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

Twelfth Session
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THE PROTECTION OF TRADITIONAL KNOWLEDGE:

FACTUAL EXTRACTION

Document prepared by the Secretariat

Background

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 related and complementary 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 TK.

2. The Committee decided at its Eleventh Session in July 2007 that the WIPO Secretariat should prepare “a factual extraction, with attribution, consolidating the view points and questions of Members and Observers on the List of Issues considered during the Eleventh Session including their comments submitted in writing for the Eleventh Session, subject to review of Member States and observers and without prejudice to any position taken on these issues.” It also decided the revised objectives and principles for TK protection should remain on the table.

3. In line with these decisions, the working documents on protection of TK being prepared for the twelfth session of the Committee comprise:

- (i) WIPO/GRTKF/IC/12/5(a): a brief overview of current work on TK;
- (ii) WIPO/GRTKF/IC/12/5(b): the present document, the text of the required ‘factual extraction’;
- (iii) WIPO/GRTKF/IC/12/5(c): the text of the draft Objectives and Principles, identical to the text that was circulated at the eighth, ninth, tenth and eleventh sessions, but provided for ease of reference in view of the decision that this document remains on the table.

The draft factual extraction

4. The Annex to the present document (“Factual Extraction”) is the factual extraction referred to in the Eleventh Session’s decision, now provided for consideration and further review, as required, by the Committee at its Twelfth Session. It was made available on the WIPO website at www.wipo.int/tk in draft for review by Member States and observers, which were invited to send their comments to the WIPO Secretariat before January 31, 2008. This version of the factual extraction incorporates comments received up to and including February 18, 2008. .

How has this “factual extraction” been prepared?

5. The Committee’s decision at its Eleventh Session required the Secretariat to make “a factual extraction” which “consolidates” the view points and questions of States and observers on the List of Issues relating to traditional knowledge (TK). The “factual extraction” should be made “with attribution”. The view points and comments to be extracted and consolidated are those appearing in the written comments on the List of Issues provided by States and observers (as documented in WIPO/GRTKF/IC/11/5(a), WIPO/GRTKF/IC/11/5(a) Add. and

WIPO/GRTKF/IC/11/5(a) Add. 2.) and those made orally at the Committee's Eleventh Session (as recorded in the session's draft report, WIPO/GRTKF/IC/11/15 Prov.).

6. The draft "factual extraction" in this present document comprises extractions reproduced directly from the written comments and oral interventions in respect of each of the ten issues in the List of Issues made by States and observers. The extractions appear, therefore, in quotation marks. As the written comments and oral interventions themselves raised a number of more specific questions related to the ten main Issues in the List of Issues, and as several comments and interventions identified the same questions, an attempt has been made to consolidate the comments and interventions around the more specific questions ("sub-issues") related to each of the ten main Issues. The extractions are, therefore, presented in "clusters", each cluster relating to a specific sub-issue that several comments and interventions identified. This may mean that parts of a single written comment or intervention have been "extracted" and appear in different clusters. Where text of a comment or intervention has not been included in a particular extraction (in which case that text will appear elsewhere), this is indicated by the use of stop marks (such as "..."). All comments and interventions are included, however, save for comments and interventions of a purely formal and/or procedural nature. In addition, some comments referring to the comments of other delegations and observers may have been omitted where the context would not make it clear which other comment was being referred to. In some cases, an extraction of a comment or intervention appears in more than one place, in cases where the extraction relates to more than one question or sub-issue. The full written comments and the full interventions remain available to be consulted in the documents cited above.

7. Each extraction is attributed, as required, by identifying the name of the State or observer and through the use of footnotes. Footnote references to "WIPO/GRTKF/IC/11/5(a)", for example, means the extraction is from a written comment appearing in that document, while a reference to "WIPO/GRTKF/IC/11/15 Prov." means that the extraction is from an oral intervention made at the Committee's eleventh session.

8. In cases where a State or observer made both a written comment and an oral intervention at the eleventh session, the Secretariat has generally reproduced both, unless there is a direct repetition, in which case both the written comment and the oral intervention are cited as sources for the extraction.

9. The general comments on substantive issues related to TK that States and observers made in their written comments and oral interventions have also been included, and clustered as described above.

10. The Committee is invited to refer to the annex factual extraction in its consideration of the protection of traditional knowledge at its twelfth session, and to provide instructions or guidance on the further development, if any, of this material.

[Annex follows]

ANNEX

DRAFT FACTUAL EXTRACTION ON TRADITIONAL KNOWLEDGE

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GENERAL COMMENTS

A: ON THE OBJECTIVES OF THE COMMENTARY PROCESS

- (i) *Curbing misappropriation*
- (ii) *Examining the adequacy of IP system*
- (iii) *Addressing the international dimension*

B: ON THE COMMENTARY PROCESS IN GENERAL

C: ON THE STATUS OF THE ISSUES AND COMMENTS

D: ON THE RELATIONSHIP OF THE ISSUE-COMMENTARY PROCESS WITH THE DRAFT OBJECTIVES AND PRINCIPLES

E: GENERAL POSITIONS ON SUBSTANTIVE ISSUES AND ON TK PROTECTION

- (i) *Linkages between the issues under review*
- (ii) *Implications for work on TK protection in general*
- (iii) *Linkage between the issues and approaches to developing TK protection*

Before turning to the specific issues under consideration, a number of commentators provided general comments. These general comments are recorded in this section, and are extracted and grouped according to their contents. As for other sections of this extraction, no assessment or interpretation is intended or implied by the arrangement and selection of material: it represents an attempt to arrange a wide array of commentary in useful categories, to facilitate its understanding, without pre-determining any of the issues before the Committee.

Some general comments relate to the objectives of the commentary process itself, for instance citing the objective of curbing misappropriation, the application of the IP system to TK as subject matter, and the international dimension. Comments also addressed the character of the commentary process and the specific approach taken by delegations and other participants to the process. Other general comments addressed the status of the list of ten issues and the status of the comments on those issues, and discussed the relationship between the list of ten issues and the parallel work of the Committee, such as the preparation of draft objectives and principles on TK protection. And some general comments addressed the substance of the issues from a broader perspective than the individual issues. These comments considered, for example, the linkages between the ten issues (such comments regarding linkages were also made in the context of specific issues), as well as the implications of this work for the general development of protection for TK. Issue-related comments cited in this section in the earlier draft of the factual extraction are now relocated under the numbered issue concerned, in the light of responses to the previous draft.

<u>A: On the objectives of the commentary process</u>

- (i) *Curbing misappropriation*

Brazil

“...Measures should be established to curb the misappropriation of TK, in particular to prevent and, when applicable, revert, the granting of IPRs without the authorization of the holders of TK, irrespective of whether the TK have been registered...”¹

¹ WIPO/GRTKF/IC/11/5(a)

Intellectual Property Owners Association (IPO)

“...Discussions relating to the protection of TK in the IGC have also focused on the perceived misappropriation of TK, and in response, recent deliberations have included the possibility of using databases of publicly-known TK as an aid to patent examiners. It is important to note that secret TK would not be available as prior art in the examination of patent applications. Therefore, independently developed inventions that meet the criteria of novelty, inventive step and industrial applicability would not be examples of misappropriation. Conversely, publicly known TK could be cited against such inventions, but such public TK would not be considered protected TK...”²

(ii) *Examining the adequacy of IP system*

Brazil

“...Without prejudice to the decision Members may take to protect TK via “sui generis” systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TK by examining, for example, possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TK...”³

(iii) *Addressing the international dimension*

Brazil

“...The Committee should address ways and means to facilitate the enforcement of national legislation on the protection of TK in third countries...”⁴

<u>B: On the commentary process in general</u>

Switzerland

Switzerland is responding willingly to this questionnaire and considers these questions to be central to the Committee’s future work. The questions should be answered in detail in the Committee’s future discussions, so that traditional knowledge protection is effective and performs well. As a non-applicant country, Switzerland always tries to be active and constructive during discussions within the Committee. It is keen to highlight the importance of the responses from applicant countries and the representatives of native and local communities. These will be very useful for the continuation of work.⁵

Algeria speaking on behalf of the African Group

² WIPO/GRTKF/IC/11/5(a)

³ WIPO/GRTKF/IC/11/5(a)

⁴ WIPO/GRTKF/IC/11/5(a)

⁵ WIPO/GRTKF/IC/11/5(a)

“...the ultimate objective of this process should be the development and adoption of a legally binding international instrument for the protection of TK, TCEs and GR. The answers to the 10 questions currently under discussion, and of which the Members of the African Group had provided comprehensive responses, were complementary to the work done by the IGC in establishing parameters for defining and clarifying issues related to Objectives and Principles for the protection of TK.”⁶

C: On the status of the issues and comments

International Chamber of Commerce (ICC)

This question (question 1), and the related questions of the objectives sought to be achieved and of what the substance of any rights and exceptions should be, is one on which consensus will be needed before any progress can be made. Those who will be called to respect the rights sought will in any event require reasonable certainty as to what is protected, and what is not; reasonable certainty as to the extent to which it is protected, and what use if any can still be freely made of it (e.g., mere possession? private study? research use?); a clear nexus between the knowledge and the claimant of rights in it; a proper justification for the rights claimed, which must be proportionate; a fair and effective system for enforcing the rights and adjudicating disputes.⁷

European Community

Within this context, and in line with our previous position, that the objectives and general principles needed to be discussed as a basis for further work, and our concerns about discussion on substantive provisions at this stage, we are pleased to provide comments on this list of issues. Moreover, we would also like to underline that in our point of view two questions are crucial: "What is the definition of TK?", and, "What objective is to be achieved?"⁸

Portugal speaking on behalf of the European Community and their Member States

“...looked forward to deepening the discussion of these objectives and principles with a view to reaching the understanding of these complex questions. WIPO/GRTKF/IC/11/5(b) and (c) constituted a good basis for this future work. A constructive way forward was possible particularly on those areas of the discussions where a certain consensus had already been reached. In this regard, it supported a flexible approach and considered this essential in order to take into account the diverse options for the protection of TK which already existed and which had been presented to this Committee. It also acknowledged the work done by the Secretariat regarding the elaboration of a list of issues on TK, WIPO/GRTKF/IC/11/5(a), that the European Communities had already commented on. It represented a valuable contribution to the Committee’s work to define common objectives and rich consensus on this issue...”⁹

⁶ WIPO/GRTKF/IC/11/15 Prov.

⁷ WIPO/GRTKF/IC/11/5(a)

⁸ WIPO/GRTKF/IC/11/5(a)

⁹ WIPO/GRTKF/IC/11/15 Prov.

D: On the relationship of the issue-commentary process with the draft objectives and principles

China

Most of the issues about TK have been included in the Draft Objectives and Principles (annex of WIPO/GRTKF/IC/10/5). As an achievement of the collective efforts of the member states, the Draft offers a solid foundation for the discussion on the topic of GRTKF protection. Future ICG work should concentrate the directions fixed in the *Draft* for the achievement of substantial progress.¹⁰

European Community

“...In line with the objectives and general principles needed to be discussed as a basis for further work, and our concerns about discussion on substantive provisions at this stage, we are pleased to provide comments on this list of issues...”¹¹

E: General positions on substantive issues and on TK protection

(i) *Linkages between the issues under review*

European Community

Supports work towards the development of international *sui generis* models or other non-binding options for the legal protection of TK. The final decision of TK should be left to the individual Contracting Party. Two questions are crucial: “what is the definition of TK?”, and, “what objective is to be achieved?”

To establish an appropriate balance between interests of right holders and third parties, the concept of a public domain in respect of TK needs to be well analyzed.¹²

(ii) *Implications for work on TK protection in general*

United States of America

The IGC has explored in very broad terms the complex issue of the beneficiaries of measures to protect TK. Similar to the case of TCEs/EoF, this topic includes complicated issues related to the web of interests of many stakeholders, including the roles of states and their nationals, immigrant communities, governmental authorities, and the indigenous peoples and traditional and other cultural communities. The inherent problem of defining beneficiaries is made all the more difficult in a world where individuals and groups readily cross national borders and geographic boundaries. In the deliberations to date, Committee participants have not had the opportunity to undertake a sustained discussion and reach a clear understanding of these complex issues, much less reach a consensus on the scope and meaning of such important terms

¹⁰ WIPO/GRTKF/IC/11/5(a)

¹¹ WIPO/GRTKF/IC/11/5(a)

¹² WIPO/GRTKF/IC/11/5(a)

as “indigenous peoples,” “traditional,” and “other cultural communities.” The United States believes that the IGC would benefit from further study, informed by representatives from many stakeholder groups, including indigenous groups, of existing mechanisms to protect TK, with a view toward deepening the understanding of the Committee on the most successful strategies to identify beneficiary groups and to resolve the sometimes competing claims of beneficiaries.¹³

(iii) Linkage between the issues and approaches to developing TK protection

United States of America

“...the framing of these policy objectives is not just a useful technique for facilitating discussion within the Committee. Rather, the IGC’s work on the policy framework for the preservation, promotion and protection of TK is itself an extremely useful tool for policymakers at the national, regional, and international levels. The United States notes that a number of WIPO Member States, informed by the work of the IGC, are taking steps to address specific issues and concerns related to the preservation, promotion and protection of TK.

Nonetheless, more work remains at the international level. In the view of the United States, the IGC should continue to make a positive contribution to the policy dimension of preserving, promoting and protecting TK. As noted earlier, the United States believes that the IGC can make a significant contribution by reaching agreement on policy objectives and general principles at the international level.

More specifically, the IGC may productively focus discussion on the great potential of traditional creativity and innovation to promote economic and cultural development, especially rural development. Regrettably, however, in many nations the policy framework for making decisions about the use (or non-use) of these assets is not in place or fully developed. The IGC may serve an important role in advancing the development of appropriate national policy frameworks for the use of TK by WIPO Member States for economic and cultural development. Consistent with WIPO’s mandate, such work should focus on the IPR-related aspects of economic and cultural development, including both economic and moral rights considerations...”¹⁴

New Zealand

“...Some argue that a tension exists between Western or European models of law and world views and indigenous laws, customs and world views. The commodification of culture can be seen as an example of this perceived divergence in laws and world views. One principle to be followed in according intellectual property protection for TK and TCEs should consist of balancing the competing views and expectations in relation to the use of TK and TCEs to the general satisfaction of all. This is also in line with the objectives to promote intellectual and artistic freedom, research and cultural exchange on equitable terms, and to enhance certainty, transparency and mutual confidence.

Other peripheral, but important, objectives would be to:

¹³ WIPO/GRTKF/IC/11/5(a)

¹⁴ WIPO/GRTKF/IC/11/5(a)

- Raise awareness, domestically and internationally, of issues at the interface between TK/TCEs and IPRs (for example through education and best practice mechanisms).
- Assist indigenous and local communities to preserve, develop, and promote their TK and TCEs and support their traditional structures of creation, preservation and transmission.
- Assist in safeguard and promotion of cultural integrity and diversity.
- Promote positive working relationships that enhance or build mutual respect, trust and cooperation.
- Assure consistency with, and promote respect and adherence to, other related international and domestic indigenous rights and rights of local communities.”¹⁵

Australia

“... It is important that any new measures developed to protect TK should be consistent with, and complementary to, existing IP regimes. Australia acknowledges the importance of addressing the issues of respecting, conserving and preserving traditional knowledge and acknowledges that TK issues must be addressed taking into account their whole context.

In the light of the extensive and very useful work of the IGC to date it may now be beneficial to focus deliberation and analysis on specific priority examples of inappropriate use of TK.

In the course of such work it would be important to explore fully what impact such use has on the communities involved and, correspondingly, what level of response is required – in general terms the response should be proportionate to the actual harm. It would also be important in such an exercise to fully analyse all avenues of addressing problems. This would include non-legal methods that could provide solutions or partial solutions, how the current general legal framework could be used to provide solutions, how the current IP system could be used to provide solutions and how concepts from the current IP system might be built upon or developed to provide solutions.

Such a specific analysis would put into more concrete terms the problems faced, the level of harm experienced and what solutions might be appropriate and proportionate. This would also enable testing of the agreed policy objectives and general guiding principles to enable an assessment of their fitness for purpose. In this way areas that are considered of highest priority could be addressed in a way that might bring benefits to TK holders more quickly than could be achieved by considering all issues together or by seeking a ‘one-size-fits-all’ solution.”¹⁶

United States of America

“...it is premature for the IGC to undertake a focused discussion of the duration of possible rights with respect to TK. This question appears to presume a particular outcome, which should be avoided at this stage of the Committee’s work. There are many mechanisms available for the promotion, preservation and protection of TK. Some mechanisms that may preserve and maintain TK may be indefinite in length of

¹⁵ WIPO/GRTKF/IC/11/5(a) Add.

¹⁶ WIPO/GRTKF/IC/11/5(a) Add.

time. On the other hand, many existing forms of intellectual property protection are time-limited.”¹⁷

Intellectual Property Owners Association (IPO)

“...As noted in WIPO document WIPO/GRTKF/IC/2/9, very few Member states responded to questionnaires regarding existing forms of IP protection for TK. Therefore, it is difficult to ascertain what gaps need to be filled, or indeed, if gaps in existing forms of IP exist. This should be the subject of further discussion in future IGC meetings, and WIPO should undertake a gap analysis study to determine to what extent existing trade secret laws adequately protect TK.”¹⁸

Colombia

“Given the complexity of the subject, discussions are required at the regional and national level to identify common issues and differences, in order to establish simple, flexible and applicable measures. Positive actions or differential treatment in such cases are very relevant...”¹⁹

Intellectual Property Owners Association (IPO)

This question will require further deliberation and more input from Member countries regarding protection of TK under existing IPRs. Therefore, it is premature to delineate what, if any, regulation may be required at the international level. As noted above, WIPO should undertake a gap analysis to determine to what extent existing national trade secret laws adequately protect TK.²⁰

Japan

As mentioned in the above item 3, justifiable reasons for IP right protection to be extended to traditional knowledge have not been clearly identified and sufficiently explained. Japan has a serious concern about establishing a new type of intellectual property right or a sui-generis right for protection of TK as well as about creating a legally binding international instrument that obligates member States to establish such a regime.

Before discussing ways of internationally addressing this issue, discussions must be conducted on what domestic solutions exist and where their limits lie and the extent to which contracts, etc. are incapable of addressing this issue. Discussion based on factual information about what damage has been caused by what illegal acts is essential.²¹

Canada

¹⁷ WIPO/GRTKF/IC/11/5(a).

¹⁸ WIPO/GRTKF/IC/11/5(a)

¹⁹ WIPO/GRTKF/IC/11/5(a)

²⁰ WIPO/GRTKF/IC/11/5(a)

²¹ WIPO/GRTKF/IC/11/5(a)

As noted above, how to address the list of issues is dependent in large measure on the policy objective that is to be addressed. The question as to what issues should be addressed at the international level and at the domestic level is problematic. The domestic legal framework and concerns of Member States should guide the shape and direct our discussions as to what issues, if any, should be addressed at the international level. Discussions on any potential form of protection of TK should reflect the particularities of each country and be consistent with its international obligations.²²

South Africa

“...In order to illuminate a positive role on the continued working of the IGC both the Interdepartmental Committee on IKS and the IGC sub-committee warmly encourages the following proposals in the likely event of IGC veering toward a stalemate. At the heart of our propositions is the opportunity to deepen connections by lobbying and networking with other likeminded members states. We are convinced that a comprehensive and integral legal international binding convention to promote and protect the rights and dignity of local and indigenous communities in so far as intellectual property rights may not be possible under the current climate of discussions. At the outset it needs to be stated that where the negotiations are to be conducted as a charade as observed in IGC and where some member states have no intention of negotiating in good faith, such negotiations are to be avoided until circumstances for negotiations are ripe. We are of the view that negotiations at the IGC are at the same level/stage since it was first conceived in 2002. Hence we propose that following:

That the South African response to the decision of the 10th session be integrated in the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA). As a lead country on Policy issues around indigenous Knowledge Systems that South Africa proposes to proceed with the formulation of a possible treaty on the protection of Indigenous Knowledge Systems. As the lead department on IKS it is required on NIKSO to consolidate the South African position. That the African Group propose the adoption of the African Model Law; That South Africa conjointly with the African Group proposes a the drafting of framework for the protection IKS/TEC/GR based on the Model Law and South African IKS Policy. That South Africa does not oppose the total collapse the IGC leaving the onus to individual countries to develop its own policies/legislation...”²³

²² WIPO/GRTKF/IC/11/5(a) Add.

²³ WIPO/GRTKF/IC/11/5(a)

ISSUE I: DEFINITION OF TRADITIONAL KNOWLEDGE THAT SHOULD BE PROTECTED

The comments provide detailed analysis both of the context of defining traditional knowledge and of the content and nature of traditional knowledge. On the context of defining traditional knowledge, the comments considered the need for a definition, the linkage between a definition and work on other issues under consideration, how the purpose of framing a definition would inflect definition itself, and the different approaches to formulating a definition.

The specific factors to be considered in a definition were reviewed in detail, including the implications of the objectives of protection for the definition of TK, the community and social context of TK, the recognition of customary law, and the relationship between TK and TCEs. Distinctions between TK and TCEs were discussed, as well as the implications of distinct approaches to defining TK and TCEs. Policy issues were discussed in relation to specific exclusions for publicly known TK, as well as other constraints that should apply to defining protected TK.

