibility for protection of traditional knowledge against acts of misappropriation should not require any formalities</p> <p><i>Comment: The South African position is that there should be formalities to ascertain the validity of the IK to be protected</i></p> <p>2. In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may maintain registers or other records of traditional knowledge, where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of <b><i>traditional knowledge holders and practitioners</i></b>. Such registers <b><i>and databases</i></b> may be associated with specific forms of protection, and should not compromise the status of hitherto undisclosed traditional knowledge or the interests of <b><i>traditional knowledge holders and practitioners in</i></b> relation to undisclosed elements of their knowledge.</p> <p>(SOUTH AFRICA)</p>
<p><b>Article 12. Consistency with the General Legal Framework</b></p>	<p>Include language stating clearly that the national legislation to be respected is the one from the country where knowledge holders are located.</p> <p>(BRAZIL)</p> <hr/> <p>We need to see Article 12 – “Consistency with the Legal Framework” deleted. As explained earlier, the Article as currently drafted contradicts well-established international law and violates the UN Charter. Indigenous peoples have human rights to traditional knowledge and natural resources that can, per definition, not be subject to national legislation.</p> <p>(SAAMI COUNCIL)</p> <hr/> <p>1. In case of traditional knowledge which relates to components of biological diversity, access to, and use of, that traditional knowledge shall be consistent with national laws, <b><i>regional and international laws, conventions and protocols</i></b> regulating access to those components of biological diversity. Permission to access and/or use traditional knowledge does not imply permission to access</p>

	<p>and/or use associated genetic resources and vice versa.</p> <p>(SOUTH AFRICA)</p>
<p><b>Article 13. Administration and Enforcement of Protection</b></p>	<p>We could support Article 13 – “Administration and Enforcement of Protection”, provided that at the end of para. 1. (a) (i) –(v) is added the phrase “in accordance with these Objectives and Core Principles and international law”.</p> <p>(SAAMI COUNCIL)</p> <p>1.(a). An appropriate national or regional authority, or <i>international</i> authorities, should be competent for:</p> <ul style="list-style-type: none"> <li>(i) distributing information about traditional knowledge protection and conducting public awareness and advertising campaigns to inform <i>traditional knowledge holders and practitioners</i> and other stakeholders about the availability, scope, use and enforcement of traditional knowledge protection;</li> <li>(ii) determining whether an act pertaining to traditional knowledge constitutes an act of misappropriation of, or an other act of unfair competition in relation to, that knowledge;</li> <li>(iii) determining whether prior informed consent for access to and use of traditional knowledge has been granted;</li> <li>(iv) determining fair and equitable benefit-sharing;</li> <li>(v) determining whether a right in traditional knowledge has been infringed, and for determining remedies and damages;</li> <li>(vi) assisting, where possible and appropriate, holders of traditional knowledge to use, exercise and enforce their rights over their traditional knowledge.</li> </ul> <p>(b) The identity of the competent/<i>regulatory</i> national or regional authority or <i>international</i> authorities should be communicated to an international body and published widely so as to facilitate cooperation and exchange of information in relation to protection of traditional knowledge and the equitable sharing of benefits.</p> <p>2. Measures and procedures developed by national, <del>and</del> regional <i>and or international</i> authorities to give effect to protection in accordance with these Principles should be fair and equitable, 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.</p> <p>(SOUTH AFRICA)</p>
<p><b>Article 14. International and Regional Protection</b></p>	<p>With regard to Article 14 - “International and regional protection”, our comments are similar to those on the TCE document. We thus believe that this issue warrants some further consideration, but emphasize the importance of recognizing the role that indigenous customary legal systems must play also in cross-boundary protection of TCEs.</p> <p>(SAAMI COUNCIL)</p> <p>International, <del>and</del> Regional <i>and National</i> Protection</p> <p>The protection, benefits and advantages available to holders of TK under the national measures or laws that give effect to these international standards should be available to all eligible <i>traditional knowledge holders and practitioners</i>, who nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign holders of TK should enjoy benefits</p>

	<p>of protection to at least the same level as <i><b><u>traditional knowledge holders and practitioners</u></b></i> who are nationals of the country of protection. Exceptions to this principle should only be allowed for essentially administrative matters such as appointment of a legal representative or address for service, or to maintain reasonable compatibility with domestic programs which concern issues not directly related to the prevention of misappropriation of traditional knowledge.</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,<sup>1</sup> 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.<sup>2</sup>

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*".<sup>3</sup>

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'<sup>4</sup> in the DDRIP, so as to "*preserve the political unity and territorial integrity of any State.*"<sup>5</sup> 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.*"<sup>6</sup>

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.<sup>7</sup> 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 Rights<sup>8</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> 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.