Some comments reviewed the distinction between TK in general, as a broad description, and the definition of TK that should be subject to specific legal protection. The comments also addressed a number of existing definitions, including the Committee's own work in progress, and included proposals for revision of existing definitions as well as new definitions. The Comments also touched on the distinctions between TK as such and indigenous knowledge. Finally, comments also considered the appropriate sequencing and timing of the Committee's work on defining TK.

A: Role and nature of a definition of TK

(i) *The need for a definition*

European Community

There is no internationally adopted definition of traditional knowledge (TK). In order to achieve the necessary legal certainty, TK should be defined so that it can be clearly identified and described. Despite the fact that a single exhaustive definition might not be appropriate in light of the diverse and dynamic nature of TK, and the differences in existing national laws on TK, it would be in the interests of right holders as well as national legislators to set out as clearly as possible the general concept. Therefore, further efforts should be made at developing, defining and qualifying further the present working definition.²⁴

International Publishers Association (IPA)

“For publishers to be able to publish works related to TK with economic and legal certainty, a clear and concise definition of the protected subject-matter is required, leaving no room for ambiguity...”²⁵

²⁴ WIPO/GRTKF/IC/11/5(a)

²⁵ WIPO/GRTKF/IC/11/5(a)

United States of America

“A definition of traditional knowledge (TK) is important in order to ensure a common understanding of the debate among WIPO Members. There are many issues that need to be more fully considered in the IGC in order to build upon the vast amounts of study already done in the Committee and to take the next step of achieving agreement among Members. While much discussion has taken place, more work needs to be done to better identify convergences among Members...”²⁶

Portugal speaking on behalf of the European Community and their Member States

“...Regarding question 1 of the list of issues on TK, it noted that there was no internationally adopted definition of TK. In order to achieve the necessary legal certainty TK should be defined so that it could be clearly identified and described...”²⁷

(ii) *Approaches to formulating a definition*

Latvia

“As we see these questions the answers to them can not be equipollent. They depend on which stand you take - either you believe that TK must be protected or on the contrary - they are common heritage of the mankind. To us (Latvia) protection of TK is not a priority however we answer as if the protection of TK had been already decided and these questions are asked to shape the protection mechanism...”²⁸

New Zealand

“The first question we should ask is whether a formal or rigid definition is needed. This is particularly important given the evolving nature of knowledge and culture. By attempting to define TK and TCEs, we run the risk of freezing or restricting the rights at the time that they are defined, hence not fully taking into account their evolutionary nature. Rather we should explore models of protection which do not require the elaboration of formal definitions of TK and TCEs or that fully recognise the changing nature of TK and TCEs.

There is currently no agreed formal definition of what are considered TK and TCEs. TK has been generally defined in the context of the Convention on Biological Diversity as “knowledge, innovations and practices of indigenous and local communities around the world, developed from experience gained over the centuries and adapted to the local culture and environment, and passed on orally from generation to generation.”

The WIPO working definitions state that TK is knowledge which is “generated, preserved and transmitted in a traditional context and between generations; distinctively associated with or linked to a traditional or indigenous cultural or community (or communities) through a sense of custodianship or cultural responsibility; or identified

²⁶ WIPO/GRTKF/IC/11/5(a)

²⁷ WIPO/GRTKF/IC/11/15 Prov.

²⁸ WIPO/GRTKF/IC/11/5(a)

by the source community as being traditional knowledge.” TK is defined in general, indicative terms at Article 3 of document WIPO/GRTKF/IC/11/5 (c) as “the content or substance of knowledge resulting from intellectual activity in a traditional context, and is not limited to any specific field, extending to agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.” ...”²⁹

Australia

“Further discussion is required regarding defining TK for the purposes of protection, whether that protection is by legal, non-legal, national or international means. This is the key issue. In the discussion of definitions it is important to keep in mind both the aspirations, expectations and needs of TK holders and the complex web of existing international and national laws and policies. When considering such aspirations and interests the consequential differences arising from whether TK is held within an oral or written tradition must be carefully considered. A position must be reached where all of those issues are treated in a consistent and mutually supporting manner.”³⁰

Peru

“...Having a perfect definition which would satisfy all Delegations one hundred percent was not possible. In line with what other Delegations had said a perfect definition was not needed but rather a definition which would enable the Committee to move towards the establishment of a binding international instrument for the protection of TK.”³¹

Mexico

“...regarding the definition of TK it was important to continue discussion at international level in order to have a clear idea of what TK was so that independently of the diversity of definitions and legal systems which existed or may exist at a national, regional level, it would be possible to come up with an operative but also dynamic broad and flexible definition which would give possibility to continue work in the Committee...”³²

(iii) Relationship between the definition of TK and other issues

Arts Law Centre of Australia

“...clarification of the definition of “Traditional Knowledge” is the threshold issue that must be settled before confirmation of the other agreed list of Issues on Traditional Knowledge. ... the definition of “traditional” and “indigenous” must be examined and clarified if necessary.”³³

²⁹ WIPO/GRTKF/IC/11/5(a) Add.

³⁰ WIPO/GRTKF/IC/11/5(a) Add.

³¹ WIPO/GRTKF/IC/11/15 Prov.

³² WIPO/GRTKF/IC/11/15 Prov.

³³ WIPO/GRTKF/IC/11/5(a) Add. 2

International Federation of Pharmaceutical Manufacturers and Associations (IFPMA)

An agreed definition of what constitutes “traditional knowledge” and how it is distinguished from other knowledge is essential before remaining questions and issues can be discussed.

Premature to take any decision to establish an international *sui generis* system of protection for traditional knowledge. Such a decision should not be made before having agreed on the definition on what it is that it is to be protected by such a *sui generis* system.³⁴

B: Discussion of general character of TK

(i) *General descriptions of TK*

Ghana

“...Traditional Knowledge should be protected comprises information held in human memories that is by recall and the practice of learned skills in a useful way in day to day life. However, what is generally recognized is that it is a multi faceted concept encompassing several components. These may range from traditional Knowledge systems in the field of medicine and healing, biodiversity conservation, the environment, food and agricultural techniques and so on.

WIPO currently uses the term “traditional knowledge” to refer to traditional – based literary, artistic or scientific works; performances, invention, information and all other traditional – based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. Tradition – based refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment. Categories of traditional knowledge could include agricultural knowledge, scientific knowledge, technical knowledge, ecological knowledge, medicinal knowledge, “expressions of folklore” in the form of music, dance, song handicrafts, designs, stories and art work; elements of languages, such as names, geographical indications an symbols, and movable cultural properties. Excluded from this description of traditional knowledge would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of “heritage” in the broad sense...”³⁵

New Zealand

“...The key characteristics of TK and TCEs are that they:

- originate, are preserved and transmitted in a traditional context;
- are transmitted from generation to generation;
- pertain to a particular traditional or indigenous people or community;

³⁴ WIPO/GRTKF/IC/11/5(a)

³⁵ WIPO/GRTKF/IC/11/5(a)

are not static, but rather evolve as communities respond to new challenges and needs;
and
are collective in nature.

Any definition of TK and TCEs that should be the subject of protection should also take account of the commonly understood facts that:

Indigenous knowledge is a subset of traditional knowledge
Traditional cultural expressions are the manifestation of traditional knowledge.

TK and TCEs are embedded in cultural systems of intergenerational transmission and preservation, which each community has developed and maintained in its local cultural and physical environment.

The term ‘traditional’ in “traditional knowledge and cultural expressions” does not necessarily imply that the knowledge or cultural expressions are old or unscientific in nature. They may be new tradition-based, evolutionary, creations or innovations, which build upon cultural traditions and emerge when individuals and communities take up the new challenges and realities presented by their social and physical environment.

However, a distinction can be drawn between:

the ‘traditional knowledge base’ (which includes cultural traditions and heritage, language, sacred sites, human remains, natural resources, and the knowledge associated with them); and

‘traditional knowledge based innovations and creations’ (which build upon or are inspired by the ‘traditional knowledge base’ ...³⁶

(ii) *distinctions and clarifications regarding general character of TK*

New Zealand

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The term ‘traditional’ in “traditional knowledge and cultural expressions” does not necessarily imply that the knowledge or cultural expressions are old or unscientific in nature. They may be new tradition-based, evolutionary, creations or innovations, which build upon cultural traditions and emerge when individuals and communities take up the new challenges and realities presented by their social and physical environment.

However, a distinction can be drawn between:

- the ‘traditional knowledge base’ (which includes cultural traditions and heritage, language, sacred sites, human remains, natural resources, and the knowledge associated with them); and
- ‘traditional knowledge based innovations and creations’ (which build upon or are inspired by the ‘traditional knowledge base’ ...³⁷

³⁶ WIPO/GRTKF/IC/11/5(a) Add.

³⁷ WIPO/GRTKF/IC/11/5(a) Add.

Australia

“...In document WIPO/GRTKF/IC/3/9, the IGC explored the complex issues surrounding a definition of TK. It highlighted the importance of clarifying the distinction between ‘legal protection’ and other forms of protection such as physical preservation and conservation so as to help determine the scope of TK that could be covered by IP-related protection. This document also suggests that consideration of the traditional context, the collective or communal context and inter-generational character of TK, and its preservation and transmission, would help focus discussions on the distinguishing characteristics of TK in such a way so as to avoid pre-determining the nature of any protection that could be available...”³⁸

United States of America

“...Paragraph 58 of document 6/4 provides the following parameters when considering characteristics of TK, those being knowledge that is:

- generated, preserved and transmitted in a traditional context;
- distinctively associated with the traditional or Indigenous culture or community which preserves and transmits it between generations;
- linked to a local or Indigenous community through a sense of custodianship, guardianship or cultural responsibility, such as a sense of obligation to preserve the knowledge or a sense that to permit misappropriation or demeaning usage would be harmful or offensive; this relationship may be expressed formally or informally by customary law or practices;
- ‘knowledge’ in the sense that it originates from intellectual activity in a wide range of social, cultural, environmental and technological contexts; and
- identified by the source community as being TK.

While such parameters are helpful in assessing broad characteristics of TK, it appears that there are wide divergences existing in the IGC as to what subject matter may be considered to fall under this rubric. In addition, it is not clear whether all Members share the view that these are all essential characteristics of TK. In that light, clarification of these matters is essential.

A number of fundamental questions arise. For example, does the “traditional” context imply a time frame, e.g., should only that knowledge or expression from the past that is now recognized as traditional be protected? If so, can innovations taking place in the modern day ever be considered to fall under the definition of TK? What if these innovations are attributable to a particular individual – rather than being deemed “collective”? Can an innovation that is patented by an individual from a particular community, which is subject to an ownership right by that individual, also be claimed by the community as traditional knowledge, solely on the basis that the individual is a member of the community? Would this apply even if the innovation is not related to pre-existing TK? ...”³⁹

³⁸ WIPO/GRTKF/IC/11/5(a) Add.

³⁹ WIPO/GRTKF/IC/11/5(a)

C: Specific factors to be considered in a definition

(i) *Objectives of protection*

Australia

Further discussion is required regarding defining TK for the purposes of protection, whether that protection is by legal, non-legal, national or international means. This is the key issue. Consistent with the IGC's mandate, which does not preclude any outcome from its work, it may be that one definition will not be suitable to all circumstances. For some purposes a broad definition or set of principles may be appropriate but for others a more targeted definition may be needed. This will depend on the objective/s the definition is supporting. For example, for the purposes of a resolution on the protection of TK or general discussion of the issue a set of broadly drafted principles may be appropriate, but a contract regarding an access and benefit sharing arrangement for TK would probably require a different, more specific definition. This view is to some extent already evident in the IGC's work with the separate treatment of TK and Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF).

Definitions must enable clarity as to subject matter of protection. This is crucial to both enable the objectives of TK protection to be met and to ensure that what lies in the public domain, is clearly identifiable. Defensive protection of TK, through recognition of its role as prior art or as trade secret, is important to Indigenous peoples and clear definitions play an essential role in this regard.⁴⁰

(ii) *Community and social context*

Brazil

“The definition to be adopted should be anthropological, meaning that, *inter alia*, all knowledge dynamically produced, reproduced, maintained and transmitted by traditional methods, in a collective and inter-generational environment, and related to the identity and the socio-cultural integrity of a given community should be protected (including beliefs, spirituality, values and knowledge employed for the conservation of biodiversity)...”⁴¹

Ghana

“...Traditional based; refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation and are generally regarded as pertaining to a particular people or its territory and are constantly evolving in response to a changing environment...”⁴²

⁴⁰ WIPO/GRTKF/IC/11/5(a) Add.

⁴¹ WIPO/GRTKF/IC/11/5(a)

⁴² WIPO/GRTKF/IC/11/5(a)

Tunisia

Traditional knowledge includes the processes acquired by peoples through the know-how, skills and creativity, which they inherit. It is handing-down of culture, from one generation to another.

Traditional knowledge should be preserved because it contains indicators of the identity and specific nature of a nation. In Tunisia, the fields of application of such traditional knowledge are as follows:

- crafts,
- culinary aspects,
- the art of living,
- the art of building,
- agriculture and nature,
- medicinal knowledge.⁴³

Russian Association of Indigenous Peoples of the North (RAIPON)

The traditional knowledge relating to the system of traditional life activity includes:

- knowledge of the methods of use of natural resources and forms of economic activity of indigenous peoples and ethnic communities of the north, related to reindeer breeding and other northern forms of rearing local and aboriginal breeds of domestic animals, fishing, the river, lake, maritime and maritime hunting industry, hunting for meat and fur, market gardening and the gathering of wild plants;
- knowledge of territories with essential biological resources, populations of domesticated and wild animals, knowledge of the system of seasonal and spatial arrangement of fixed and industrial settlements, cattle shelters and routes of nomadic camps;
- knowledge of the methods of economic management of different areas of land and natural climatic zones;
- the traditional system of self-management and economic organization ensuring the durability of the use of renewable natural resources and transfer of ecologically and ethically important information: the traditional economic calendar, methods of collecting, gathering and processing produce, skills in the manufacture of work instruments and objects for use in the home, industrial restrictions, temporary removal from economic circulation of areas of land in the form of special zones restricted to visits, knowledge of edible and medicinal plants, forms of distribution of lands and produce, domestic trades and raising of children.⁴⁴

Nicaragua

Knowledge acquired in the course of time in a particular region with characteristics of a specific community which passes said knowledge on from generation to generation as part of its customs and culture.⁴⁵

⁴³ WIPO/GRTKF/IC/11/5(a)

⁴⁴ WIPO/GRTKF/IC/11/5(a)

⁴⁵ WIPO/GRTKF/IC/11/5(a) Add.

Norway

“Traditional Knowledge is knowledge that is generated, preserved and transmitted in a traditional and intergenerational context, which is distinctively associated with a community which preserves and transmits it between generations and is an integral to the cultural identity of the community which is recognized as holding the knowledge...”⁴⁶

New Zealand

“...The individuals and organisations with whom we have consulted on the above working definitions have said that they generally agree with them, as they appear to cover most areas of concern. They also agreed that traditional knowledge and particularly mātauranga Māori (Māori knowledge), is often orally transmitted and distinctly linked to the local culture and to the relationship that the community has to the land and its natural resources...”⁴⁷

India

TK was the accumulated knowledge which was the result of intellectual activity and insight in a traditional context and included the know-how, skills, innovations, practices and learning that formed part of traditional wisdom embodied in the traditional lifestyle systems. It could contain the codified knowledge systems past between communities or people or other groups of persons identifying traditional culture between generations. Such was the case with the traditional medicine system, Ayurveda, of India. Such knowledge could also remain uncoded as was the case with folk medicine practiced by many communities. The knowledge could include any field of technology.⁴⁸

Mexico

“...This definition or these elements should be identified with the culture and identity of the indigenous so with a knowledge or awareness of being the guardians or having cultural responsibility to maintain and preserve them. Such knowledge were those arising from a creative dynamic process in the people, indigenous or local community. This was very important: such knowledge must be identified as TK by the Community or the members thereof and, finally, by the nature and characteristics of such knowledge. The knowledge must be able to be reproduced and transmitted in any means or form provided that PIC of the holders of such knowledge was taken into account...”⁴⁹

Algeria speaking on behalf of the African Group

“...As to point 1 concerning the definition of TK that should be protected, the African Group was of the view that TK should be defined to include knowledge systems

⁴⁶ WIPO/GRTKF/IC/11/5(a) Add.2

⁴⁷ WIPO/GRTKF/IC/11/5(a) Add.

⁴⁸ WIPO/GRTKF/IC/11/15 Prov.

⁴⁹ WIPO/GRTKF/IC/11/15 Prov.

generating from local indigenous or traditional communities that were the result of intellectual activities and inside a traditional context. Such knowledge systems shall consist of *inter alia* skills, know-how, innovation, practices and learning that were embodied in the traditional lifestyles of the community including the exploitation of knowledge associated with the resources...”⁵⁰

Thailand

“...TK should be defined in a descriptive term in order to cover broad and diverse nature of content of knowledge resulting from intellectual activity of local or traditional communities in their traditional and customary context. The protection should not seek to limit to specific field of technology or knowledge. It should be broad enough to include agricultural, environmental or medical knowledge, and knowledge associated with GR. In this light, Article 3 and 4 in WIPO/GRTKF/IC/11/5(c) could serve as a basis for further discussion.”⁵¹

International Indian Treaty Council (IITC)

“...TK was alive and had developed over time, collectively with its peoples. Many of its cultures were manifested in traditional and contemporary arts. Its authenticity, quality and the cultural integrity of its TK and art forms had been maintained throughout the generations. TK was dynamic and could not be limited to a specific definition. The definition of the Council’s TK should not be limited but should include details of the cultural landscape and particularly of places of major significance for indigenous peoples, knowledge of contemporary use, prior use and potential use of plants and species of animals, minerals, soil etc. For example, in the Kuna culture traditional medicine was produced using plants, minerals, animals, food products, small roots, non-edible fruits, and it was also practiced through therapeutic songs and orations...”⁵²

Saami Council

“Article 3 in the Substantive Provisions sufficiently defined the term “TK”. It failed to see how this issue could be made so complicated. TK was knowledge developed in a traditional cultural context. For instance, in a reindeer herding Saami community, a reindeer herder’s knowledge about reindeer husbandry will qualify as TK, since it will always have been developed in a cultural context, whereas his or her knowledge about how to brew the kind of coffee served outside this meeting room for example, will not be. Individual elements of TK can be developed by individuals or a group, but the knowledge was always collective in the sense that it built on previous knowledge developed by the people or community...”⁵³

⁵⁰ WIPO/GRTKF/IC/11/15 Prov.

⁵¹ WIPO/GRTKF/IC/11/15 Prov.

⁵² WIPO/GRTKF/IC/11/15 Prov.

⁵³ WIPO/GRTKF/IC/11/15 Prov.

(iii) *Recognition of customary law*

New Zealand

“...The ‘traditional knowledge base’ is subject to customary laws and protocols. It is often collectively ‘owned’ or guarded, and may be sacred/secret or in the public domain. Traditional knowledge based innovations may be individual creations, to which communal responsibilities may attach, and which may be subject to both formal and customary laws...”⁵⁴

Ethiopia

“...Finally communities should enjoy certain space for determining what was important and vital for their identity. This could be achieved by allowing the application of customary law in determining what was TK and how it was related to their identity...”⁵⁵

(iv) *Relationship with TCEs*

Distinctions between TK and TCEs

United States of America

“...As was noted in document WIPO/GRTKF/IC/6/4, paragraph 57, two uses of the term ‘traditional knowledge’ have become customary in the Committee: first, a general sense (TK *lato sensu*), which embraces the content of knowledge itself as well as traditional cultural expressions (TCEs)/expressions of folklore, and distinctive signs and symbols associated with TK; and, second, a more precise sense (TK *stricto sensu*), which refers to “the content or substance of traditional know-how, skills, practices and learning;” this can be recognized as distinct subject matter, even though this “content or substance may be considered integral with traditional ways of expressing the knowledge and the traditional context in which the knowledge is developed, preserved and transmitted.”

However, while it is helpful to have these distinctions, even use of the stricter definition leads to many questions. The first being how to delineate with greater precision, if possible, the boundaries between TK and TCEs/EoF, and whether there are any traditional cultural expressions that are not expressions of traditional knowledge. While definitive answers to these questions may not be achievable, further discussion of the inter-relationship between TK and TCEs/EoF would appear warranted in order to assess these two issues as envisioned with respect to the existing List of Issues...”⁵⁶

New Zealand

“...Conventional IPRs only protect innovations and creations based on TK, not the underlying TK itself. The problem arises because traditional knowledge based innovations and creations cannot be separated from the TK itself. Traditional cultural

⁵⁴ WIPO/GRTKF/IC/11/5(a) Add.

⁵⁵ WIPO/GRTKF/IC/11/15 Prov.

⁵⁶ WIPO/GRTKF/IC/11/5(a)

expressions cannot be dissociated from the traditional knowledge itself or from the cultural and physical environment from which they emerge. However, traditional cultural expressions, being specific cultural manifestations or practices of TK, are possibly easier to protect than traditional knowledge.”⁵⁷

Arts Law Centre of Australia

“...While Arts Law recognizes that Traditional Knowledge is inseparable from Traditional Cultural Expressions which are the product and embodiment of Traditional Knowledge, Arts Law supports the definition of “Traditional Knowledge” provided in Article 3(2) of the Substantive Provisions of the Policy Objectives and Core Principles on Traditional Knowledge...”⁵⁸

Implications of distinct approaches to defining TK and TCEs

Ethiopia

“...There were two important elements to these criteria of defining TK, one was what was referred as “the minimal linkage” and the second was the intergenerational linkage. There were different standards used for TCEs for reasons not clear. TCEs were also intrinsically associated with the identity of their holders and were intergenerational. It, therefore, recommended that the content of article 4 (Revised Provision) be common article for both TCEs and TK, the merging of the last two paragraphs since they were talking of the same thing, namely the association of TK with the identity of their holders...”⁵⁹

Reference to cultural and artistic heritage

Guatemala

Decree No. 26-97, revised by Decree No. 81-98 of the Congress of the Republic of Guatemala. Law for the protection of the National Cultural Heritage:

Intangible cultural heritage: this is constituted by institutions, traditions and customs such as: the oral, musical, medicinal, culinary, craft, religious, dance and theatre traditions. This covers the cultural property which is more than 50 years old, from the time of its construction or creation and which has historical or artistic value, and may include property less than 50 years old but which is of relevant interest for art, history, science, architecture and general culture, and contributes to the strengthening of the identity of the Guatemalan people.

Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states:

Intangible cultural heritage: this is the uses, representations, expressions, knowledge and techniques together with the instruments, objects, artefacts and cultural for an

⁵⁷ WIPO/GRTKF/IC/11/5(a) Add.

⁵⁸ WIPO/GRTKF/IC/11/5(a) Add.2

⁵⁹ WIPO/GRTKF/IC/11/15 Prov.

inherent in communities and groups and in some cases individuals, for which it is recognized as an integral part of their cultural heritage. This intangible cultural heritage which is handed down from generation to generation is constantly recreated by communities and groups on the basis of their environment, their interaction with nature and their history.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2. The productions containing characteristic elements of the artistic and traditional heritage developed and perpetuated by a community or by individuals, reflecting the traditional artistic expectations of that community.⁶⁰

(v) *Specific exclusions for publicly known TK*

United States of America

“...One further issue is the diffusion of what may have once constituted “traditional knowledge” that now may be considered to be in the public domain of different jurisdictions. Existing systems of intellectual property promote innovation and sharing of knowledge and thereby are directed toward providing protection for limited time to inventions or creations. After the term of protection, the invention or creation is no longer subject to exclusive rights. The nature of the word “traditional” indicates a link to the past. It appears that much knowledge that could be, by some measure, considered “traditional” may already be diffused widely throughout the world as common knowledge or widely used knowledge at least in those economic and social sectors where that knowledge is relevant. In that light, it may well be that much of this knowledge has fallen into the public domain and is thereby available for use by the public at large without restriction in many jurisdictions. Attempts to take existing public information and to reassert private ownership retrospectively would appear to give rise to several issues and have significant consequences not only on intellectual property law, but more broadly...”⁶¹

Intellectual Property Owners Association (IPO)

“...As a fundamental matter, information or knowledge that has entered the public domain cannot be recaptured, as the public has legitimate rights to such information. Indeed, such publicly-available information is often the basis for new inventions or creative works...”

“...Discussions relating to the protection of TK in the IGC have also focused on the perceived misappropriation of TK, and in response, recent deliberations have included the possibility of using databases of publicly-known TK as an aid to patent examiners. It is important to note that secret TK would not be available as prior art in the examination of patent applications. Therefore, independently developed inventions that meet the criteria of novelty, inventive step and industrial applicability would not be

⁶⁰ WIPO/GRTKF/IC/11/5(a)

⁶¹ WIPO/GRTKF/IC/11/5(a)

examples of misappropriation. Conversely, publicly known TK could be cited against such inventions, but such public TK would not be considered protected TK.”⁶²

International Federation of Pharmaceutical Manufacturers and Associations (IFPMA)

Public domain knowledge should continue to be freely usable, even if such knowledge would be called by certain stakeholders “traditional knowledge”. However, in case some TK is still confidential it should be protectable as a trade secret and if otherwise possible by other forms of existing IP. In contrast, TK which is in the public domain should not be patentable.⁶³

(vi) *Constraints on a definition of TK*

International Publishers Association (IPA)

“...Given the severe impact that such protection may have, IPA suggests the narrowest possible definition, protection only very important ritual or religious matters.”⁶⁴

D: Distinction between TK in general and protectable TK

Canada

“...there are two parts to defining protectable TK that should be protected: (1) developing the appropriate definition of TK, and (2) determining the full scope of the protectable subject matter. Both represent a challenge given the complexity of the issues and the particularities of all Member States. As noted in Canada’s general comments, achieving consensus on the objective of protecting TK could help to define the subject matter to be protected and assist with terminological clarity. Some of the issues that the IGC needs to address in detail are what is meant by “traditional” and clarity as to which persons or entities fall within the scope of the term “communities”... ”⁶⁵

Japan

The expression “traditional knowledge” gives you a rough idea of what it means in general, but from legal perspective, the expression is very vague. Before defining this expression, the meanings of “traditional,” “knowledge,” and “[traditional knowledge] that should be protected” should be made clear. The following is for illustrating issues necessary to deepen understanding.

Meaning of “traditional”

The word “traditional” has the basic implication that “someone passes information down to someone else along a temporal dimension.”

⁶² WIPO/GRTKF/IC/11/5(a)

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⁶⁴ WIPO/GRTKF/IC/11/5(a)

⁶⁵ WIPO/GRTKF/IC/11/5(a) Add.

Temporal dimension: For the passing down of information to future generations, it is not clear around how many generations would be sufficient to be deemed “traditional?” Nor is it clear whether information that has not been passed down to the current generation or one that has ceased to be passed down in the past could be seen as “traditional”?

From who to who: Information can be passed down through various relationships such as the relationships which exist between parents and children, among families/relatives (i.e., relationship by blood), within a local community, within an indigenous group, or within a country. Actors conveying information can also be changed. For example, a piece of information that had been passed down in Family A can be handed down to Family B or widely disseminated in Community C to which Family A has belonged for a certain period of time, or another piece of information that had been handed down in Community D can go out of style and may be only passed on from generation to generation in Family E.

Meaning of “knowledge”

The word “knowledge” implies “value,” “state of management,” and “level of public ownership.”

Value

The value of knowledge ranges from “beneficial to all human beings” (e.g. beneficial effect of an herbal medicine) to “valuable only within a certain group” (e.g. religious ceremony).

State of management

The expression “state of management” ranges from “something managed in secret” to “something that is publicly used and not particularly managed” or “something that is actively provided to outside parties.”

Level of public ownership: The expression “level of public ownership” covers “knowledge that is already in the public domain and used freely by the public,” “knowledge that is used only by interested parties and kept secret,” and “knowledge that is not secret but not yet commercially used.” The meaning of the word “commercially” may vary due to the scale of business and other factors.

The content of “knowledge” may be changeable in the course of passing down through improvements and other factors. In that case, how widely or through how many generations must the “knowledge” be passed down after undergoing such changes to be deemed traditional knowledge? If any improvement is added to a certain piece of knowledge by an actor other than the actor to whom the knowledge was passed, can the “improved” knowledge be defined as “traditional knowledge”?

As mentioned above, the concept of “traditional knowledge” covers a wide range of factors. Japan wishes to know what particular factors demander countries have in mind when they refer to “traditional knowledge.”

Traditional knowledge “that should be protected”

There is a view that the meaning of the expression “traditional knowledge” can be made clear if the requirements for protecting “traditional knowledge” are clearly established, even if the meaning of the expression “traditional knowledge” itself is vague. However, it should be noted that no consensus about “protection” has yet been reached. The following opinions about the List of Issues are just for the purpose of discussion and this does not mean that Japan agrees to start discussion on the listed issues for any other purpose than for clarification.

The criteria for “[traditional knowledge] that should be protected” is inextricably linked with the criteria for judging what benefits society can enjoy by protecting traditional knowledge. Will “traditional knowledge” be made widely available to the public (as are patents and copyrights) with the aim of enhancing technology and culture for succeeding generations? Or will the maintenance of “traditional knowledge” itself be regarded as serving the public interest? Taking all these questions into account, discussions should focus on public interest and the benefit to society. Without discussing such public interest, it will not be made clear if any protection is necessary or what should be protected.

The subject matter of protection may vary by form/level of protection. The level of protection required to ensure that “traditional knowledge is respected” can cover a substantially wide range of traditional knowledge. If the level of protection is that of granting an exclusive right, the scope of the subject matter to be protected will be greatly narrowed. In addition, a level of protection such as granting a right to demand license fees or providing government subsidies is conceivable.

To clarify the expression “[traditional knowledge] that should be protected,” the discussion about public interest, identification of existing problems, and practical needs for protection is indispensable.⁶⁶

United States of America

“...There are many other issues that will arise during the IGC deliberations as we take the necessary next steps in deepening the understanding of the issues and attempt to further common understandings and agreement. The issue of defining TK also includes the difficult question of identifying TK, or elements thereof, which “should be protected.” As noted in our general comments, the United States understands the use of the term “protection” to include a broad range of measures (including legal and non-legal measures) to address specific issues and concerns related to TCEs/EoF and TK. It would be productive for the IGC to examine in greater detail what TK, or related elements, are capable of protection under existing legal and non-legal mechanisms...”⁶⁷

E: Comments on existing definition in Committee’s working documents

Brazil

In this context, the definition proposed in Article 3 (2) of the Annex to document

⁶⁶ WIPO/GRTKF/IC/11/5(a).

⁶⁷ WIPO/GRTKF/IC/11/5(a).

WIPO/GRTKF/IC/10/5, transcribed below, represents adequate basis to discuss the issue:

“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.”⁶⁸

China

“The definition of TK in the current draft, Article 3 and 4 of part III, substantive provisions, can be a basic for the discussion on this issue...”⁶⁹

European Community

“...Although several definitions of TK have been already advanced (WIPO, CBD, UNESCO), the definition contained in the WIPO Secretariat draft substantive provisions (Article 3 document WIPO/GRTKF/IC/10/5) is a good working definition and starting point for discussion...”⁷⁰

Colombia

“The government of Colombia supports the definition of traditional knowledge contained in Article 3 (2) of the substantive provisions included in documents WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/10/5...”⁷¹

Switzerland

“... the WIPO working definition (para 25 of document WIPO/GRTKF/IC/3/9) would be a very good option, as well as a very good basis for discussion.”⁷²

Burkina Faso

“... the definition given in the draft provisions on protection of TK to be an excellent basis for work...”⁷³

⁶⁸ WIPO/GRTKF/IC/11/5(a)

⁶⁹ WIPO/GRTKF/IC/11/5(a)

⁷⁰ WIPO/GRTKF/IC/11/5(a)

⁷¹ WIPO/GRTKF/IC/11/5(a)

⁷² WIPO/GRTKF/IC/11/5(a)

⁷³ WIPO/GRTKF/IC/11/15 Prov.

F: Proposals for new or revised definitions

(i) Proposed revisions to existing definitions

China

“...TK has been generated, preserved and transmitted in different approaches and by different people which might also include ethical groups (minorities). For example, Chinese traditional medicine is almost always preserved and transmitted by one or more ethical groups (including the minorities). So Article 4 should be amended as follows:

Protection should be extended at least to that traditional knowledge which is: generated, preserved and transmitted in a traditional and intergenerational context; distinctively associated with a traditional or indigenous community, people or ethnic groups which preserves and transmits it between generations; and integral to the cultural identity of an indigenous or traditional community, people or ethnic groups 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.”⁷⁴

South Africa

“Whilst we agree with the definition WIPO/GRTKF/10/5 in Article 3 we recommend an inclusion that “IK will be passed from generation to generation and between generations”. In addition to the definition we propose the following: to include in TK technical know-how.

Include spirituality. Include ‘memory’ amongst resources section under article 3 In article 4 (iii) add “traditional and local”...”⁷⁵

Latvia

“...definition of TK should not be formulated in so called „holistic approach” (including spiritual, religious and similar aspects) instead it should be formulated as technical knowledge linked with resources (not only genetic but also other natural resources) it exploits. The definition given in Article 3 of the WIPO document “Revised provisions for the Protection of Traditional Knowledge” could be a basis for the final definition.”⁷⁶

Algeria speaking on behalf of the African Group

“...The African Group noted that WIPO/GRTKF/IC/11/5(c) did not contain a comprehensive definition for TK which was currently provided for under the general scope of protection in Article 3, subparagraph 2. The African Group was of the view that a more coherent definition was required and that the substantive provisions took also into consideration the provision within Article 4 in WIPO/GRTKF/IC/11/5(c). TK was contained in codified or written knowledge systems and was passed between

⁷⁴ WIPO/GRTKF/IC/11/5(a)

⁷⁵ WIPO/GRTKF/IC/11/5(a)

⁷⁶ WIPO/GRTKF/IC/11/5(a)

generations. Hence, in Article 3, paragraph 2, the African Group recommended an inclusion that indigenous knowledge will be passed from generation to generation and between generations. It was not limited to any specific technical fields and may include agriculture, environmental and medicinal knowledge and knowledge associated with GR. Tradition-based reference to knowledge system, creation, innovation and culture expression which had generally been transmitted from generation to generation, were generally regarded as pertaining to a particular people or its territory and were constantly evolving in a response to the environment.”⁷⁷

Saudi Arabia

“...the definition presented by the Committee was a suitable one and constituted a good basis for achieving an acceptable definition. It however suggested that TK should have a value for humanity and questioned about some of the TK which could be useful for some and useless to others.”⁷⁸

(ii) *Definitions of traditional knowledge*

Ghana

“Definition of traditional Knowledge: - this refers to tradition based literary, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols undisclosed information and all other tradition based innovation and creations resulting from intellectual activities in the industrial, scientific, literary or artistic fields...”⁷⁹

Eurasian Patent Office (EPO)

Traditional knowledge – is knowledge that is passed between generations, typical to a certain nation (community) and/or relating to the territory of habitation and is constantly developing along with environmental changes. A list of subjects relating to traditional knowledge (TK) needs to be specified.⁸⁰

The Ogiek Community

Traditional Knowledge should be defined as an origin means of invention and creativity of ideas and use that sustains indigenous people’s livelihoods. Traditional Knowledge is unique among many indigenous and non-indigenous people’s definition should recognize the transmitting process of TK from a current generation to the next in an attempt of protecting it from the verge of extinction through copyrights and patterning. For instance, the forest provided firewood, herbal medicine, and wild fruits besides acted as secret sites for the Ogiek culture; any mechanisms applied in protecting the forest will safeguard the interest and value of the community.⁸¹

⁷⁷ WIPO/GRTKF/IC/11/15 Prov.

⁷⁸ WIPO/GRTKF/IC/11/15 Prov.

⁷⁹ WIPO/GRTKF/IC/11/5(a)

⁸⁰ WIPO/GRTKF/IC/11/5(a)

⁸¹ WIPO/GRTKF/IC/11/5(a)

New Zealand

“...Examples of traditional knowledge and traditional cultural expressions in New Zealand might include knowledge systems and practices in relation to weaving, performing arts, medicines, traditional house building, games, songs, tribal stories, fishing, hunting and agricultural knowledge and practices, food gathering practices, biological and environmental knowledge, classification and quantification structures such as the Māori calendar, among other things...”⁸²

Sudan

“...TK was not limited to a single field of arts or technology since human inventions were open ended and that was why mechanisms of TK in the field of medical treatments and agriculture were well known. Moreover there were other elements of TK such as dance, music, handicrafts which were related to given peoples and which must be protected for promotion and preservation purposes...”⁸³

Mexico

“...This definition should include knowledge, beliefs, thought processes, spiritualities, philosophies, in other words a world vision...”⁸⁴

Indonesia

“...It however suggested to redefine TK as follows: TK referred to the content or substance of knowledge that resulted from intellectual activity including the know-how, skills, innovation, practices and learning that form part of TK systems and knowledge embodying traditional lifestyles of indigenous and local communities or contained in codified knowledge systems passed between generations and continuously developed following any change in the environment, geographical conditions and other factors. It was not limited to any specific technical field and may include agriculture, environmental and medicinal knowledge and knowledge associated with GR.”⁸⁵

International Indian Treaty Council (IITC)

“...TK was a concept that encompassed tangible and intangible creations, cultural manifestations, technologies, sciences, agricultural knowledge, designs, literatures, and visual and performance arts derived from oral and written traditions. TK was also connected to indigenous traditional territories, lands, natural and GR, and was transmitted from generation to generation.”⁸⁶

⁸² WIPO/GRTKF/IC/11/5(a) Add.

⁸³ WIPO/GRTKF/IC/11/15 Prov.

⁸⁴ WIPO/GRTKF/IC/11/15 Prov.

⁸⁵ WIPO/GRTKF/IC/11/15 Prov.

⁸⁶ WIPO/GRTKF/IC/11/15 Prov.

(iii) *Distinctions between traditional, local and indigenous knowledge*

Colombia

Local communities should not be compared with indigenous communities; indigenous knowledge is “the knowledge developed by indigenous or other local communities, including knowledge systems, creations, innovations and cultural expressions which have generally been handed down from generation to generation; and are considered to belong to a group of persons in particular and to their territory, and are developing constantly in response to the changing environment. The categories of traditional knowledge include: agricultural, scientific, technical, ecological and medicinal (related to medicines and remedies) knowledge as well as that related to biodiversity etc. Such knowledge is characterized by:

- A holistic nature: traditional knowledge includes all the knowledge, innovations and traditional practices which form part of complex cultural systems where the knowledge is part of specific world visions, and mythical and historical traditions, with a view to access thereto and the exercise, learning and transmission thereof (TRIPS, JOB/02/60, 2002; WIPO/GRTKF/IC/6/12, 2003).
- Its continuous development: traditional knowledge is complex and dynamic, and is in a permanent state of change and development.
- It is a fundamental part of the entity of indigenous and local communities (WIPO/GRTKF/IC/4/8, 2002).
- It is generally transmitted orally.
- It is collective in nature.
- For indigenous and certain local communities, traditional knowledge is closely related to the territory.⁸⁷

South Africa

“...will continue to use Indigenous Knowledge (IK) as opposed to the use of Traditional Knowledge (TK). The use of this terminology is in sync with our IKS policy, proposed amendments to our IP legislations, and Draft Access and benefit regulations etc. Any international recognition or use of this term? This might support the use of IK as opposed to TK.”⁸⁸

Peru

“...had a law which laid out a regional protection for collective knowledge of indigenous peoples linked to biological resources since August 2002. This Law continued definition of what was understood by collective knowledge and was the following: accumulated in trans-generational knowledge developed by indigenous peoples and communities with respect to properties, uses and characteristics of biological diversity. The definition in the Law was more limited than that contained in

⁸⁷ WIPO/GRTKF/IC/11/5(a)

⁸⁸ WIPO/GRTKF/IC/11/5(a)

the revised provisions on protection of TK. The definition included in these revised provisions did suitably cover the elements that should be taken into account when defining TK...⁸⁹

International Indian Treaty Council (ITTC)

“...Thus, collective indigenous TK could be said to contain all the intellectual creations, their knowledge of use of the natural resources which indigenous peoples had used and produced, throughout their history, including their indigenous knowledge of the sustainable use of biodiversity in the field of medicine and food products, and other fields could be mentioned, in which indigenous peoples had their TK...”⁹⁰

G: Distinct definitions of protectable knowledge

Intellectual Property Owners Association (IPO)

“As noted in WIPO document WIPO/GRTKF/IC/3/8, the scope of protected subject matter may be kept open-ended and undefined, or it may be limited to specific forms of TK that meet certain criteria. In order to provide certainty to both rightholders and the public, it is important that the scope of protected subject matter be limited to specific TK that meets well defined criteria...”

“...Thus, in order to be available for protection, protected TK must be defined as that which has not become publicly known. The requirement that TK be secret in order to be protected is analogous to the protections afforded to undisclosed trade secret information in many national and international laws. Generally, trade secret laws require that the information be (1) commercially valuable; (2) not in the public domain; and (3) subject to reasonable efforts to maintain its secrecy. Similar elements should also be required for protected TK...”⁹¹

Canada

“...Traditional knowledge that should be protected in knowledge accumulated by indigenous people and communities, passed on from generation to generation and therefore enriched and recreated in time, as well as being shared by various indigenous peoples and/or communities, the result of their interaction with their environment, and is considered part of their cultural heritage. It is linked to biological resources such as knowledge of the properties, uses and characteristics of biodiversity; as well as to cultural expressions and folklore.”⁹²

Kyrgyz Republic

Traditional knowledge to be protected – knowledge, means and methods, including those using genetic resources applied in different fields of human activities, which were transferred from generation to generation during the years in certain order and meaning.

⁸⁹ WIPO/GRTKF/IC/11/15 Prov.

⁹⁰ WIPO/GRTKF/IC/11/15 Prov.

⁹¹ WIPO/GRTKF/IC/11/5(a)

⁹² WIPO/GRTKF/IC/11/5(a) Add.

This knowledge was kept and adapted for particular needs, local communities and traditional knowledge owners and has certain value for development of different fields of human activities.⁹³

H: Timing of work on definitions of traditional knowledge

International Federation of Pharmaceutical Manufacturers and Associations (IFPMA)

Premature to offer answers to the question before a definition has been agreed.⁹⁴

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⁹⁴ WIPO/GRTKF/IC/11/5(a)

ISSUE II: WHO SHOULD BENEFIT FROM ANY SUCH PROTECTION OR WHO SHOULD HOLD THE RIGHTS TO PROTECTABLE TRADITIONAL KNOWLEDGE?