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

<sup>4</sup> As articulated in Article 3 of DDRIP

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

<sup>6</sup> Aotearoa Indigenous rights Trust statement to WGIP, Geneva, 15 December 2005.

<sup>7</sup> 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.

<sup>8</sup> (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.<sup>9</sup> This was followed in 1993 with the signing of the Mataatua Declaration on indigenous cultural and intellectual property rights.<sup>10</sup> This past decade has also witnessed a significant increase in the alleged misappropriation of matauranga Maori<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

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

<sup>9</sup> The Wai 262 claim (colloquially known as such because it was the 262<sup>nd</sup> 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.

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

<sup>11</sup> Maori knowledge.

<sup>12</sup> 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.

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

<sup>14</sup> <http://www.toiho.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.

<sup>15</sup> 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.).

<sup>16</sup> 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 Waitangi<sup>17</sup>. 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 principles<sup>18</sup>. 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.<sup>19</sup>

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.<sup>20</sup>

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*"<sup>21</sup> 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*".<sup>22</sup>

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.<sup>23</sup> 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*"<sup>24</sup> including *tikanga Maori, tangata whenua, mana whenua, kaitiakitanga, iwi, hapu, taonga, waahi tapu, tauranga waka, maataitai* and *taonga*

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<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> 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 whenua 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).

<sup>21</sup> Muriwhenua Land Report (1997) p 386.

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

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

<sup>24</sup> *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’.<sup>25</sup>

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,<sup>26</sup> 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.<sup>27</sup> 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 principles<sup>28</sup> in the context of this review:

Relevant Treaty Principles		
Principle	Explanation	Relevance to WIPO Objectives/Principles
<b>Tino Rangatiratanga</b>	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> ”. <sup>29</sup> As a minimum, rangatiratanga guaranteed to Maori <i>tribal control of tribal resources</i> <sup>30</sup> . 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 <sup>31</sup> . The guarantee of rangatiratanga requires “ <i>a high priority for Maori interests when proposed works may impact on Maori taonga</i> ” <sup>32</sup>	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> ” <sup>33</sup> 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.
<b>Kawanatanga</b>	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

<sup>25</sup> 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.

<sup>26</sup> 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!

<sup>27</sup> 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).

<sup>28</sup> 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.

<sup>29</sup> 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”

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

<sup>31</sup> Maori Language and Radio Spectrum Waitangi Tribunal Reports.

<sup>32</sup> Ngawha Geothermal resources Report 1993, page 102

<sup>33</sup> 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>
<b>Partnership</b>	<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”<sup>34</sup>.</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 future<sup>35</sup>.</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>”<sup>36</sup>.</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>
<b>Good faith</b>	<p>The Treaty principles “<i>require that Pakeha and Maori Treaty partners act towards each other reasonably and with the utmost good faith</i>”.<sup>37</sup></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>
<b>Active protection</b>	<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>”<sup>38</sup> The duty and principle of active protection stems from Article 3 which extends Her Majesty The Queen’s “royal protection” to Maori<sup>39</sup>. 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>”<sup>40</sup>.</p>	<p>The Crown has a duty to <b>actively</b> 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>
<b>Redress</b>	<p>The <i>Maori Council case</i> established that the Crown has</p>	<p>The development of a framework for protecting and</p>

<sup>34</sup> 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.

<sup>35</sup> Waipareira Report, p 29.

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

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

<sup>38</sup> New Zealand Maori Council case, per Cooke P, 664.

<sup>39</sup> Waipareira Report, p 21.

<sup>40</sup> 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 <sup>41</sup> . 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 <sup>42</sup> .	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.
<b>Reciprocity</b>	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. <sup>43</sup>	<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.<sup>44</sup> 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.<sup>45</sup>

<sup>41</sup> Ibid, p. 703

<sup>42</sup> 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.

<sup>43</sup> New Zealand Maori Council case page 689

<sup>44</sup> 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 4<sup>th</sup> Session, December 9-17, 2002, Geneva, p 8, paras 35 and 36 [WIPO/GRTK/IC/4/Inf2/Annex II]

<sup>45</sup> 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”.<sup>46</sup> 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”.<sup>47</sup>

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.<sup>48</sup>

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.<sup>49</sup>

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.<sup>50</sup>

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 values<sup>51</sup> 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.<sup>52</sup>

#### 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.

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

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

<sup>48</sup> WIPO/GRTKF/IC/8/4, Article 4.

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

<sup>50</sup> WIPO/GRTKF/IC/8/4, Annex p 22(b).