- A: ROLE AND NATURE OF A DEFINITION OF TK
 - (i) *The need for a definition*
 - (ii) *Approaches to formulating a definition*
 - (iii) *Relationship between the definition of TK and other issues*
- B: DISCUSSION OF GENERAL CHARACTER OF TK
 - (i) *General descriptions of TK*
 - (ii) *distinctions and clarifications regarding general character of TK*
- C: SPECIFIC FACTORS TO BE CONSIDERED IN A DEFINITION
 - (i) *Objectives of protection*
 - (ii) *Community and social context*
 - (iii) *Recognition of customary law*
 - (iv) *Relationship with TCEs*
 - Distinctions between TK and TCEs*
 - Implications of distinct approaches to defining TK and TCEs*
 - Reference to cultural and artistic heritage*
 - (v) *Specific exclusions for publicly known TK*
 - (vi) *Constraints on a definition of TK*
- D: DISTINCTION BETWEEN TK IN GENERAL AND PROTECTABLE TK
- E: COMMENTS ON EXISTING DEFINITION IN COMMITTEE'S WORKING DOCUMENTS
- F: PROPOSALS FOR NEW OR REVISED DEFINITIONS
 - (i) *Proposed revisions to existing definitions*
 - (ii) *Definitions of traditional knowledge*
 - (iii) *Distinctions between traditional, local and indigenous knowledge*
- G: DISTINCT DEFINITIONS OF PROTECTABLE KNOWLEDGE
- H: TIMING OF WORK ON DEFINITIONS OF TRADITIONAL KNOWLEDGE

This issue concerns the specific communities, other collective groups or in some circumstances the state or other authorities that should either benefit in some way from measures to protect TK, or who should be identified as the holders of legal rights associated with protected TK. The comments included general positions of principle that should apply, including the need to base the status of beneficiaries on the collective or communal aspect of TK, with comments also pointing to the need to recognize some certain individuals. In discussing specific definitions of beneficiaries, the comments highlighted the originators and custodians of knowledge as such, and distinguished between such primary TK holders and the secondary or downstream users of TK. Some comments identified the concept of custodianship of through descent.

Comments considered possible ways of establishing an appropriate relationship between the beneficiary and the protected traditional knowledge. Specific categories of beneficiaries included indigenous communities already recognized under national laws. Various roles of state agencies were identified, including comments that foresaw multiple possible roles for government agencies, depending on the context of protection. Specific roles for government agencies included acting as custodian where no other beneficiary was identifiable, undertaking determinations of beneficiary status for eligible communities, and serving as owner of TK in contrast with communities as beneficiary. The responsibility of government agencies to conserve TK was identified.

Among the factors relevant to determining status as beneficiary or right holder, the comments identified existing national experiences and existing definitions, including the draft WIPO provisions, other international instruments, and national laws in related areas.

A: Definition of beneficiaries

(i) *Beneficiary status based on the collective or communal aspect of TK*

Ghana

“The community at large should be recognized as the sole beneficiary of such protection and also be accorded the rights to protect able Traditional Knowledge”⁹⁵

European Community

“Considering existing human rights instruments...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. Benefits from the protection should accordingly flow to the indigenous and traditional communities that hold TK in this manner, as well as to recognized individuals within these communities and people. It could however be difficult in practice to delimit the sphere of groups in title of protection as a clear common understanding of what constituted such communities is hard to obtain.”⁹⁶

Kyrgyz Republic

Traditional knowledge owners shall be a local community – people permanently residing in particular territory of respective country possessing their own national and cultural traditions, way of life and traditional knowledge in different fields of human activities, which possibly may be valuable to improve living standards of people as well as natural persons and legal entities of any organizational and legal forms and patterns of ownership possessing traditional knowledge.⁹⁷

Norway

The beneficiaries should be the community that has generated, preserved and transmitted the traditional knowledge and which still continues to do so, and in which the knowledge is transmitted in a traditional and inter generational context. Local customs may provide guidance when identifying the appropriate beneficiaries and who is entitled to represent the collective group, e.g. an organization for the beneficiaries or similar.⁹⁸

India

“... protection of TK should benefit the communities who generated, preserved and transmitted the knowledge in a traditional and intergenerational context, who were associated with it and who identified with it.”⁹⁹

⁹⁵ WIPO/GRTKF/IC/11/5(a)

⁹⁶ WIPO/GRTKF/IC/11/5(a)

⁹⁷

⁹⁸ WIPO/GRTKF/IC/11/5(a) Add.2

⁹⁹ WIPO/GRTKF/IC/11/15 Prov.

(ii) *Recognition of certain individuals*

India

Protection should accordingly benefit the traditional communities themselves that held TK in this manner as well as recognized individual knowledge holders within these communities and peoples.¹⁰⁰

Russian Association of Indigenous Peoples of the North (RAIPON)^o

Individual representatives or groups of holders of such knowledge.¹⁰¹

(iii) *Specific definitions of beneficiaries*

Originators and custodians of knowledge

Eurasian Patent Office (EPO)

The term "holders of traditional knowledge" is related to anyone who creates, develops and uses TK in traditional conditions (in a traditional way of life or traditional housekeeping) as well as passes it over. Holders of TK are the ones who should benefit from commercialization of TK.¹⁰²

International Publishers Association (IPA)

For publishers to be able to publish works related to TK with economic and legal certainty, a clear and concise definition of who could be potential beneficiaries is required, leaving no room for ambiguity. Only the originators or custodians of TK should benefit from protection, and they must be clearly identifiable through the application of transparent and agreed principles.¹⁰³

Switzerland

The owner of the rights in such protection should be the person who satisfies the requirements for obtaining protection. It may be imagined that this is the creator and/or the holder of traditional knowledge, and there may be several rights holders (if a population is the holder of traditional knowledge) who would be joint holders. It is important to note that traditional knowledge is often collective in nature.¹⁰⁴

¹⁰⁰ WIPO/GRTKF/IC/11/15 Prov.

¹⁰¹ WIPO/GRTKF/IC/11/5(a)

¹⁰² WIPO/GRTKF/IC/11/5(a)

¹⁰³ WIPO/GRTKF/IC/11/5(a)

¹⁰⁴ WIPO/GRTKF/IC/11/5(a)

Tunisia

Governments, peoples and holders of such knowledge.¹⁰⁵

Distinction between primary holders and secondary users

Ghana

“The beneficiaries of the protection of traditional knowledge (genetic resources) may be divided into two categories viz:

i. Holders or Owners of the knowledge viz individuals, traditional communities, casts, families, ethnic groups, nations and sub regions. For instance, in West Africa except with slight differences in species and use, kente, yam, gari, and palm fruits are widely used in the sub region.

ii. derived right owners such as modern researchers, innovators and extractors of traditional knowledge...”¹⁰⁶

OPDP

“...The beneficiaries should also be categorized into two: one was the direct beneficiary which was going to be the real inventor and the community that was using it because these were the bona fide parties who were holistic to this TK; and two the indirect beneficiaries who were going to be the foreign rights holders and the Government who can play the role of guardianship in protecting this TK.”¹⁰⁷

Custodianship through descent

New Zealand

“The rights holders and beneficiaries of any benefits flowing from the use or exploitation of TK and TCEs should be the traditional knowledge holders and TCEs creators themselves and their community (-ies).

For Māori, the answer to this question has consistently been ngā uri – all the descendents who *whakapapa* (genealogically descend) through to the TK and TCEs in question. The structure of Māori communities is organised by *iwi* (tribe), *hapū* (sub-tribe), and *whānau* (family). Māori who have been consulted on this issue have stated that the distribution of benefits and the holding of rights may cause problems, given the customary structure of the communities. Some elements of TK and TCEs may be held by more than one *iwi*, *hapū*, or *whānau*; and elements of TK or TCEs may slightly vary from one *iwi*, *hapū*, *whānau* to another but may still be fundamentally the same TK and TCEs...”¹⁰⁸

¹⁰⁵ WIPO/GRTKF/IC/11/5(a)

¹⁰⁶ WIPO/GRTKF/IC/11/5(a)

¹⁰⁷ WIPO/GRTKF/IC/11/15 Prov.

¹⁰⁸ WIPO/GRTKF/IC/11/5(a) Add.

Yemen

“... the beneficiaries of these rights were in fact those who innovated and were the source of this TK which was transmitted from one generation to the next. Whether these be indigenous peoples or not, whether these be groups or individuals, whether they belong to a single national group or not. In fact, it believed therefore that they were the true beneficiaries who were part of this group and who should benefit from this protection.”¹⁰⁹

B: Relationship between the beneficiary and the traditional knowledge

Japan

As mentioned in the above item 1, there are various ways/relationships in which “traditional knowledge” is passed on, e.g., parent-child, families/relatives, communities, indigenous groups, and countries. However, the scope of a “community” or an indigenous group and so on -are not clearly enough for internationally common understanding.

Also, it is not clear if the succession of traditional knowledge over generations by such a community as a religious community, which is not founded on kinship, can be regarded as a beneficiary community. We cannot see any justifiable grounds for an organization which is firmly united not be deemed as an eligible beneficiary just because the organization members are not biologically related while a loosely united community such as a country is regarded as an eligible beneficiary.

There are other forms of communities not founded on kinship such as Internet communities. Members of these communities do not live together. –The communities have not lasted for more than one generation;- The members of these communities gather for the same purpose or because of sharing the same idea. Certainly, these communities are not traditional communities and are not considered as beneficiary communities under the traditional definition. However, why these communities should be treated differently in comparison with traditional communities is not made clear. If the traditional knowledge is just passed down within a limited circle in a community or an indigenous group, etc., how should these people be treated? For instance, how the following relationships should be treated from perspective of benefit has yet to be made clear: a) the relationship between Country A and Indigenous Group X when Indigenous Group X of Country A has been maintaining/passing on the traditional knowledge; b) the relationship between Country A, Country B, and Indigenous Group X when Indigenous Group X existing in both Country A and Country B has been maintaining/passing on the traditional knowledge; c) the relationship between Country A, Indigenous Group X, and Indigenous Group Y when Indigenous Groups X and Y both existing in Country A have respectively been maintaining/passing on the traditional knowledge; and d) the relationship between Country A, Country B, Indigenous Group X, and Indigenous Group Y when Indigenous Groups X and Y existing in both Country A and Country B have respectively been maintaining/passing on the traditional knowledge. These circumstances are not limited to countries and indigenous groups but also applicable to families and communities, etc.

¹⁰⁹ WIPO/GRTKF/IC/11/15 Prov.

There would be many cases where the community cannot exercise its rights against outside parties even when it tries to do so, due to lack of a clear decision making mechanism or representative in the community. Some have proposed that the State may exercise rights in proxy for its internal communities. When States are allowed to act as beneficiaries in proxy for indigenous peoples, there might be a problem of whether the State will act to legitimately represent the welfare and benefit of the indigenous peoples.

If certain knowledge that existed as traditional knowledge in the past in an indigenous group is not passed on or used today, how should such knowledge be treated? This problem is linked with the basic problem of whether maintenance/succession in the present day is a precondition of traditional knowledge.

If Community X has been passing on Traditional Knowledge A and Community Y has been passing on Traditional Knowledge A+ α , which was derived from Traditional Knowledge A, how should the relationship between Community X and Community Y be treated? Are there any differences in the treatment of the case in which Community Y developed Traditional Knowledge A+ α from Traditional Knowledge A of Community X and the case in which Community Y has independently been passing down Traditional Knowledge A+ α ?

As mentioned above, there might be plural beneficiaries/right-holders of Traditional Knowledge. Therefore, the scope of a community etc. should be clarified, and it would be necessary to set guideline in order to clarify relations between the interested parties.¹¹⁰

Canada

Many peoples and communities around the world create and seek to protect what they may consider as TK. TK may originate with a particular community or may be shared in whole or in part by a number of different communities. When TK is common between communities, it would be important that the IGC clarify whether all or some communities should benefit from protection for their TK and the policy implications of such protection.

Apart from communities as potential beneficiaries of protection of their TK, the IGC should address whether the protection of TK should extend to other beneficiaries. As noted by the WIPO 1998-1999 Fact Finding Missions report (at page 219), not all TK is collective in nature. There may be cases where a particular individual, family, clan or society may be acknowledged as the source of the TK. The IGC should have further discussions to clarify who are the appropriate potential beneficiaries and rights holders of protectable TK.¹¹¹

¹¹⁰ WIPO/GRTKF/IC/11/5(a)

¹¹¹ WIPO/GRTKF/IC/11/5(a) Add.

C: Different categories of beneficiaries

(i) *Recognized indigenous communities*

Colombia

“...However, given that the Convention on Biological Diversity recognizes the right of indigenous and local communities to participate in and authorize the use of its traditional knowledge relevant to the conservation and sustainable use of biodiversity, the right to participate and decide on the use of traditional knowledge must not be limited to knowledge associated with genetic resources, but in general to all the components of biodiversity which would include the biological resource...”¹¹²

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

Undoubtedly the sole beneficiary of this type of protection should be the indigenous community or ancestral people that has created an original traditional culture. Such benefit should be channelled towards direct action, through the relevant provisions, so that the maximum benefits accrue directly to the community.¹¹³

South Africa

“...the current system of protecting IPRs are limited to private monopoly rights and therefore incompatible with the protection of IK. We proceed on the premise that IK is held as part of a community’s heritage passed down from generation to generation, and should not be allowed either to be privatized or commercially exploited for individual gain; or to slip into the “public domain”. Hence, our assertion is that the first beneficiary of indigenous knowledge must be the community directly connected with the knowledge accessed and to be protected...”

“..In addition to this subsection we propose the insertion of “indigenous, traditional and ‘local’ communities”. We further recommend the insert of ‘traditional’ before knowledge holders.”¹¹⁴

Ghana

“...The beneficiaries of protection under the instrument must include indigenous communities, nations and sub-regions which own and maintain the traditional knowledge and secondary owners of rights such as collectors, researchers, extractors and developers...”¹¹⁵

Peru

Article 2 of Law 27811 defines indigenous people as follows:

¹¹² WIPO/GRTKF/IC/11/5(a).

¹¹³ WIPO/GRTKF/IC/11/5(a).

¹¹⁴ WIPO/GRTKF/IC/11/5(a).

¹¹⁵ WIPO/GRTKF/IC/11/5(a).

“... they are native people who have rights prior to the formation of the State of Peru, maintain a specific culture, a territorial area, and recognize themselves as such. These peoples shall include peoples in voluntary isolation or out of contact, as well as rural and native communities...”¹¹⁶

Ethiopia

“...there were different terminologies used to refer to beneficiaries of TK. Some of these terminologies included indigenous communities, peoples, local communities, nations, ethnic groups, minorities and even immigrant communities and so forth. Whereas Article 3 used indigenous and local communities, Article 4 of these provisions introduced new descriptions such as people and traditional communities. Its national experience indicated that there were even additional phrases used back home. It did not intend to create hierarchies of rights among these groups. All these groups in whatever designation and form they come enjoy similar and equal rights as far as they held TK under the definition of the Provisions...”¹¹⁷

Mexico

“...the protection of TK should be to the benefit of the local communities or indigenous peoples who held this knowledge. Article 5 of WIPO/GRTKF/IC/11/5(c) was a good basis for the Committee’s work. Other international instruments should also be considered particularly the UN Declaration on the Rights of Indigenous Peoples.”¹¹⁸

Morocco

“...TK holders were the first beneficiaries in fact. They were indigenous peoples and local communities. These were also individuals who had a recognized role in the context of these indigenous and local communities...”¹¹⁹

Amatau Yuyay

“...the beneficiaries should be the indigenous communities in rights holders. Indigenous communities were those who transmitted from generation to another and which maintained this TK from one generation to the next. The indigenous communities would not be able to systematize these TK and present it in the various international and national *fora*. This would be a very extensive task nor should it be the Governments who would also then lead the collection of these benefits. We should take account of the indigenous communities to jointly carry out this exercise.”¹²⁰

¹¹⁶ WIPO/GRTKF/IC/11/5(a) Add.

¹¹⁷ WIPO/GRTKF/IC/11/15 Prov.

¹¹⁸ WIPO/GRTKF/IC/11/15 Prov.

¹¹⁹ WIPO/GRTKF/IC/11/15 Prov.

¹²⁰ WIPO/GRTKF/IC/11/15 Prov.

Sudan

“...Indigenous peoples were the very source of this TK and consequently these were people who were often marginalized or living in poverty and TK was very often used not to their benefit.”¹²¹

(ii) *The role of state agencies*

Distinguishing multiple possible roles for government agencies

Indonesia

“...with regard to the definition of beneficiaries of TK as mentioned in WIPO/GRTKF/IC/11/5(c) article 5, it believed that it was a good basis for discussion. In order to make it more comprehensive, it proposed the definition should also include the following elements: (i) Other than traditional/indigenous communities as parties who maintained and developed TK, governments also needed to play a role in facilitating TK protection in case there were other communities who had potential benefits for the utilization of TK; (ii) In case the owner of TK could not be identified, the beneficiary of TK protection should be the government, and it was used for the sake of community’s interests; (iii) The owner of TK eligible to benefit from the protection should be the TK owner who had been identified by government; (iv) Regarding the individual’s contribution to the development of TK, it could be rewarded by the existing IP system; (v) A state could play certain role in facilitating the protection of the community and it could be extended further as a right holder only if it benefited the communities.”¹²²

Custodian where no beneficiary identifiable

South Africa

“...we propose that where there is no clear and/or identifiable beneficiary the State or its delegated authority will act as the custodian of the rights, and the products derived from the IPR/TK of the communities...”¹²³

Role of state agencies in determining beneficiary status

International Chamber of Commerce (ICC)

The communities that are originators or custodians of the knowledge, and that have made it available to users. National governments will need to determine what

¹²¹ WIPO/GRTKF/IC/11/15 Prov.

¹²² WIPO/GRTKF/IC/11/15 Prov.

¹²³ WIPO/GRTKF/IC/11/5(a).

communities should be recognized for this purpose, according to transparent and agreed principles.¹²⁴

Intellectual Property Owners Association (IPO)

Rights in protected TK would be established by national law, and so the country in which the TK exists should provide the public with advance notice of the class of subject matter that it considers protected TK. It is also the responsibility of the country to fairly allocate the benefit of such protection to its members.¹²⁵

Kyrgyz Republic

Benefits from any traditional knowledge shall be fairly distributed amongst local communities and other traditional knowledge owners through the participation of the Government.¹²⁶

The Russian Federation

“...It was then very important to take into account the experience of the State and the role of the State in drawing up mechanisms relating to who should benefit from protection of TK...”¹²⁷

The Ogiek Community

The right to hold the TK is vested among the inventors and the community that appreciated its vitality in using it on their daily activities. It is the basis local level decision-making in education, natural resource management, hunting & gathering, health care, food preparation and a host of other activities in rural communities. Indigenous people as a communal and individuals by sharing equitable benefits which arise from the use of their knowledge, innovations and relevant practices for conservation and sustainable use of its components are direct beneficiaries, then the Government through charging registration fees and foreigners for commercial purposes.¹²⁸

Distinguishing government as owner and community as beneficiary

Nicaragua

The beneficiaries of this knowledge must be the community or the population of the region, and the local government is the owner of these rights.¹²⁹

¹²⁴ WIPO/GRTKF/IC/11/5(a).

¹²⁵ WIPO/GRTKF/IC/11/5(a).

¹²⁶

¹²⁷ WIPO/GRTKF/IC/11/15 Prov.

¹²⁸ WIPO/GRTKF/IC/11/5(a).

¹²⁹ WIPO/GRTKF/IC/11/5(a) Add.

India

It was also possible that holders of TK may not get identified at individual or community level. In such cases, benefit must be channelled to the particular discipline of knowledge through a national competent authority. Issues such as multiple ownership at individual, community or country level would need a mechanism for resolution and apportionment of benefits. Further, entitlement to the benefit of protection should, as far as possible and appropriate, take account of the customary protocols, understandings, laws and practices of these communities and peoples.¹³⁰

Responsibility to conserve TK

Ethiopia

“...This articulation of beneficiaries should not be interpreted to exclude the responsibility of the State to conserve and protect TK.”¹³¹

Morocco

“...Government had an essential role to play in maintaining, preserving and transmitting this TK...”¹³²

D: factors to be considered

(i) *National experiences*

The Russian Federation

“...national experience in this area should be taken into account in the Committee’s documents. The concepts of indigenous peoples, local communities, ethnic groups, small groups, individuals representing local communities existed and there might be other expressions as well...”¹³³

Islamic Republic of Iran

“...the right holders in this scope could be individual group, family, local community, tribes and nations. The rights of holders were considerable in this society. In this regard national legislation was important and of course should not be ignored. The rights holders, in particular the rights of local communities who were real owners and their consent should be observed. The existing IP system was not sufficient and adequate to provide the protection to their rights. The appropriate institution or mechanism should

¹³⁰ WIPO/GRTKF/IC/11/15 Prov.

¹³¹ WIPO/GRTKF/IC/11/15 Prov.

¹³² WIPO/GRTKF/IC/11/15 Prov.

¹³³ WIPO/GRTKF/IC/11/15 Prov.

be created for the distribution of benefits from the commercialization of TK. It supported the Delegations of Brazil and Indonesia in general.”¹³⁴

Colombia

“supports the definition of beneficiary contained in Article 5 of the substantive provisions included in documents WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/10/5. in that regards, it should be pointed out that Andean Decision 391, Article 7, recognizes and assesses traditional knowledge, innovations and practices associated with a genetic resources, and the capacity of communities to take decisions thereon, therefore the holders of any right associated with traditional knowledge would be precisely said communities which are defined as the human group whose social, cultural and economic conditions distinguish it from other sectors of the national community, is governed wholly or partially by its own customs or traditions or by special legislation and, whatever its legal situation, retains its own social, economic, cultural and political institutions, or part thereof...”

“...Given the particular nature of the resources covered by traditional knowledge, the existence of a sui generis protection system is justified and which, although it should develop the provisions relating to access to genetic resources established in Decision 391 of the Cartagena Agreement, should also recognize the specific features of the cases in which access processes affect the traditional knowledge dimension and, depending on the above, regulate associated practices in order to guarantee both the protection of knowledge itself, and the fair and equitable sharing of benefits.”¹³⁵

Peru

“...There had also been a lengthy discussion as to which terms to use. The term of indigenous peoples in Law 27/11 was chosen because it was considered the appropriate term which reflected the real situation in Peru...”¹³⁶

(ii) *Existing definitions*

Comments on the draft WIPO provisions

Arts Law Centre of Australia

Beneficiaries of Protection under Article 5 (Substantive Provisions of the policy objectives and Core Principles on Traditional Knowledge)

- Arts Law supports the notion that beneficiaries of protection should be the traditional holders of that traditional knowledge, i.e. the indigenous peoples who have a connection with that traditional knowledge.
- Arts Law also supports the principle that entitlement to protection takes into account customary protocols, understandings, laws and practices of those communities.

¹³⁴ WIPO/GRTKF/IC/11/15 Prov.

¹³⁵ WIPO/GRTKF/IC/11/5(a)

¹³⁶ WIPO/GRTKF/IC/11/15 Prov.

- There should be an presumption in favour of the Indigenous community claiming to be the custodians of the TK and the onus should be on others to disprove the connection.¹³⁷

Morocco

“...Article 5 of WIPO/GRTKF/IC/10/5 was essential and would enable the Committee to move forward in the discussions and define the protection of TK which was transferred from one generation to another.”¹³⁸

Brazil

Discussion on this issue should follow developments in relevant international fora. The provisions in Articles 4 and 5 of the Annex to document WIPO/GRTKF/IC/10/5, transcribed below, represent adequate basis to discuss the issue:

“Article 5

Beneficiaries of protection

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. 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.”

“Article 4

Eligibility for protection

Protection should be extended at least to that traditional knowledge which is:

- (i) generated, preserved and transmitted in a traditional and intergenerational context;
- (ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and
- (iii) 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.”¹³⁹

China

Article 5 of the part III, substantive provisions, in the current draft, could be a basis for the discussion on this issue.

¹³⁷ WIPO/GRTKF/IC/11/5(a) Add.2

¹³⁸ WIPO/GRTKF/IC/11/15 Prov.

¹³⁹ WIPO/GRTKF/IC/11/5(a)

Associated with the issue above, ethical groups should be taken into account for the confirmation of the right' holders. And we also think that the uniqueness of origin TK would not be derogated from its wide transmitting. Both the origin and primary creators of TK should be respected and protected properly.¹⁴⁰

Peru

“...the documents submitted for consideration to the Committee in all its sessions showed that there were sufficient elements with which to define who the beneficiaries of this protection should be and who should be considered right holders. What was mentioned in Article 5 of WIPO/GRTKF/IC/11/5(c) was a very good basis for the definition of beneficiaries in rights holders. In Peru there had been a lengthy discussion related to these issues and a conclusion which was very similar to what was reflected in Article 5 had been reached...”¹⁴¹

Other international instruments

IITC

“...the UN documents could facilitate the understanding of who constituted indigenous peoples as the CBD, for example. The Declaration of the Rights of Indigenous Peoples might provide elements necessary for this discussion. Some of these documents might help delegations from Japan and the Russian Federation understanding who the indigenous peoples were and who the beneficiaries should be. He endorsed Article 5 of WIPO/GRTKF/IC/11/5(c) and its Annex. This was a good basis for progress.”¹⁴²

FAO

“the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR)... recognized that it was local and indigenous communities and farmers of all regions of the world who had made enormous contributions to the conservation and development of plant GR...”¹⁴³

Guatemala

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

The native communities and people that are authors.¹⁴⁴

¹⁴⁰ WIPO/GRTKF/IC/11/5(a)

¹⁴¹ WIPO/GRTKF/IC/11/15 Prov.

¹⁴² WIPO/GRTKF/IC/11/15 Prov.

¹⁴³ WIPO/GRTKF/IC/11/15 Prov.

¹⁴⁴ WIPO/GRTKF/IC/11/5(a)

National laws in related areas

Guatemala

Model Provisions for National Laws on the Protection of Expressions of Folklore
Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

The native communities and people that are authors.¹⁴⁵

¹⁴⁵ WIPO/GRTKF/IC/11/5(a)

ISSUE III: WHAT OBJECTIVE IS SOUGHT TO BE ACHIEVED THROUGH
ACCORDING INTELLECTUAL PROPERTY PROTECTION (ECONOMIC RIGHTS,
MORAL RIGHTS)?

A: GENERAL POSITIONS

B: POLITICAL AND MORAL RIGHTS OBJECTIVES

- (i) *Respect and acknowledge the TK holders*
- (ii) *Acknowledge the inherent value of TK*
- (iii) *Protection to promote creativity and innovation*
- (iv) *Respect prior informed consent*

C: ECONOMIC OBJECTIVES

- (i) *Promote economic and social development*
- (ii) *Acknowledgement of custodianship, ownership and property rights*
- (iii) *Equitable sharing of benefits*
- (iv) *Protection against misappropriation*

D: REFRAMING THE IP SYSTEM

- (i) *Consideration of other international instruments*
- (ii) *Development of new forms of IP*
- (iii) *Shaping sui generis systems*
- (iv) *Recognition of customary law*

E: FURTHER CONSIDERATIONS IN SHAPING OBJECTIVES OF PROTECTION

- (i) *Building the form and nature of protection on the policy objectives*
- (ii) *The social context and impact on communities*
- (iii) *Objectives concerning the role of the State*

The comments on objectives are grouped into a category of general positions on the purpose of protection category, and into more specific categories concerning political and moral rights, economic objectives, and objectives touching on reframing the intellectual property system. A final category grouped together comments on broader considerations considered relevant to the objectives of protection, including weighing the social context and the impact of protection on traditional and local communities, and clarifying the appropriate role of the State in the protection of TK.

The moral rights, political and economic objectives clearly showed considerable overlap, and the categories were established only for ease of reference, bearing in mind that political objectives may have economic implications and *vice versa*. The moral rights or political objectives including showing respect for and acknowledging TK holders, acknowledging the inherent value of TK, promoting creativity and innovation, and respecting the principle of prior informed consent. The category of broadly economic objectives included promoting economic and social development, acknowledging custodianship, ownership and property rights, the equitable sharing of benefits, and protection against commercial misappropriation of TK. Comments directed at reframing the IP system included considering how other international instruments and areas of public international law should impact on IP law, developing new forms of IP that were better adapted to TK subject matter, and the recognition of the customary law of the communities who hold TK.

A: General positions

China

“...the objective includes both economic rights and moral rights. And the content of the part I, Policy Objectives, in the current draft, could be a basis for the discussion on this issue.”¹⁴⁶

International Chamber of Commerce (ICC)

This is the key issue upon which consensus is needed, since it will determine what knowledge should be protectable and the substance of rights and exceptions. Both moral and economic rights may be capable of protection, provided the protection sought is proportionate.¹⁴⁷

Latvia

As we understand the protection through intellectual property rights mainly is sought for economic reasons in a form of some kind of remuneration. Obligation to accord moral rights in a form of acknowledgment of the origin of TK could be auxiliary.¹⁴⁸

Russian Association of Indigenous Peoples of the North (RAIPON)

Moral and economic objectives.¹⁴⁹

European Community

“Traditional knowledge is not initially created in order to be exploited and so reach as broad a public as possible (which could be said to be the *raison d’être* of copyright and other IP-rights). TK was originally intended solely for the community from which it originated and whose traditions and beliefs it embodies.

Some TK is even of a secret nature, transmitted from generation to generation through certain members of the community. Thus, any damage caused by exploitation of such knowledge against the will of the community is not necessarily of an economic, but could be rather a moral nature. Therefore, at least at first sight, moral rights appear capable of assuring a satisfactory protection of these non-economic interests. However, and contrary to Traditional Cultural Expressions, the link between TK and biodiversity, established under the CBD and the Bonn Guidelines, indicate that economic rights objectives are also relevant...”¹⁵⁰

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

The proposed objective should include both economic and moral rights. We favour the legal formula of rights of remuneration relating to public communication, fixation, reproduction, etc., collectively managed either through the community itself, as the sole

¹⁴⁶ WIPO/GRTKF/IC/11/5(a)

¹⁴⁷ WIPO/GRTKF/IC/11/5(a)

¹⁴⁸ WIPO/GRTKF/IC/11/5(a)

¹⁴⁹ WIPO/GRTKF/IC/11/5(a)

¹⁵⁰ WIPO/GRTKF/IC/11/5(a)

holder of the rights, or through effective collective rights administration organizations.¹⁵¹

International Publishers Association (IPA)

“...with respect to TCEs/EoF, the primary focus should be put on the protection of moral rights. Overall, publishing TCEs/EoF is not a highly profitable business, despite the anecdotal evidence that points to the exceptional cases, rather than the typical publishing enterprise.

The focus of any policy in this area must be to incentivise more publishing, not to add costs or commercial uncertainty to an already risky publishing venture. Prescribed economic rights would add to such risks, and disincentivise publishers further from publishing in this area.”¹⁵²

Nicaragua

As regards economic rights, the exclusive nature of the exploitation of said knowledge must be guaranteed, as well as the right to authorize or prohibit said exploitation, while moral rights are collective (regional or community) rights.¹⁵³

India

“...TK had for long been misappropriated and misused in various ways. Therefore, the first and foremost objective of the IP protection for TK was to prevent such misappropriation, whether it was for commercial or non-commercial activities. Conservation and preservation of TK should also be a major objective. Other objectives could be: (i) empowerment of the holders of TK; (ii) ensuring PIC by the holders before others are permitted use of the TK; (iii) promoting fair and equitable sharing and distribution of monetary and non-monetary benefits arising from the use of TK; (iv) facilitating the continuing customary use, development, exchange and transmission of TK by and between TK holders; and (v) encouraging, rewarding and protecting tradition-based creativity and innovation. In fact, the whole TK could not be evaluated in monetary terms and most of the time TK holders wanted their moral rights to be acknowledged and not be infringed. Hence, it was both the economic and moral rights that were to be protected as a means of rewarding the holders of TK.”¹⁵⁴

Algeria on behalf of the African Group

“...Article 6 in WIPO/GRTKF/IC/11/5(c) was a good basis for discussion on the objectives of IP protection for TK and should also include the following: to prevent the misappropriation; to recognize and promote upon knowledge holders the right to exploit their TK; to prohibited unauthorized exploitation and dissemination of protected TK without the PIC of the knowledge holders; to regulate access to a biological resources and associated TK; to promote equitable benefit sharing arising from the use of GR and

¹⁵¹ WIPO/GRTKF/IC/11/5(a)

¹⁵² WIPO/GRTKF/IC/11/5(a)

¹⁵³ WIPO/GRTKF/IC/11/5(a) Add.

¹⁵⁴ WIPO/GRTKF/IC/11/15 Prov.

its associated TK; to ensure that the IP system was compatible with provisions of international instrument governing access to and use of TK especially in regards to PIC, access to benefit sharing and disclosure of origin and then to promote creativity and innovation based on TK and practice towards a sustainable development...”.¹⁵⁵

Indonesia

“...it was clear that the objectives which were sought to be achieved according to the IP Protection, without prejudice to the possibility of granting protection to TK via *sui generis* systems, was the realization of both moral and economic rights. When talking about economic rights in this particular subject, it was not limited to cash money, but the revenue could be in different form that would generate the prosperity of the communities. This should be facilitated by the existing IP regime and also in the spirit of respecting national law...”.¹⁵⁶

Thailand

“...the objective of the protection of TK should contribute to the maintenance, conservation, preservation and safeguarding of TK as well as the acknowledgement and recognition of the TK holders. Legitimate rights, both economic and moral should be accorded to the beneficiaries of protection of TK. In case of economic rights the access and the use of TK beyond traditional context required PIC from local or traditional community. In addition, the fair and equitable sharing of benefit for such access and use should be guaranteed for further conservation, preservation and transmission of TK by local or traditional community.

Regarding moral rights the holders of TK should be duly recognized as originators of custodians for TK and they should have the right to prohibit any distortion or derogatory modification that would cause any damages or undermine the moral and human rights as regards the spiritual values of their TK.”¹⁵⁷

Nigeria

“...stated the primary objective, economic and moral, of the present effort was to better secure TK from misappropriation and misuse and to recognize the rights of local communities to control access to their TK.”¹⁵⁸

Kyrgyz Republic

The objective of traditional knowledge protection is to protect, contribute to maintenance and broad use of thereof in different fields of human activities and to use in industrial production and to further commercialize subjects created on its base.¹⁵⁹

¹⁵⁵ WIPO/GRTKF/IC/11/15 Prov.

¹⁵⁶ WIPO/GRTKF/IC/11/15 Prov.

¹⁵⁷ WIPO/GRTKF/IC/11/15 Prov.

¹⁵⁸ WIPO/GRTKF/IC/11/15 Prov.

¹⁵⁹

B: Political and moral rights objectives

(i) *Respect and acknowledge the TK holders*

Brazil

“...Promote respect

- promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge holders; and for the contribution which traditional knowledge holders have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology;

Meet the actual needs of holders of traditional knowledge

- be guided by the aspirations and expectations expressed directly by traditional knowledge holders, 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 to the progress of science and socially beneficial technology;...”

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

- 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;...”

“...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 values of its holders...”

“...Preclude the grant of improper IP rights to unauthorized parties

- 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 have been complied with in the country of origin;...”

“...Legal means should be available to provide remedies for traditional knowledge holders 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...”¹⁶⁰

Ghana

The objective for the protection of Traditional Knowledge as provided in document GRTKF/9/INF/5 is too limited. It is true that some researchers, extractors and innovators who come by traditional knowledge, most often misappropriate this knowledge. The source of the information is not acknowledged and little or no financial benefit ensure to the owners or holders of the knowledge from the exploitation of the traditional knowledge. Misappropriation should not be the only basis or objective for the protection of traditional knowledge. It is necessary to expand the objectives for the protection of traditional knowledge.¹⁶¹

Guatemala

Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states:

Respect for the intangible cultural heritage of communities, groups and individuals as to the awareness, at the local, national and international level, of the importance of the intangible cultural heritage, and for their reciprocal recognition.

Safeguarding means the measures designed to guarantee the viability of the intangible cultural heritage, including identification, documentation, research, preservation, protection, promotion, enhancement and transmission, basically through formal and informal education, and the revitalization of the various aspects of the heritage.¹⁶²

Japan

“...There is another opinion that traditional knowledge should be protected as a moral right, in consideration of values that have long been fostered in an indigenous population or local community. If moral rights protection is made applicable to traditional knowledge, right holders should be protected against any acts infringing their moral rights. However, the scope of such acts has yet to be clearly defined. For serious moral right infringements, protection under the Civil Code or other general laws may be applicable even if no IP right protection is available...”¹⁶³

South Africa

“...That no distortion of the expression in a manner prejudicial to honor, dignity or cultural interest of the indigenous and local community...”¹⁶⁴

¹⁶⁰ WIPO/GRTKF/IC/11/5(a)

¹⁶¹ WIPO/GRTKF/IC/11/5(a)

¹⁶² WIPO/GRTKF/IC/11/5(a)

¹⁶³ WIPO/GRTKF/IC/11/5(a)

¹⁶⁴ WIPO/GRTKF/IC/11/5(a)

Sudan

“...It was in fact necessary to protect TK. A binding international instrument was needed as it was the best way of protecting and preserving the dignity of the holders of TK. TK was essential, it led to the building of bridges between the holders of TK and new knowledge...”¹⁶⁵

OPDP

The representative of OPDP agreed with the policy objectives in WIPO/GRTKF/IC/11/5(b) and that the concrete objectives should safeguard the interest and values of the indigenous people. This should be borrowed from ILO convention 169 that encouraged the right to self-determination i.e. the right to use, control and manage the TK.¹⁶⁶

(ii) *Acknowledge the inherent value of TK*

Brazil

“Recognize value

- recognize the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, 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;

“...Promote conservation and preservation of traditional knowledge

- promote and support the conservation and preservation of traditional knowledge by 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;...”

“...Support traditional knowledge systems

- respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;

Contribute to safeguarding traditional knowledge

- 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 traditional knowledge holders, for the primary and direct

¹⁶⁵ WIPO/GRTKF/IC/11/15 Prov.

¹⁶⁶ WIPO/GRTKF/IC/11/15 Prov.

benefit of traditional knowledge holders in particular, and for the benefit of humanity in general;...”

“...Enhance transparency and mutual confidence

- 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;

Complement protection of traditional cultural expressions

- operate consistently with protection of traditional cultural expressions and expressions of folklore, respecting that for many traditional communities their knowledge and cultural expressions form an indivisible part of their holistic identity.” ...¹⁶⁷

South Africa

“...for IP protection to transpire it should be compatible with and supportive of a wide range of policy objectives related to the protection and conservations of IK, including: the establishment of legal certainty regarding rights in IK, the survival of indigenous cultures – which translates into matter of survival as an Indigenous people and as a community, the recognition of customary laws and practices governing IK, the recognition of customary laws and protocols that govern the creation, transmission, reproduction and utilization of IK, the repatriation of cultural heritage, and the recording, maintenance, protection and promotion of oral tradition Behaviour – unacceptable.”¹⁶⁸

Tunisia

“Traditional knowledge in Tunisia is the subject of sustained political attention and undergoes change in the approach applied to its development. Today traditional knowledge is perceived as an element with rich potential for human and economic resources that must be exploited as part of an overall approach.

The Ministry of Culture and heritage Protection in Tunisia is the reference partner in this policy of enhancing ancestral knowledge.

The objectives of the action undertaken to protect intellectual property are as follows:

The safeguarding of the memory of a nation and its identity.

The creation of employment at reduced cost.

Promotion and enhancement...”

“...The enhancement of regional and local resources.

The sustainable development of such knowledge as an indicator of the specific nature of a nation in the process of globalization”¹⁶⁹

¹⁶⁷ WIPO/GRTKF/IC/11/5(a)

¹⁶⁸ WIPO/GRTKF/IC/11/5(a)

¹⁶⁹ WIPO/GRTKF/IC/11/5(a)

New Zealand

“Prevent misappropriation, misuse, and misrepresentation of TK and TCEs by providing communities with the means to control the ways in which TK and TCEs are used beyond the customary and traditional context...”¹⁷⁰

Norway

“...By providing protection one also secures recognition and respect of the intrinsic value of traditional knowledge...”¹⁷¹

(iii) Protection to promote creativity and innovation

Brazil

“...Promote innovation and creativity
- 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 traditional knowledge holders, by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge;...”¹⁷²

United States of America

“The broadest overall objective of providing intellectual property rights is to promote creativity and innovation. The WIPO Convention provides that the primary objective of WIPO is to “promote the protection of intellectual property.” The 1974 Agreement between the UN and the WIPO recognizes that WIPO is the specialized agency to “promote creative intellectual activity.” Existing systems of intellectual property protection may be used or adapted to address specific concerns related to TK, including both economic and non-economic concerns to meet the actual needs of communities.

Over the last several sessions, with the strong support of the IB, the IGC has made substantial progress in identifying and articulating a wide range of specific policy objectives for the protection, preservation and promotion of TK. To name just a few of these policy objectives, the IGC has underscored the importance of promoting an environment of respect for TK, contributing to the preservation and safeguarding of TK, and encouraging, rewarding, and protecting authentic tradition-based creativity and innovation...”¹⁷³

New Zealand

“...Ensure the recognition of the contribution to innovation and creativity that TK and TCEs holders make – moral right of acknowledgement (from whom and from where?)

¹⁷⁰ WIPO/GRTKF/IC/11/5(a) Add.

¹⁷¹ WIPO/GRTKF/IC/11/5(a) Add.2

¹⁷² WIPO/GRTKF/IC/11/5(a)

¹⁷³ WIPO/GRTKF/IC/11/5(a)

Ensure proper attribution of rights through recognition of TK and TCEs contributions to creative endeavors...¹⁷⁴

(iv) *Respect prior informed consent*

Brazil

Ensure prior informed consent and exchanges based on mutually agreed terms

- ensure prior informed consent and exchanges based on mutually agreed terms, in coordination with existing international and national regimes governing access to genetic resources;

“Article 7

Principle of prior informed consent

1. The principle of prior informed consent should govern any access of traditional knowledge from its traditional holders, subject to these principles and relevant national laws.
2. The holder of traditional knowledge shall be entitled to grant prior informed consent for access to traditional knowledge, or to approve the grant of such consent by an appropriate national authority, as provided by applicable national legislation.
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 traditional knowledge holders; 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.”¹⁷⁵

Russian Association of Indigenous Peoples of the North (RAIPON)

Use of traditional knowledge for commercial purposes without the voluntary and conscious consent of its holders.¹⁷⁶

South Africa

“...Disrespect/denigration

In concert with our proposal on access and benefit sharing regulations we support the inclusion of the following text to this sub-section, “Failure to obtain prior informed consent- unauthorized usage”.