<sup>51</sup> 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

<sup>52</sup> 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.<sup>53</sup>

3.45 It appears that as early as 1994, the Government was considering the issue of *sui generis* mechanisms for protecting TK.<sup>54</sup> 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”.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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).<sup>59</sup> 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”.<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup>

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

<sup>54</sup> Government Delegation submission to WIPO/IGC 4<sup>th</sup> 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.

<sup>55</sup> Ibid, Para 76.

<sup>56</sup> Ibid, Para 76.

<sup>57</sup> See [www.med.govt.nz](http://www.med.govt.nz) (“Traditional Knowledge” section)

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

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

<sup>60</sup> Ibid, p 2, Para 9.

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

<sup>62</sup> 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](http://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”,<sup>63</sup> 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”<sup>64</sup>.

(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*”.<sup>65</sup>

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.<sup>66</sup>

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”.<sup>67</sup>

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.<sup>68</sup>

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

<sup>63</sup> See Creative New Zealand website [www.creativenz.govt.nz](http://www.creativenz.govt.nz) “*Creative New Zealand – Cultural Recovery*” article called “*Seriously Maori*”.

<sup>64</sup> [www.mch.govt.nz/cwb/index.html](http://www.mch.govt.nz/cwb/index.html) - Cultural Well Being.

<sup>65</sup> [www.historic.org.nz/heritage/maoriheritage\\_intro.html](http://www.historic.org.nz/heritage/maoriheritage_intro.html).

<sup>66</sup> [www.crop.cri.nz/home/company-info/maori-partnerships.jsp](http://www.crop.cri.nz/home/company-info/maori-partnerships.jsp) (search as at 2 February 2006).

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

<sup>68</sup> [www.landcareresearch.co.nz/services/Maori.asp](http://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”.<sup>69</sup>

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”.<sup>70</sup>

It will also have relevance to MORST’s new Vision Mātauranga 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”.<sup>71</sup>

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).<sup>72</sup> This has been the author’s personal experience and dealings with Te Papa concerning the care of Māori 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.<sup>73</sup>

(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.<sup>74</sup> 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.<sup>75</sup>

#### *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

<sup>69</sup> Available from the FRST website [www.frst.govt.nz](http://www.frst.govt.nz).

<sup>70</sup> [www.morst.govt.nz/currentwork/ipguidelines](http://www.morst.govt.nz/currentwork/ipguidelines).

<sup>71</sup> [www.morst.govt.nz/visionmatauranga](http://www.morst.govt.nz/visionmatauranga).

<sup>72</sup> 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](http://www.tepapa.govt.nz)

<sup>73</sup> 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).

<sup>74</sup> 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](http://www.med.govt.nz/patents/review/part3) - as at 7 February 2006)

<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup>

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.<sup>79</sup> 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

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

<sup>77</sup> 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.

<sup>78</sup> *Background*, on Creative NZ website, Creative NZ, New Zealand Arts Council 2003 (online: [www.toiio.com/aboutus/](http://www.toiio.com/aboutus/)).

<sup>79</sup> 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.<sup>80</sup>

#### **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.<sup>81</sup>

#### **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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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';

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

<sup>81</sup> [HTTP://frst.govt.nz/research/downloads/maoriinn/research\\_involving\\_maori-may04.doc](http://frst.govt.nz/research/downloads/maoriinn/research_involving_maori-may04.doc).

<sup>82</sup> Ibid page 8.

<sup>83</sup> Ibid page 11.

<sup>84</sup> 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.<sup>85</sup>

“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.<sup>86</sup>

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:<sup>87</sup>

“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 company<sup>88</sup> 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

<sup>85</sup> *Practice Guidelines – Trade Marks Act 2002: Maori Trade Marks Advisory Committee and Maori Trade Marks.*

<sup>86</sup> 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).

<sup>87</sup> Personal communications with Simon Gallagher from IPONZ 12 January 2006.

<sup>88</sup> ‘*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.<sup>89</sup> 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.<sup>90</sup> 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)".<sup>91</sup>

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:<sup>92</sup>

"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.<sup>93</sup>

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

<sup>89</sup> 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](http://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](http://thetvroom.com/p-bbc-one-2002_a.shtml))

<sup>90</sup> 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).

<sup>91</sup> Ibid p 6, Para 17.

<sup>92</sup> 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.

<sup>93</sup> 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.<sup>94</sup> 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".<sup>95</sup>

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.<sup>96</sup> 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,<sup>97</sup> 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".<sup>98</sup>

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',<sup>99</sup> 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.<sup>100</sup>

#### 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 copyright<sup>101</sup>. 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.

<sup>94</sup> 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)

<sup>95</sup> 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.

<sup>96</sup> 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.

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

<sup>98</sup> Document 8/5, Annex, p 9(b).

<sup>99</sup> Document 8/5, Annex, p 9(a).