We are steadfast in our stance that any person who without the prior informed consent of the community uses knowledge, an innovation or a practice in a manner inconsistent with our propose access and benefit sharing regulations...”¹⁷⁷

Norway

¹⁷⁴ WIPO/GRTKF/IC/11/5(a) Add.

¹⁷⁵ WIPO/GRTKF/IC/11/5(a)

¹⁷⁶ WIPO/GRTKF/IC/11/5(a)

¹⁷⁷ WIPO/GRTKF/IC/11/5(a)

“...Furthermore, protection should seek to: ... ensure prior informed consent and exchanges based on mutually agreed terms...”¹⁷⁸

Mexico

“...the substantive provisions contained in WIPO/GRTKF/IC/11/5(c) were a good basis to continue the discussions within this Committee. It pointed out once again that PIC was a *sine qua non* for the access of TK providers...”¹⁷⁹

C: Economic objectives

(i) *Promote economic and social development*

Brazil

“...Promote community development and legitimate trading activities

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 traditional knowledge holders seek such development and opportunities consistent with their right to freely pursue economic development;...”¹⁸⁰

Ghana

“...To encourage collection, storage, collation, retrieval and use of traditional knowledge

To facilitate research extraction and development rights in traditional knowledge. To make same available for the benefit of mankind...”¹⁸¹

Japan

“There is an opinion that IP right protection should be extended to traditional knowledge considering its industrial value. This opinion, however, does not clearly contain or identify any justifiable reason why traditional knowledge is eligible for such protection. If the purpose of the protection of traditional knowledge is to correct the inequities in economic development to ensure sustainable development of certain communities by providing a new financial resource, discussion should be conducted as to whether the protection of traditional knowledge is an appropriate way to achieve these purposes.

¹⁷⁸ WIPO/GRTKF/IC/11/5(a) Add.2

¹⁷⁹ WIPO/GRTKF/IC/11/15 Prov.

¹⁸⁰ WIPO/GRTKF/IC/11/5(a)

¹⁸¹ WIPO/GRTKF/IC/11/5(a)

Currently, the main purposes of an IP protection system are to (i) give incentive to creators by protecting their creations and (ii) vitalize industries and society. In this context, the right for protection should be valid for only a limited period of time to encourage use by third parties for further development and to secure the balance between the interests of right holders and public interests. However, it might be problematic to enable only a certain generation to enjoy the benefits derived from traditional knowledge that has long been passed down. Moreover, there will be no financial incentive for the generations after the expiration of the IP right to maintain and pass down the traditional knowledge. On the other hand, from the viewpoint of public interests, it is also inappropriate to grant an IP right that will stay valid forever...¹⁸²

South Africa

“Some, but not all, of our concerns would be met by the recommendations set out by the below mentioned objectives for intellectual property protections. Hence we support the introduction of: Sustainable development; Preservation. Within this context we draw attention to the fact IP protection should be distinguished from the concepts of ‘preservation’ and ‘safeguarding’. By contrast safeguarding in the context of cultural heritage refers generally to the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability. Promotion. We are of the view that the recognition and promotion of IP protection for contemporary creativity can in turn support such economic development. We note that there now appears to be wide recognition that IP protocols have the ultimate objective of enhancing social welfare. Hence the potential socio-economic benefit needs to be emphasized. Social cohesion Prevent misappropriation/ abuse Protect against Unauthorised use of existing IPR. We endorse the comments subsumed in draft objectives WIPO 10/5 Pg 3-5...¹⁸³

(ii) Acknowledgement of custodianship, ownership and property rights

Ghana

1. To acknowledge ownership of traditional knowledge
2. To protect the rights of the owners...¹⁸⁴

Eurasian Patent Office (EPO)

“...It should promote fair benefit sharing arising from the use of TK. Realization of rights of TK holders includes right of TK disclosure and use, the right to make profits, the right to claim authorship and to be named, right to prevent distortion, abusive or erroneous use. The means of TK protection shall depend on the way the subject matter for protection shall be determined.”¹⁸⁵

¹⁸² WIPO/GRTKF/IC/11/5(a)

¹⁸³ WIPO/GRTKF/IC/11/5(a)

¹⁸⁴ WIPO/GRTKF/IC/11/5(a)

¹⁸⁵ WIPO/GRTKF/IC/11/5(a)

Intellectual Property Owners Association (IPO)

“...Alternatively, holders of TK may determine that they wish to continue to maintain their TK as a trade secret, or to develop or otherwise commercialize their TK without according any rights to third parties. They may even choose to develop their TK into a patented invention, thereby using the patent system to generate greater public benefit as well as revenues.”¹⁸⁶

(iii) *Equitable sharing of benefits*

Brazil

“...Promote equitable benefit-sharing

- promote the fair and equitable 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;...”

“... “Article 6

Fair and equitable benefit-sharing and recognition of knowledge holders

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.

Use of traditional knowledge for non-commercial purposes need only give rise to non monetary benefits, such as access to research outcomes and involvement of the source community in research and educational activities...”¹⁸⁷

Ghana

“...To guarantee adequate remuneration to the beneficiaries...”¹⁸⁸

Intellectual Property Owners Association (IPO)

“The fair and equitable sharing of benefits arising from the use or commercialization of TK must necessarily allow for access to such TK (WIPO/GRTKF/IC/3/8). The ability to license, or otherwise transfer, rights in protected TK is a necessary objective. License fees or royalties are possible forms of consideration and may be fairly based on the relative contribution of the TK to the final commercialized product...”¹⁸⁹

¹⁸⁶ WIPO/GRTKF/IC/11/5(a)

¹⁸⁷ WIPO/GRTKF/IC/11/5(a)

¹⁸⁸ WIPO/GRTKF/IC/11/5(a)

¹⁸⁹ WIPO/GRTKF/IC/11/5(a)

Eurasian Patent Office (EPO)

“Introduction of TK legal protection aimed at prevention of TK misappropriation and use, will promote preservation of TK and equitable benefit sharing of TK between holders...”¹⁹⁰

New Zealand

“...Promote fair and equitable management and sharing of benefits (economic or otherwise) flowing from the use of TK and TCEs...”¹⁹¹

Norway

“...Promote equitable benefit-sharing...”¹⁹²

South Africa

“...The range of the overall protection of the social and cultural communities from which the IK emerges recognizing IK as a knowledge system, the rights of the holders of such knowledge must be guaranteed – e.g. against appropriation from outside the community, and to issues of fairness and justice in benefit sharing...”¹⁹³

(iv) Protection against misappropriation

Brazil

“Considering that work of the Committee is circumscribed by WIPO’s mandate, one specific objective that must be addressed is the setting out of measures aimed at preventing and curbing the misappropriation of TK by the granting of IPRs...”

“...Repress unfair and inequitable uses

- repress 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...”¹⁹⁴

The Ogiek Community

The objectives sought to be achieved in IPR through protection of TK need to be approached from the best practices and mechanism put in place to ensure the role of tradition knowledge systems have been protected and transmitted to the next generations. Through the tradition knowledge TK products like honey, arrow etc., the locals earns income hence improve their livelihoods. Any behaviour that exposes the TK to non-TK holders should be prohibited and unaccepted. WIPO committee needs to entrench limitation to prevent exploitation and misuse of TK by non-holders.¹⁹⁵

¹⁹⁰ WIPO/GRTKF/IC/11/5(a)

¹⁹¹ WIPO/GRTKF/IC/11/5(a) Add.

¹⁹² WIPO/GRTKF/IC/11/5(a) Add.2

¹⁹³ WIPO/GRTKF/IC/11/5(a)

¹⁹⁴ WIPO/GRTKF/IC/11/5(a)

¹⁹⁵ WIPO/GRTKF/IC/11/5(a)

South Africa

“...Misappropriation

We are of the view that any acquisition or appropriation of IK/TCE/GR by unfair or illicit means constitutes an act of misappropriation. We further propose that any commercial benefit derived from the use of IK/TCE/GR contrary to any honest practice that gains inequitable monetary advantage constitutes misappropriation.

This is also applicable to person/s accessing the knowledge that knows or is negligent in failing to know. Regarding text 10/4 we query protection against the misappropriation of TK. Our particular concern regards:

What is fair use and what is misappropriation? Is the public domain legitimate?

Distortion We are concerned at the rampant manipulation and distortion of IK/TCE/GR. Given the nature of IK/TCE/GR the presentation of indigenous cultural material in a manner of promoting integrity requires careful consideration...”¹⁹⁶

European Community

“...the objective of the protection of TK should be a means of securing the diversity of TK and maintaining it for future generations. . It should be focused on the protection against misappropriation of TK. Existing international and national laws already contain rules against misappropriation of related intangible rights such as geographical indications.

We believe that in order to establish an appropriate balance between interests of TK holders and third parties the function of the concept of a public domain in respect of TK needs to be well analysed...”¹⁹⁷

Switzerland

The purpose of an intellectual property right is to some extent to act as a right of defense. The right owner may prohibit third parties from using the protected property for industrial purposes. Use can be understood as manufacture, storage, supply, circulation, import, export, transit and possession for these purposes. The owner can also forbid third parties from participating in, promoting or facilitating illicit use. That does not mean that the owner may sell his protected property without condition, as there may be additional sale rules relating to the marketing of the product concerned. It may be useful to recall that existing intellectual property rights are territorial rights, in the sense that they are limited geographically by the State which has granted the right of protection.¹⁹⁸

Tunisia

“...The preservation and protection of traditional knowledge in order to prevent its exploitation and unlawful commercial and non-commercial use...”¹⁹⁹

¹⁹⁶ WIPO/GRTKF/IC/11/5(a)

¹⁹⁷ WIPO/GRTKF/IC/11/5(a)

¹⁹⁸ WIPO/GRTKF/IC/11/5(a)

¹⁹⁹ WIPO/GRTKF/IC/11/5(a)

Norway

- “...the main objectives of protection in regard of traditional knowledge are:
- to prevent misappropriation
 - to preclude the granting of unauthorized IP rights...”²⁰⁰

D: Reframing the IP system

(i) *Consideration of other international instruments*

Brazil

“...Particular attention should be given to the need to render the IP system compatible with the relevant provisions of other international instruments that govern access to TK, such as the Convention on Biological Diversity. Accordingly, discussions on the issue should ensure that the granting of IPRs related to traditional knowledge is contingent upon compliance with the requirements of prior informed consent and benefit-sharing, by demanding that IP applications disclose evidence to that effect...”

“...Respect for and cooperation with relevant international agreements and processes (WIPO/GRTKF/IC/10/5)

- take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit-sharing from genetic resources which are associated with that traditional knowledge;...”²⁰¹

(ii) *Development of new forms of IP*

China

“As we understand the “intellectual property” mentioned above would not be limited to the existing systems, but also include the new systems related that may come into being in the future...”²⁰²

South Africa

“...Contrary to Constitution / domestic legislation / international instruments / human rights South Africa has a bundle of legislation that seeks to protect IK/TCE/GR hence we are the view that any violation of these pieces of legislation will constitute behaviour, which is unacceptable...”²⁰³

²⁰⁰ WIPO/GRTKF/IC/11/5(a) Add.2

²⁰¹ WIPO/GRTKF/IC/11/5(a).

²⁰² WIPO/GRTKF/IC/11/5(a).

²⁰³ WIPO/GRTKF/IC/11/5(a).

(iii) *Shaping sui generis systems*

Brazil

“...Also, since the issue is being discussed within the framework of WIPO, the Committee should examine possible “positive” measures necessary to ensure protection of TK under existing categories of intellectual property rights that respect the specific features of the former, and without prejudice to the possibility that Members may decide to accord protection to TK via “sui generis” systems.

In this respect, along with draft Articles 6 and 7, the draft objectives proposed in document WIPO/GRTKF/IC/10/5, transcribed below, represent adequate basis to discuss the issue, in particular objective number (xiv) – Preclude the grant of improper IP rights to unauthorized parties - that touches more directly upon WIPO’s competences:...”²⁰⁴

Colombia

The systems of *sui generis* protection of traditional knowledge could recognize both the economic rights and moral rights of the owners of said knowledge insofar as it would be a *sui generis* instrument that would not be subject in the strict sense of the term to the requirements of the system of intellectual property rights as it is currently established. This is in line with all the objectives proposed by the Intergovernmental Committee at the seventh and eight sessions (document WIPO/GRTKF/IC/8/5).²⁰⁵

(iv) *Recognition of customary law*

Brazil

“...Customary laws within local communities may play an important role in sharing benefits that may arise from the use of traditional knowledge...”²⁰⁶

New Zealand

“...Foster and encourage more respectful practices by individuals and organisations who wish to use TK and TCEs, in accordance with customary laws and protocols associated with TK and TCEs.
Strengthen and recognise the application of customary laws and protocols in relation to TK and TCEs...”

“...Recognise collective responsibilities associated with TK and TCEs. Although the law currently recognises economic and some moral rights held by the individual descendants from the tipuna (ancestors) who translate the mātauranga (Māori knowledge) into traditional cultural expressions, those individual creators are seen by some Māori as simply being a vehicle of expression of TK. They consider that the customary rights in relation to TK and TCEs are first and foremost collective rights,

²⁰⁴ WIPO/GRTKF/IC/11/5(a).

²⁰⁵ WIPO/GRTKF/IC/11/5(a).

²⁰⁶ WIPO/GRTKF/IC/11/5(a).

with an individual expression. The customary collective dimension of the rights should be recognised in IPRs systems...²⁰⁷

E: Further considerations in shaping objectives of protection

(i) *Building the form and nature of protection on the policy objectives*

Australia

“...the key initial step in the development of any approach to the protection of TK as it intersects with IP, 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 articulates the intended objectives of the protection that appropriate tools to achieve those objectives can be developed. It is noted that a wide range of policy tools may need to be developed to achieve the policy objectives arising out of the many contexts of TK. Such an approach may be preferable to a ‘one-size-fits-all’ approach. Members States should be free to choose to implement those policy tools that are particular relevance to their situations. It is important that any new measures developed to protect TK should be consistent with, and complementary to, existing IP regimes...”²⁰⁸

Canada

Prior to determining whether IP protection or *sui generis* protection should be provided for TK and whether it should take the form of an economic or a moral-based right, Member States must agree on the objectives for according protection to TK. A consensus on the objectives may also inform a discussion on whether existing mechanisms can be used. In the meantime, it is important that maximum flexibility be maintained in order that the varying legal traditions of Member States are respected. Communities may have different objectives when seeking to “protect” their TK such as preservation, promoting diversity, and promoting creativity and innovation. In this context, there has been a growing consensus among a number of delegations that the prevention of “misappropriation” should be the main or core objective. Canada has stated that it shares in the concern regarding the prevention of “misappropriation” and misuse of TK. It also agrees that the term “misappropriation” is a complex term and a number of Members have pointed out that “misappropriation” can mean different things to different people. At the same time, the manner in which the IGC defines its common objective in the context of TK should take into account how such an objective may impact on users and the broader public interest, in particular, where IP may impact other important policy initiatives.²⁰⁹

²⁰⁷ WIPO/GRTKF/IC/11/5(a) Add.

²⁰⁸ WIPO/GRTKF/IC/11/5(a) Add.

²⁰⁹ WIPO/GRTKF/IC/11/5(a) Add.

(ii) *The social context and impact on communities*

Australia

“...Australia acknowledges the importance of addressing the issues of respecting, conserving and preserving traditional knowledge and acknowledges that TK issues must be addressed taking into account their whole context. However, this does not necessarily mean that all issues of the intersection of TK and IP must be treated in the same way or with the same priority. In the light of the extensive and very useful work of the IGC to date it may now be beneficial to focus deliberation and analysis on specific priority examples of inappropriate use of TK. In this way areas of particular concern, that are considered to have the most serious adverse impacts on communities now, could be studied intensively by WIPO and the full range of policy options to address those issues analysed...”²¹⁰

(iii) *Objectives concerning the role of the State*

Indonesia

“...Regarding the role of State, it believed that the State may also play a role as a facilitator in regulating the economic rights of the communities. In line with this, the Delegation was of the view that the objectives set out in WIPO/GRTKF/IC/11/5(c) were a good basis for discussion.”²¹¹

²¹⁰ WIPO/GRTKF/IC/11/5(a) Add.

²¹¹ WIPO/GRTKF/IC/11/15 Prov.

ISSUE IV: WHAT FORM OF BEHAVIOUR IN RELATION TO THE PROTECTABLE
TRADITIONAL KNOWLEDGE SHOULD BE CONSIDERED UNACCEPTABLE/
ILLEGAL?

- A. GENERAL POLICY CONSIDERATIONS
- B: DIFFERENT FORMS OF ILLEGAL/UNACCEPTABLE BEHAVIOURS
 - (i) *Forms of unfair commercial use*
 - (ii) *Derogatory or offensive use*
 - (iii) *Misleading or deceptive practices*
 - (iv) *Misappropriation of TK*
 - (v) *Impairing recognition of communities' rights*
- C: FACTORS TO BE CONSIDERED FOR ILLEGALITY OR UNACCEPTABILITY
 - (i) *Prior informed consent*
 - (ii) *Failure to share benefits equitably/ unfair enrichment*
 - (iii) *Failure to acknowledge origin or source*
 - (iv) *The grant of invalid IPRs*
- D: APPLICATION OF EXISTING LEGAL INSTRUMENTS
- E: LIMITATIONS ON DEFINITIONS OF ILLEGAL BEHAVIOUR

In discussing those acts that should be constrained by TK protection, the comments covered a range of general policy considerations, including the scope of the term 'misappropriation' and the reference to unacceptable behaviour. Specific forms of illegal or unacceptable behaviour identified in the comments included unfair commercial usage, derogatory or offensive use, misleading or deceptive practices relating to TK, and the misappropriation of TK. The comments also pointed to the question of impairing the recognition of communities' rights relating to TK. Comments set out specific factors that may be weighed in assessing whether acts are illegal or unacceptable, such as breach of prior informed consent arrangements, the failure to share benefits equitably or other forms of unjust enrichment, the failure to acknowledge origin or source of TK, and the grant of invalid IPRs based on TK.

Comments reviewed the application of existing legal instruments in setting the bounds for illegal acts, and pointed to policy considerations that may set bounds or limitations on those forms of behaviour that may be considered illegal or unacceptable.

<u>A. General policy considerations</u>

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

In general, any form of appropriation, in the broad sense of this concept, which can be reflected in specific civil, administrative or criminal provisions.

In general, the looting to which peoples and communities are subject by third parties must be avoided, which logically implies intellectual property protection and knowledge thereof, with relevant registrations designed to produce an inventory/register in relation to third parties.²¹²

²¹² WIPO/GRTKF/IC/11/5(a)

International Publishers Association (IPA)

“IPA is concerned by the introduction of the notion of “unacceptability” in the ongoing discussions. “Unacceptability” is not a legal term and means different things to different people. IPA recommends the use of clear and unambiguous terms throughout the ongoing discussions...”²¹³

United States of America

“The IGC has made considerable progress in identifying specific forms of behaviour regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities relating to TK. Discussion in the IGC has identified a number of specific behaviors that are regarded as unacceptable or illegal, sometimes broadly called “misappropriation.” However, there continues to be significant divergence between members about what types of activity or behavior is included within this term. The draft Policy Objectives contained in document WIPO/GRTKF/IC/10/5 include the objective to “repress the misappropriation of traditional knowledge and other unfair commercial and non-commercial activities, recognizing the need to adapt approaches for repression of misappropriation of traditional knowledge to national and local needs.” In that light, convergence on the draft Policy Objectives would still appear to be an important first step to addressing the concerns raised in the IGC.

Paragraph 18 of document 7/5 sets forth a number of specific aspects of misappropriation that have been addressed by the Committee in the context of TK, including:

- (a) acquiring invalid IP rights over TK;
- (b) acquiring TK in violation of prior informed consent; and
- (c) acquiring or using TK contrary to honest practices or for inequitable benefit, such as through failing to share benefits equitably.

Further, a number of the concerns raised with respect to TCEs/EoF’s that are noted in that section of our comments would also be applicable in this context...”²¹⁴

Canada

Communities and individuals around the world have historically drawn upon and co-mingled materials, ideas and other aspects of culture from one another. In many instances these actions may be considered positive acts of “appropriation” for which individuals and communities do not express concerns. However, there may be cases where individuals and communities may view such acts in relation to TK as “misappropriation”.

There has been a growing consensus among a number of delegations that the prevention of “misappropriation” should be the main or core objective. Canada has stated that it shares the concern regarding the prevention of “misappropriation” and misuse of TK. It also agrees that the term “misappropriation” is a complex term, and a number of Member States have pointed out that “misappropriation” may mean different things to different people. At the same time, how the IGC defines its common objective in the context of TK should take into account how such an objective may impact on users and

²¹³ WIPO/GRTKF/IC/11/5(a)

²¹⁴ WIPO/GRTKF/IC/11/5(a)

the broader public interest. If “misappropriation” is to be the primary focus of the future work of the IGC, then more work should be directed at achieving a consensus as to what specific forms of behavior in relation to TK constitute “misappropriation”.²¹⁵

Kyrgyz Republic

Any forms of illegal use of traditional knowledge and illegal patenting of subjects created on the base of traditional knowledge shall be considered illegal.²¹⁶

Amatau Yuyay

“...history could not be divided into eleven years after the beginning of the discussions of the IGC. Five hundred years before these discussions, there had been a systematic unacceptable and illicit attitude which had been against the indigenous peoples. He asked whether with issue No. 4, one was trying to repair injury caused by misappropriation of TK in past years or whether there was an attempt to put an end to these unacceptable behavior?”²¹⁷

B: Different forms of illegal/unacceptable behaviours
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(i) *Forms of unfair commercial use*

Guatemala

Model Provision for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, (WIPO/GRTKF/IC/2).

Commercialization on a global scale without due respect for the cultural and economic interests of the communities in which they originated and without the peoples who are the authors receiving any share of the benefits of such exploitation.²¹⁸

Nicaragua

Individual exploitation and commercialization and variation in the processes of preparation or production that do not comply with the transmission of said knowledge and which are designed for large-scale exploitation by companies from outside the community.²¹⁹

²¹⁵ WIPO/GRTKF/IC/11/5(a) Add.
²¹⁶

²¹⁷ WIPO/GRTKF/IC/11/15 Prov.

²¹⁸ WIPO/GRTKF/IC/11/5(a)

²¹⁹ WIPO/GRTKF/IC/11/5(a) Add.

Norway

“...Adequate and effective protection should be given against misappropriation and unfair use such as use against honest practices in cultural, industrial or commercial matters...”²²⁰

(ii) *Derogatory or offensive use*

Brazil

“...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 order public or morality. (WIPO/GRTKF/IC/10/5, Article 1)...”²²¹

Colombia

“...Wilful offensive use of traditional knowledge of moral or spiritual value.
False or misleading representations that a product or service is related to the community possessing the traditional knowledge (may be dealt with under Article 10bis of the Paris Convention on unfair competition law). (WIPO/GRTKF/IC/9/5) and (WIPO/GRTKF/IC/10/5, Article 1)...”²²²

Ghana

“Unauthorized collection of traditional from the right owners.
Non acknowledge of the rights of the owners or holders of the Traditional Knowledge...”
“...Publishing the protected information without the authorization nor observance of the moral right in the traditional knowledge...”²²³

New Zealand

“...Use of TK and TCEs in a way that is insulting, degrading, culturally or spiritually offensive.
Manufacture, importation/exportation and/or sale of fake traditional souvenirs as ‘indigenous’ or ‘authentic’ and the misrepresentation of TK and TCEs in terms of its integrity; or the attempt to associate and market products or services in a fashion that would lead consumers to reasonably assume that the TK and TCEs holders support or endorse the product or service in question.
Unauthorised access to and disclosure of sacred-secret TK and TCEs, such as burial sites, objects of spiritual and cultural significance...”²²⁴

²²⁰ WIPO/GRTKF/IC/11/5(a) Add.2

²²¹ WIPO/GRTKF/IC/11/5(a)

²²² WIPO/GRTKF/IC/11/5(a).

²²³ WIPO/GRTKF/IC/11/5(a).

²²⁴ WIPO/GRTKF/IC/11/5(a) Add.

Norway

“...Beneficiaries should in particular be provided with effective means to ensure: ...
- all acts of such a nature that would be offensive for the holder are repressed...”²²⁵

Nigeria

“...the objectives already considered should guide the IGC in formulating the prohibited acts particularly misappropriation and unfair use and any other acts that may be offensive to the holding communities...”²²⁶

(iii) Misleading or deceptive practices

Brazil

“...The draft provision put forward in document WIPO/GRTKF/IC/10/5, Article 1, transcribed below, represents adequate basis to discuss the issue:

“Protection against misappropriation

1. Traditional knowledge shall be protected against misappropriation.

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.

3. In particular, legal means should be provided to prevent:

-acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception, misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means;...”

“...- false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matter when those intellectual property rights are not validly held in the light of that traditional knowledge and any conditions relating to its access;...”²²⁷

²²⁵ WIPO/GRTKF/IC/11/5(a) Add.2

²²⁶ WIPO/GRTKF/IC/11/15 Prov.

²²⁷ WIPO/GRTKF/IC/11/5(a).

(iv) *Misappropriation of TK*

Colombia

“In general we support the definition of acts of misappropriation, contained in Article 1 of the substantive provisions included in documents WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/10/5, and in particular we consider that said acts actually correspond to those acts listed in said Article, although they are not limited thereto, i.e.:

- acquisition of traditional knowledge by theft, coercion, fraud, breach of confidence or confidentiality, breach of relations of trust, or the provision of misleading information when obtaining prior informed consent for the use of traditional knowledge...”

“...- False claims of ownership over traditional knowledge_ related subject matter (claiming intellectual property rights)...”²²⁸

Tunisia

Piracy, unauthorized use of such knowledge. Copying (counterfeiting).²²⁹

Eurasian Patent Office (EPO)

Unacceptable forms of behavior aimed at misappropriation of TK may be theft, bribery, misrepresentation, espionage, coercion, fraud, breach or inducement of breach of contract, acquisition without prior consent and so on. Unfair competition, any forms of products and services discredit relating to TK are not allowed.²³⁰

Indonesia

“...regarding the forms of behavior considered unacceptable or illegal the Provisions contained any acquisition, appropriation or utilization of TK by unfair or illicit means constituted an act of misappropriation was essential. Article 1 of WIPO/GRTKF/IC/11/5(c) was a good basis for discussion...”²³¹

Islamic Republic of Iran

“...regarding Article 1, Section 2 of WIPO/GRTKF/IC/11/5(c), that any acquisition, appropriation or utilization of TK by illicit means constituted an act of misappropriation. This may also include deriving commercial benefits from the acquisition, appropriation or utilization of TK by illicit means and other commercial activities contrary to honest practices among unfair competition.”²³²

²²⁸ WIPO/GRTKF/IC/11/5(a).

²²⁹ WIPO/GRTKF/IC/11/5(a).

²³⁰ WIPO/GRTKF/IC/11/5(a).

²³¹ WIPO/GRTKF/IC/11/15 Prov.

²³² WIPO/GRTKF/IC/11/15 Prov.

(v) *Impairing recognition of communities' rights*

Brazil

“Any act that impairs the recognition or exercise of the rights held by communities over their knowledge should be deemed illegal...”²³³

C: Factors to be considered for illegality or unacceptability

(i) *Prior informed consent*

Brazil

“...An international instrument for the protection of TK negotiated in an IP forum such as WIPO should not overlook the need to provide for measures aimed at curbing acts of misappropriation, specifically those acts that take place via the use of IP mechanisms. Among these measures, the requirement for prior informed consent should apply to all TK, registered or not. Registration should not be a condition for the enforcement of rights by the communities in question...”

“...- acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent as a condition of access to the knowledge, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent concerning access to that knowledge;...”²³⁴

Colombia

“...Acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent. (WIPO/GRTKF/IC/10/5 and WIPO/GRTKF/IC/9/5)...”²³⁵

Ghana

“...Exploitation of the protected traditional knowledge without the consent nor authorization of the owner of the traditional knowledge...”²³⁶

Russian Association of Indigenous Peoples of the North (RAIPON)

Use of traditional knowledge for commercial purposes without the voluntary and conscious consent of its holders.²³⁷

²³³ WIPO/GRTKF/IC/11/5(a)

²³⁴ WIPO/GRTKF/IC/11/5(a).

²³⁵ WIPO/GRTKF/IC/11/5(a).

²³⁶ WIPO/GRTKF/IC/11/5(a)

²³⁷ WIPO/GRTKF/IC/11/5(a)

Switzerland

Several options are possible, depending on the aims¹⁸ and rights attached to traditional knowledge. Use without authorization could be considered unacceptable or illegal. Use is understood as manufacture, storage, supply, circulation, import, export, transit and possession for these purposes.

(Cf. documents WIPO/GRTKF/IC/9/5 and 10/5: “the protection of Traditional Knowledge: Draft Objectives and Principles”)²³⁸

New Zealand

“Use of TK and TCEs without adequate consultation with or permission from the TK/TCEs holders...”

“...Use of TK and TCEs which is contrary to or disrespectful of customary laws, protocols, and practices in relation to such TK and TCEs. For example, appropriation of a traditional language for use outside of the customary cultural context without authorisation from the indigenous people (-s) or local community (-ies) whose language is being appropriated...”²³⁹

Arts Law Centre of Australia

“...Article 1, clause 2 defines “misappropriation” the acquisition of traditional knowledge by “unfair or illicit means”, in light of the fact that the notion of “fairness” may be open to dispute. In Arts Law’s view, “misappropriation” should be defined as “acquisition, appropriation or utilization without the consent of the traditional knowledge holders.”²⁴⁰

Norway

“...Beneficiaries should in particular be provided with effective means to ensure:
- That the principle of prior informed consent applies to access to traditional knowledge...”²⁴¹

(ii) *Failure to share benefits equitably/ unfair enrichment*

Brazil

“... (iv) if traditional knowledge has been accessed, commercial or industrial use of traditional knowledge without just and appropriate compensation to the recognized holders of the knowledge, when such use has gainful intent and confers a technological or commercial advantage on its user, and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge;...” (WIPO/GRTKF/IC/10/5 article 1)²⁴²

²³⁸ WIPO/GRTKF/IC/11/5(a)

²³⁹ WIPO/GRTKF/IC/11/5(a) Add.

²⁴⁰ WIPO/GRTKF/IC/11/5(a) Add.2

²⁴¹ WIPO/GRTKF/IC/11/5(a) Add.2

²⁴² WIPO/GRTKF/IC/11/5(a)

Colombia

“... (iv) use and commercialization of traditional knowledge without just and appropriate compensation to the holders of the knowledge...” (WIPO/GRTKF/IC/10/5 and WIPO/GRTKF/IC/9/5)²⁴³

Latvia

Misappropriation and conversion into commercially successful goods without sharing benefits in cases where the law provides for asking such permission.²⁴⁴

New Zealand

“...Unauthorised reproduction, adaptation and commercialisation with no sharing of benefits (economic or otherwise) with the TK and/or TCEs holders...”²⁴⁵

Norway

“...Beneficiaries should in particular be provided with effective means to ensure: ... - benefits arising from certain uses are fairly and equitably shared ...”²⁴⁶

Indonesia

“...In addition to that, measures mentioned in the document should also include any change of forms of TK which did not give any benefit to TK holders.”²⁴⁷

(iii) Failure to acknowledge origin or source

China

Article 1 of the part III, Substantive Provisions, in the current draft, could be a basis for the discussion on this issue.

And we also consider that people who use TK accessed already shall disclose the origin of the TK in an appropriate way and shall not disguise, distort or tamper the fact.²⁴⁸

Ghana

“...Unreasonable withholding of information on traditional knowledge by the holders from researchers.”²⁴⁹

²⁴³ WIPO/GRTKF/IC/11/5(a)

²⁴⁴ WIPO/GRTKF/IC/11/5(a)

²⁴⁵ WIPO/GRTKF/IC/11/5(a) Add.

²⁴⁶ WIPO/GRTKF/IC/11/5(a) Add.2

²⁴⁷ WIPO/GRTKF/IC/11/15 Prov.

²⁴⁸ WIPO/GRTKF/IC/11/5(a)

²⁴⁹ WIPO/GRTKF/IC/11/5(a)

International Publishers Association (IPA)

“...IPA could envisage a requirement that the publication or other use of TK should be done only with appropriate acknowledgement of the source.”²⁵⁰

New Zealand

“...Failure to recognise and acknowledge the source of a tradition-based innovation or creation and the TK and TCEs holders themselves. Failure to recognise and acknowledge the contribution that TK and TCEs make to innovations and creative endeavours...”²⁵¹

Norway

“...Beneficiaries should in particular be provided with effective means to ensure: ...
-all acts of such a nature as to create confusion by any means whatsoever with the origin are repressed...”²⁵²

(iv) *The grant of invalid IPRs*

New Zealand

“...Granting of erroneous or invalid IPRs over TK and TCEs and derivatives thereof. The creation of works or inventions that are adaptations or derivatives of TK and TCEs is a form of behavior that requires further analysis in order to determine what should be considered unacceptable or illegal.”²⁵³

D: Application of existing legal instruments

Brazil

“...4. Traditional knowledge holders 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 traditional knowledge holders, 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 traditional knowledge holders; and false allegations in the course of trade which discredit the products or services of traditional knowledge holders.

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

²⁵⁰ WIPO/GRTKF/IC/11/5(a)

²⁵¹ WIPO/GRTKF/IC/11/5(a) Add.

²⁵² WIPO/GRTKF/IC/11/5(a) Add.2

²⁵³ WIPO/GRTKF/IC/11/5(a) Add.

knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.”...” (WIPO/GRTKF/IC/10/5, article 1)²⁵⁴

European Community

“...without prejudice to protection already available under current IP law, TK should be protected, against misappropriation which consists of any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means. Article 10bis of the Paris Convention prohibits a certain number of acts which are regarded as acts of unfair competition.”²⁵⁵

Arts Law Centre of Australia

“...any act that impairs the recognition or exercise of the rights held by communities over their traditional knowledge or traditional cultural expressions are unacceptable and should be protected against under international conventions and domestic laws which enshrine such conventions in legislation. To this end, Arts Law supports the tenets of Article 1 (Protection Against Misappropriation) of the Policy Objectives and Core Principles on Traditional Knowledge...”²⁵⁶

E: Limitations on definitions of illegal behaviour

International Chamber of Commerce (ICC)

This question must be considered alongside the questions of definitions and objectives. Fundamental is that the rights of the holders must be in balance with the rights of the public. Forbidden acts may vary according to the nature and status of the knowledge, the objective of protecting it (moral or economic or both) and (perhaps) the status of the owners and users.²⁵⁷

Intellectual Property Owners Association (IPO)

“...misappropriation or other unauthorized use of protected TK should be considered illegal. However, this must be distinguished from the use of legitimately-acquired TK, or the use of publicly-known TK. Such authorized or legitimate uses of TK cannot properly be subject to allegations of misappropriation.”²⁵⁸

F. General considerations on clarifying scope of misappropriation and illegitimate use

Japan

Unacceptable/illegal acts may vary depending on the form of protection for traditional knowledge. As mentioned in the above item 3, there is no clear justifiable reason why

²⁵⁴ WIPO/GRTKF/IC/11/5(a).

²⁵⁵ WIPO/GRTKF/IC/11/5(a).

²⁵⁶ WIPO/GRTKF/IC/11/5(a) Add.2

²⁵⁷ WIPO/GRTKF/IC/11/5(a).

²⁵⁸ WIPO/GRTKF/IC/11/5(a).

traditional knowledge is eligible for IP right protection. Japan is greatly concerned about extending IP right protection to traditional knowledge. If the protection of traditional knowledge provides incentive for further creation that will lead to industrial development and if traditional knowledge is accorded IP right protection for that reason, as mentioned in the above item 3, the term of IP right for traditional knowledge should be limited in consideration of the balance between the interests of inventors and public interests. In that case, upon the expiration of the term of an IP right, acts prohibited under the above mentioned protection system will no longer be illegal. Moreover, when defining illegal acts, a fact finding survey should be conducted to find out what damage is incurred by what acts.²⁵⁹

United States of America

“...Building on this foundation, the IGC should deepen its understanding of these concerns by examining and discussing in detail the existing mechanisms, including legal (both IPR and non-IPR) and non-legal measures, that are available to address these specific issues or concerns. The IGC would then be able identify gaps, if any, in existing mechanisms at the domestic and/or international levels to address the specific issues or concerns.

For example, discussions in this context have included proposals relating to adoption of national systems that ensure appropriate access mechanisms in the context of TK and Genetic Resources that would also provide for equitable benefit-sharing arising from utilization of TK or GR. Similarly, improved patent databases, such as that proposed in great detail by the delegation of Japan in document WIPO/GRTKF/IC/9/13 should be further considered with respect to the issue of the granting of invalid IPR over TK. While the Japanese proposal was made in the context of genetic resources and related traditional knowledge, it appears that further investigation may be warranted as to whether that proposal would be appropriate, or could be modified to be appropriate, in the broader context of TK generally.”²⁶⁰

Australia

The IGC has concentrated on the concept of repression of misappropriated TK. This concept has developed out of the sharing of national experiences. As Australia noted in its comments on WIPO/GRTKF/IC/9/5 the term misappropriation can cover a broad scope of issues and it needs further discussion and analysis by Member States. How would such a concept interact with that of unfair competition under Article 10bis of the Paris Convention? Again, it is important to have a set of clear and agreed objectives before delineating forms of behaviour that might be considered to be unacceptable/illegal. Such delineation should take into account how the various forms of existing IP protection relate to perceptions of misappropriation and which forms of behaviour fall within forms of non-IP protection such as cultural, heritage and racial vilification law.²⁶¹

²⁵⁹ WIPO/GRTKF/IC/11/5(a)

²⁶⁰ WIPO/GRTKF/IC/11/5(a).

²⁶¹ WIPO/GRTKF/IC/11/5(a) Add.

ISSUE V: SHOULD THERE BE ANY EXCEPTION OR LIMITATIONS TO RIGHTS
ATTACHING TO PROTECTABLE TRADITIONAL KNOWLEDGE?

- A. GENERAL REFERENCES TO EXCEPTIONS AND LIMITATIONS
 - (i) *Need for exceptions and limitations in general*
 - (ii) *Contrast with limitations and exceptions under conventional IP law*
 - (iii) *General references to WIPO draft provisions*
- B: CONTINUING CUSTOMARY USE
- C: PUBLIC INTEREST EXCEPTIONS
 - (i) *Public health*
 - (ii) *General public interest exceptions and limitations*
 - (iii) *Public interest considerations in the exercise of limitations*
- D: EDUCATIONAL USE
- E: NON-COMMERCIAL RESEARCH
- F: MAINTAINING THE PUBLIC DOMAIN
- G: APPROACHES TO DEFINING EXCEPTIONS AND LIMITATIONS
 - (i) *Substantive considerations to apply in developing exceptions and limitations*
 - (ii) *Timing of work on exceptions and limitations*
- H. LINKS WITH OTHER AREAS OF LAW AND POLICY

Comments touched on the need in general for exceptions and limitations to TK protection, contrasting the context of TK protection with conventional IP law and noting the existing draft WIPO provisions on this subject. Some comments pointed to the need to ensure that TK protection did not impede continuing customary use of TK, in particular by communities who hold or maintain TK within the traditional or customary context. Other comments pointed to certain limitations and exceptions that may be appropriate for third-party use of TK, notably:

- for public health
- for the general public interest (comments also noting that exceptions should not be exercised in contradiction of the public interest)
- educational use and non-commercial research

Comments also addressed the need to maintain an appropriate public domain. Concerning methodology and approaches to defining limitations and exceptions, the comments reviewed a range of key factors that may be considered, as well as the appropriate sequence and timing of such work. The linkages between exceptions and limitations to TK protection, and other areas of law and policy, were also explored.

A. General references to exceptions and limitations

- (i) *Need for exceptions and limitations in general*

Kyrgyz Republic

Exceptions and limitations shall be provided in respect of use of traditional knowledge.
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Japan

As mentioned in the above item 3, any justifiable reasons for IP right protection to be extended to traditional knowledge are not clearly identified and sufficiently explained. In this respect, Japan has a serious concern. Japan is not in a position to enter discussion based on right or protection, but in discussing exceptions and limitations, consideration should be given to the balance between the interests of inventors and public interests although such balance may vary by the form of protection and the scope of illegal acts.²⁶³

(ii) *Contrast with limitations and exceptions under conventional IP law*

India

“...a legally binding international instrument on protection of TK was a matter of urgency in view of the continuing misappropriation of TK in different parts of the globe. Such an instrument naturally should have exceptions and limitations. However, the exceptions or limitations to rights attaching to protectable TK could not be in any way different from the exceptions and limitations applicable to modern knowledge systems under IPRs. In fact, rights of TK holders should have lesser limitations and exceptions than in the case of other IPRs and, in any case, should not exceed limitations and exceptions available to other IPRs.... Limitations should also be attached to prevent the offensive use of any sacred TK”²⁶⁴

(iii) *General references to WIPO draft provisions*

Arts Law Centre of Australia

“Article 8(1) (Exceptions and Limitations) is an appropriate starting point for a discussion of the principles which might limit any protection of traditional knowledge...”²⁶⁵

China

“...there should be some exceptions and limitations to rights attaching to protectable TK in an effort to permit fair use and reasonable application exemption.

And Article 8 of the part III, Substantive Provisions, in the current draft, could be a basis for the discussion on this issue.”²⁶⁶

²⁶³ WIPO/GRTKF/IC/11/5(a)

²⁶⁴ WIPO/GRTKF/IC/11/15 Prov.

²⁶⁵ WIPO/GRTKF/IC/11/5(a) Add.2

²⁶⁶ WIPO/GRTKF/IC/11/5(a).

B: Continuing customary use

Brazil

“...Considering the preceding remarks, the draft provision put forward in document WIPO/GRTKF/IC/10/5, Article 8 (1), transcribed below, represents adequate basis to discuss the issue: “Exceptions and limitations...”