<sup>100</sup> Document 8/4, p 5, Para 17.

<sup>101</sup> 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](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.<sup>102</sup> 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*".<sup>103</sup>

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*".<sup>104</sup>

4.17 More importantly, Tame Iti could invoke objective 1(iv) in document 8/4<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup> 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

<sup>102</sup> 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

<sup>103</sup> WIPO/GRTKF/IC/8/4, annex p 13.

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

<sup>105</sup> WIPO/GRTKF/IC/8/4.

<sup>106</sup> Interview with Tame Iti on Mana News, Friday 25 November 2005.

<sup>107</sup> 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.

<sup>108</sup> 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;<sup>109</sup>
- the documents maintain the status quo regarding acknowledging that nation states have sovereignty over their biological resources.<sup>110</sup> 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).<sup>111</sup>

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

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<sup>109</sup> 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".

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

<sup>111</sup> 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 TK<sup>112</sup> 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.<sup>113</sup>

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).<sup>114</sup> 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).

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

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

<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup>

<sup>115</sup> 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.

<sup>116</sup> 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:

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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...”<sup>117</sup>

#### 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,

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<sup>117</sup> 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.<sup>118</sup> 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".<sup>119</sup>

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.<sup>120</sup>

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.

<sup>118</sup> See for details of the draft papers prepared by the Secretariat [www.wipo-int/tk/en/consultations/customary\\_law/index.html](http://www.wipo-int/tk/en/consultations/customary_law/index.html)

<sup>119</sup> 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.

<sup>120</sup> 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 norms<sup>121</sup> is important because of the emphasis that Maori and other indigenous peoples place upon matters of self-determination in particular.<sup>122</sup> The principle of self determination was first elaborated by the Charter of the United Nations 1945<sup>123</sup> and further elaborated in the International Covenant on Economic, Social and Cultural Rights 1966<sup>124</sup> and International Covenant on Civil and Political Rights 1966.<sup>125</sup> 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".<sup>126</sup>

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".

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<sup>121</sup> 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.

<sup>122</sup> 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".

<sup>123</sup> See Article 1.2 of the Charter of the United Nations.

<sup>124</sup> 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"

<sup>125</sup> 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

<sup>126</sup> 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<sup>127</sup>.

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.<sup>128</sup>

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".<sup>129</sup>

**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;

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

<sup>128</sup> 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.

<sup>129</sup> 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.”<sup>130</sup>

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.<sup>131</sup>

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*”<sup>132</sup>  
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;

<sup>130</sup> WIPO/GRTKF/IC/8/5, annex p 10.

<sup>131</sup> 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.

<sup>132</sup> 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*<sup>133</sup>

## **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 2003***<sup>134</sup>

*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,*

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<sup>133</sup> 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>.

<sup>134</sup> 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 Peoples<sup>135</sup>**

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?

<sup>135</sup>

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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- 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.<sup>136</sup>

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.

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<sup>136</sup> 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 rights<sup>137</sup> 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*

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<sup>137</sup> 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.

## **Bibliography**

Darrell Posey, 'Introduction: Culture and Nature-The Inextricable Link' in "Cultural and Spiritual Values of Biodiversity", 1999.

Darrell A Posey, 'Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities', IUCN, 1996.

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

Graham Dutfield, 'Intellectual Property Rights, Trade and Biodiversity', 2000.

Haman Hajara, African Indigenous Women Organisation, Central Africa Network Yaoundé, Cameroon, Submission to the International Workshop On Traditional Knowledge, Panama City, 21-23 September 2005.

I. H. Kawharu. (Edited by I.H. Kawharu) 'Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi 1989'.

International Expert Workshop on Access to Genetic Resources and Benefit Sharing, Record of Discussions, Cuernavaca, Mexico, October 24-27, 2004.

Janke, Terri Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights.

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

Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples' 1993.

New Zealand Maori Council v. Attorney-General [1987] 1 NZLR 641.

Practice Guidelines Waitangi – Trade Marks Act 2002.

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

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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.

Report of the Tribunal on *the Motunui-Waitara Claim*, 1983.

Report of the Waitangi Tribunal on the *Manukau Harbour Claim* 1984.

Report of the Waitangi Tribunal on the *Maori Language Claim* 1985.

Report of the Waitangi Tribunal *Ngawha Geothermal Resources Claim* 1993.

Report of the Waitangi Tribunal on the *Radio Spectrum Claim* 1997.

Report of the Waitangi Tribunal on the *Te Whanau o Waipareira Claim* 1998.

Report of the Waitangi Tribunal on *Muriwhenua Land Claim* (1997).

Sarah A Laird, (Edited By) 'Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice', 2002.

The 'Principles for Crown Action on the Treaty of Waitangi 1989'.

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