1. The application and implementation of protection of traditional knowledge should not adversely affect:

(i) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders; ...” (WIPO/GRTKF/IC/10/5, Article 8)²⁶⁷

Colombia

“We agree with the existence of exceptions or limitations to rights attaching to protectable traditional knowledge, for example the measures for the protection of traditional knowledge may not restrict the use of such knowledge in the habitual and traditional community context...”²⁶⁸

European Community

“...exceptions and limitations to TK rights can only be determined once it has become clear what kind of protection can be afforded for TK. The application and implementation of protection of TK should not adversely affect the continued availability of TK for the customary practice, exchange, use and transmission of TK by TK holders; the use of traditional medicine for household or experimental purposes; or use for public health purposes.”²⁶⁹

Ghana

“This instrument shall not affect the following

- i) Traditional systems of access, use or exchange of traditional knowledge.
- ii) Access, use and exchange of knowledge and technologies by and between local communities.

The sharing of benefits based upon customary practices of the concerned local communities, provided that the exception shall not be taken to apply to any person or persons not living in the traditional and customary way of life relevant to the conservation and sustainable use of traditional knowledge

- iii) The continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders...”²⁷⁰

²⁶⁷ WIPO/GRTKF/IC/11/5(a).

²⁶⁸ WIPO/GRTKF/IC/11/5(a).

²⁶⁹ WIPO/GRTKF/IC/11/5(a).

²⁷⁰ WIPO/GRTKF/IC/11/5(a)

Algeria

“...Article 8 of WIPO/GRTKF/IC/11/5(c) was a good basis in providing that the protection of TK shall not be prejudicial to the availability of TK for the practice, exchange, use and transmission of such knowledge by its holders within the traditional context...”²⁷¹

Thailand

“...it was appropriate to provide exceptions or limitation rights attached to protectable TK in certain specific cases particularly to the use of TK by its holders within traditional context. The protection of TK should be allowed for household purposes and should not be prejudicial to the continued availability, customary practices, exchange, use or transmission of TK by TK holders.”²⁷²

Ethiopia

“...It considered Article 8 to be a sufficient basis for future negotiation within the context of the international dimension of the mandate of this Committee. It noted the considerable view supported within the Committee that time was right to discuss on all issues identified so far including the one on limitations and exceptions. Any collection of TK for the purpose of inclusion in archive or inventory, even for non commercial purpose within the context of cultural heritage safeguarding purposes, shall be included as an act of misappropriation if it was done without the consent of the TK holders themselves. The use of TK for public purposes shall be allowed at all time but such public purposes or public use shall only be limited to the territorial jurisdiction in which TK holders found themselves. Illegibility for protection of TK against acts of misappropriation did not require any formality as clearly stated under article 11 of the Draft Provisions.”²⁷³

Nigeria

“...It highlighted some of the exceptions and limitations it thought should be considered. One was the availability of TK for the customary practice, exchange and use, including transmission of TK by their holders...”²⁷⁴

²⁷¹ WIPO/GRTKF/IC/11/15 Prov.

²⁷² WIPO/GRTKF/IC/11/15 Prov.

²⁷³ WIPO/GRTKF/IC/11/15 Prov.

²⁷⁴ WIPO/GRTKF/IC/11/15 Prov.

C: Public interest exceptions

(i) *Public health*

Brazil

“... (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.” (WIPO/GRTKF/IC/10/5, Article 8)²⁷⁵

Ghana

“... (iv) 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

(v) Regime of storage categorization of traditional medical practices

(vi) Any use of the traditional knowledge or TCE for the benefit of the public...²⁷⁶

Nicaragua

Yes, above all for medicinal purposes in case of national emergency.²⁷⁷

(ii) *General public interest exceptions and limitations*

Norway

“...Further limitations in the public interest might also be appropriate.”²⁷⁸

Eurasian Patent Office (EPO)

There may be introduced limitations which are not considered as violation of rights similar to patent rights and/or copyright, such as personal use of TK (for household purposes), use in government hospitals and so on.²⁷⁹

Colombia

“...Notwithstanding the above, in the proposed Article 8 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/10/5, the Government of Colombia finds that subparagraph (ii) which grants an exception for “other public health purposes” should be delimited so that it does not end up granting exclusive benefits to individuals making use of public health services. As things stand, the exception justified for reasons of public health or general interest does not imply

²⁷⁵ WIPO/GRTKF/IC/11/5(a)

²⁷⁶ WIPO/GRTKF/IC/11/5(a)

²⁷⁷ WIPO/GRTKF/IC/11/5(a) Add.

²⁷⁸ WIPO/GRTKF/IC/11/5(a) Add.

²⁷⁹ WIPO/GRTKF/IC/11/5(a)

that the State is not obliged to retain the faculties and powers granted by intellectual property rights or other standards...”

“...It should also be taken into consideration that the research which results commercially viable goods or services may not be considered an exception. Benefit sharing must always be fair and equitable.”²⁸⁰

Brazil

“A provision on exceptions and limitations could be considered with a view to allow uses of public interest. Also, measures should be adopted to ensure the availability of traditional knowledge to their holders.”²⁸¹

India

“...Limitations should be attached to ensure that customary exchange and non commercial use, including household and traditional medicinal uses for public health system and transmission of TK by the holder community was not adversely affected...”²⁸²

Nigeria

“...The use of TK for domestic purposes and of course subject to fair and adequate compensation use in the interest of public health.”²⁸³

(iii) Public interest considerations in the exercise of limitations

Brazil

“It is relevant to note, however, that use of TK by third parties should not entail negative environmental, cultural or economic impacts to the community...”²⁸⁴

Arts Law Centre of Australia

“...the use of traditional knowledge by third parties should not have a detrimental environmental, economic or cultural effect on the traditional or indigenous community...”²⁸⁵

²⁸⁰ WIPO/GRTKF/IC/11/5(a)

²⁸¹ WIPO/GRTKF/IC/11/5(a)

²⁸² WIPO/GRTKF/IC/11/15 Prov.

²⁸³ WIPO/GRTKF/IC/11/15 Prov.

²⁸⁴ WIPO/GRTKF/IC/11/5(a)

²⁸⁵ WIPO/GRTKF/IC/11/5(a) Add.2

D: Educational use

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“...consideration should be given to physical handicaps which may affect persons and at times make access to traditional culture impossible; everything related to teaching and education should also be envisaged and, in general, those limitations contained in current international treaties and national legislation relating to copyright, performers and producers, are included in the aforementioned provisions.”²⁸⁶

Guatemala

“...Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

Use for pedagogical activity purposes.”²⁸⁷

Burkina Faso

“...there should be more of a parallel between exceptions under TCEs and TK. This would enable the Committee to add to Article 8 a certain number of exceptions which were obvious: the use of TK for example in the context of teaching or education and use in the context, use for non commercial research, archiving and safeguarding TK.”²⁸⁸

E: Non-commercial research

Switzerland

Several options are possible, depending on the aims and rights attached to traditional knowledge. The exceptions that might be envisaged: for example, traditional use by communities, private, non-commercial use or for ethnological research.

In this context, it is more important to prevent misuse by unauthorized third parties.”²⁸⁹

Russian Association of Indigenous Peoples of the North (RAIPON)

Cultural borrowings not pursuing commercial use.”²⁹⁰

South Africa

“To the exhaustive proposal by the chair we submit the inclusion “limitation that should non-commercial activity lead to commercial venture the necessary...”²⁹¹

²⁸⁶ WIPO/GRTKF/IC/11/5(a)

²⁸⁷ WIPO/GRTKF/IC/11/5(a)

²⁸⁸ WIPO/GRTKF/IC/11/15 Prov.

²⁸⁹ WIPO/GRTKF/IC/11/5(a)

²⁹⁰ WIPO/GRTKF/IC/11/5(a)

²⁹¹ WIPO/GRTKF/IC/11/5(a)

Norway

“Taking inspiration from traditional intellectual property rights law, limitations on the protection of traditional knowledge should be examined. In particular the possibility for non-commercial and respectful use, including use in education and research, should be considered...”²⁹²

F: Maintaining the public domain

Colombia

“...The recognition of such an exception is therefore one of the fundamental elements characteristic of a protection system applicable to traditional knowledge...”

“...Moreover, the use of medicinal traditional knowledge which is already in the public domain may constitute exceptions to prior informed consent, but not to benefit sharing. In this connection, it would be desirable to prioritize market chains which benefit local communities, before individuals, as a mechanism for benefit sharing and tangible recognition of the origin of said traditional knowledge. With this approach, synergies could be generated between pharmaceutical companies and local communities for better sharing of benefits derived from use of natural resources and associated knowledge...”²⁹³

International Chamber of Commerce (ICC)

This will naturally depend on what those rights are decided to be. One vital objective will be to preserve the public domain. The general rule is that what is publicly known is available for all to use. Many members of ICC feel strongly that any new restrictions on use of public domain information are unacceptable.²⁹⁴

Intellectual Property Owners Association (IPO)

The guiding factor regarding protection of TK should be that publicly known TK cannot be recaptured and accorded protection, as society has legitimate expectations that public information will remain in the public domain. In addition, it is necessary to develop a more detailed description of what is protected TK before it can be determined what exceptions or limitation apply. It is also necessary to have a public notice system to apprise the public of what types of subject matter are considered protected TK.²⁹⁵

Arts Law Centre of Australia

“...Article 8(2) which provides a fair use exception from the principles of prior informed consent for knowledge already available to the general public would allow for the continued work of academic, research and cultural institutions dealing with traditional knowledge. However, Arts Law suggests that the provision should be further

²⁹² WIPO/GRTKF/IC/11/5(a) Add.2

²⁹³ WIPO/GRTKF/IC/11/5(a)

²⁹⁴ WIPO/GRTKF/IC/11/5(a)

²⁹⁵ WIPO/GRTKF/IC/11/5(a)

qualified to provide that any use of the traditional knowledge that is generally available to the public, does not cause harm to the custodians of that knowledge. This requirement should be in addition to the principle of equitable compensation.”²⁹⁶

Algeria

“...Article 8 should be further expanded and that the exceptions were in fact provisions that had to create balance between the rights of holders and the interest of the public domain...”²⁹⁷

Nigeria

“...There should be a balance between the rights of local communities and knowledge holders against all the rights of the public. In this regard, it considered Article 8 of WIPO/GRTKF/IC/11/5(c) as a good basis for further discussion on this question...”²⁹⁸

G: Approaches to defining exceptions and limitations

(i) *Substantive considerations to apply in developing exceptions and limitations*

Canada

It seems premature to address exceptions or limitations at this juncture, given that their nature and scope would depend on a number of factors, such as the scope of protectable subject matter and the type of the protection that is provided to TK. In addition, inappropriate, administratively inefficient or ineffective exceptions and limitations may end up stifling creativity and innovation in society and the economy. Consequently, the impact on creators/inventors, users and the broader public interest should be taken into account when developing appropriate exceptions or limitations to any type of rights attaching to protectable TK.²⁹⁹

Arts Law Centre of Australia

“Article 8(1) (Exceptions and Limitations) is an appropriate starting point for a discussion of the principles which might limit any protection of traditional knowledge...”³⁰⁰

Kyrgyz Republic

Exceptions and limitations shall be provided in respect of use of traditional knowledge.

³⁰¹

²⁹⁶ WIPO/GRTKF/IC/11/5(a) Add.2

²⁹⁷ WIPO/GRTKF/IC/11/15 Prov.

²⁹⁸ WIPO/GRTKF/IC/11/15 Prov.

²⁹⁹ WIPO/GRTKF/IC/11/5(a) Add.

³⁰⁰ WIPO/GRTKF/IC/11/5(a) Add.2

³⁰¹

China

“...there should be some exceptions and limitations to rights attaching to protectable TK in an effort to permit fair use and reasonable application exemption.

And Article 8 of the part III, Substantive Provisions, in the current draft, could be a basis for the discussion on this issue.”³⁰²

India

“...a legally binding international instrument on protection of TK was a matter of urgency in view of the continuing misappropriation of TK in different parts of the globe. Such an instrument naturally should have exceptions and limitations. However, the exceptions or limitations to rights attaching to protectable TK could not be in any way different from the exceptions and limitations applicable to modern knowledge systems under IPRs. In fact, rights of TK holders should have lesser limitations and exceptions than in the case of other IPRs and, in any case, should not exceed limitations and exceptions available to other IPRs.... Limitations should also be attached to prevent the offensive use of any sacred TK”³⁰³

Tunisia

The rights attaching to protectable traditional knowledge should not be subject either to exceptions or to limitations (an inventory list should be drawn up). Tunisia is now equipped with a body within the Ministry of Culture and Heritage Protection, responsible for producing a list of and devising technical specifications for references in this area.³⁰⁴

Latvia

The rights should not have retroactive effect. At present we can not name other reasons.³⁰⁵

New Zealand

“...items not resulting from intellectual activity and heritage in the broader sense (e.g. human remains, languages in general) are excluded from the WIPO definition of TK and TCEs. There may be situations where such elements of culture may be misappropriated, misused, or misrepresented in the IPRs context, and therefore they should also form part of the analysis.

As stated under question 4, the creation of works or inventions that are adaptations or derivatives of TK and TCEs is a form of behavior that requires further analysis in order to determine what should be considered unacceptable or illegal, and where limitations can be drawn in the IPRs context.

The current exceptions and limitations in the IPRs system mean that a significant amount of TK does not qualify for protection. New sui generis mechanisms and rights

³⁰² WIPO/GRTKF/IC/11/5(a).

³⁰³ WIPO/GRTKF/IC/11/15 Prov.

³⁰⁴ WIPO/GRTKF/IC/11/5(a)

³⁰⁵ WIPO/GRTKF/IC/11/5(a)

are needed to address this gap in protection. Until such mechanisms and rights are designed, it is difficult to fully assess which exceptions or limitations should attach to them. It is inappropriate to solely refer to current IP types of exceptions and limitations in answering this question. The exceptions and limitations should be informed by customary laws, protocols and practices associated with TK and TCEs, as well as by broader humanitarian and environmental objectives and principles that Member States agree should take precedence.”³⁰⁶

(ii) *Timing of work on exceptions and limitations*

International Publishers Association (IPA)

IPA opposes a hasty and premature protection of TK through an IP related framework and therefore does not at this stage want to comment on limitations and exceptions to balance a possible framework of TK protection.³⁰⁷

South Africa

“...We have not yet developed a detailed proposal dealing with issues to these provisions, but we would be happy to provide such a proposal to the Committee when completed.”³⁰⁸

United States of America

“...it is premature for the IGC to undertake a focused discussion of “exceptions and limitations attaching to rights to protectable TK.” First, as the issue is currently framed, it appears to tilt in a particular policy direction that is not useful in advancing the work of the Committee at this time. Second, such a discussion may have the unintended consequence of polarizing the discussion, thereby impeding rather than advancing the work of the IGC.

As a general matter, and consistent with comments in response to Issue 7, the IGC should continue its work in identifying the extent of existing mechanisms to address the concerns that have been raised in the Committee and identifying any perceived gaps. In that light, with specific regard to issues of limitations and exceptions, if the IGC provides recommendations that endorse the use of certain existing mechanisms, for example, to protect TK, then the exceptions that apply under that system would presumably apply as well to TK. For example, if certain expressions of traditional knowledge would be eligible for copyright protections, the exceptions and limitations provided for in copyright laws would apply.³⁰⁹

Australia

Given that important questions about objectives and how those objectives might be met are yet to be agreed, it would be premature to determine what could be considered an

³⁰⁶ WIPO/GRTKF/IC/11/5(a) Add.

³⁰⁷ WIPO/GRTKF/IC/11/5(a).

³⁰⁸ WIPO/GRTKF/IC/11/5(a).

³⁰⁹ WIPO/GRTKF/IC/11/5(a).

exception or limitation. However it is noted that this issue is very important with respect to delineating carefully the public domain in respect of TK.³¹⁰

Indonesia

“...the discussion regarding Article 8, exceptions and limitations was not premature. Article 8 in WIPO/GRTKF/IC/11/5(c) was a good basis for future discussion. In this regard, it suggested that exceptions or limitations as mentioned in Article 8 needed to include the following paragraph which read as followed “Utilization of TK in the context of education, science and public health, according to national law, while ensuring that this utilization is not for commercial purposes and does not affect the advantage of TK holder”. This utilization should also mention the source of origin of TK and it should remain with respect to the TK holder.³¹¹

Canada

It seems premature to address exceptions or limitations at this juncture, given that their nature and scope would depend on a number of factors, such as the scope of protectable subject matter and the type of the protection that is provided to TK. In addition, inappropriate, administratively inefficient or ineffective exceptions and limitations may end up stifling creativity and innovation in society and the economy. Consequently, the impact on creators/inventors, users and the broader public interest should be taken into account when developing appropriate exceptions or limitations to any type of rights attaching to protectable TK.³¹²

H. Links with other areas of law and policy

Guatemala

“Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 37. Reproduction of cultural property. Cultural property may be reproduced by all the available technical means. Where this involves direct contact between the object to be reproduced and the means that will be used to reproduce it, the authorization of the Directorate General of the Cultural and Natural Heritage shall be required, subject to the owner or holder’s authorization. Any method of reproduction causing harm to or a change in the original cultural property shall be prohibited for use. Any copy or reproduction shall have a visible sign engraved or printed on it and identifying it as such...³¹³

³¹⁰ WIPO/GRTKF/IC/11/5(a) Add.

³¹¹ WIPO/GRTKF/IC/11/15 Prov.

³¹² WIPO/GRTKF/IC/11/5(a) Add.

³¹³ WIPO/GRTKF/IC/11/5(a)

ISSUE VI: FOR HOW LONG SHOULD PROTECTION BE ACCORDED?

A: COMMENTS ON FACTORS THAT SHOULD APPLY

- (i) *Continuing link to the original community holding or using TK*
- (ii) *Continuing compliance with the criteria for protection*
- (iii) *Guidance from the objectives of protection*
- (iv) *Guidance from the form of protection*
- (v) *Economic considerations*

B: NO FIXED TERM OF DURATION OF PROTECTION

- (i) *perpetual or unlimited protection term*
- (ii) *Indefinite, provided TK continues to fulfil criteria*
- (iii) *Unlimited protection based on intergenerational rights*
- (iv) *Protection endures while TK integral to community: reference to WIPO draft provisions*
- (v) *Issues or considerations concerning an unlimited protection term*

C: SPECIFIC TERMS OF PROTECTION

- (i) *guidance from or application of conventional IP protection*
- (ii) *guidance from intrinsic characteristics of TK*

Comments on the appropriate term of protection addressed the question of whether protection should be effectively indefinite or unlimited, or specifically limited in time. Some comments identified specific factors to be weighed in determining whether protection should continue, or whether protection should lapse when TK ceased to conform with the criteria established for TK to be protected. Guidance for setting the appropriate duration of protection was drawn from a range of sources, including reviewing the purpose of protection, the form or character of the protection that was offered, and economic considerations (such as the extent of benefits derived from the TK). A number of comments proposed unlimited or perpetual protection, or protection while TK continued to conform with the conditions of protection (such as remaining integral to the collective identity of a community, the draft WIPO provisions cited in this context). Some comments cited the intergenerational character of TK as the basis for unlimited terms of protection, while others addressed the policy implications of unlimited or perpetual protection. Conventional IP as well as other analogues and models were drawn on in further comments that made proposals for specific terms of protection.

A: Comments on factors that should apply

- (i) *Continuing link to the original community holding or using TK*

Eurasian Patent Office (EPO)

Period of TK protection should correspond to the continued period of creation, development and use. Introduction of a definite period is difficult to determine.³¹⁴

European Community

The EC and its Member States have no objections to protection limited in time. However, the nature of the subject matter suggests that TK protection is not comparable to those IP titles which grant a time limited exclusive property right (e.g. a patent or a design). Therefore it has to be discussed whether the duration of protection should last

³¹⁴ WIPO/GRTKF/IC/11/5(a)

as long as the distinctive association between the beneficiaries of protection and the protected subject matter remains intact, that is as long as the knowledge is maintained by TK holders and remains integral to their collective identity.³¹⁵

Guatemala

Model Provisions for National laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial actions, WIPO/GRTKF/IC/2.

In no case may protection be interpreted so as to obstruct normal use and development.³¹⁶

(ii) *Continuing compliance with the criteria for protection*

Colombia

Protection will last for as long as traditional knowledge satisfies the protection criteria. In this regard, it is important to clarify that the criteria referring to traditional knowledge will be those which possibly define the *sui generis* protection system for such knowledge and, to that extent, their prescription should not be assimilated to the terms already introduced for existing intellectual property protection mechanisms. Taking into account these considerations, the Government of Colombia supports the proposed Article 9 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/10/5.³¹⁷

Norway

Protection should be provided for as long as the criteria for protection are fulfilled, and thus not necessarily be limited in time.³¹⁸

Brazil

Due to its inter-generational character and to the dynamics of creation of TKs, there should be no limitation in time for the protection of TK. The draft provision put forward in document WIPO/GRTKF/IC/10/5, Article 9 (1), transcribed below, represents adequate basis to discuss the issue:

“Duration of protection

1. Protection of traditional knowledge against misappropriation should last as long as the traditional knowledge fulfils the criteria of eligibility for protection according to Article 4”.³¹⁹

³¹⁵ WIPO/GRTKF/IC/11/5(a)

³¹⁶ WIPO/GRTKF/IC/11/5(a)

³¹⁷ WIPO/GRTKF/IC/11/5(a)

³¹⁸ WIPO/GRTKF/IC/11/5(a) Add.2

³¹⁹ WIPO/GRTKF/IC/11/5(a)

Nigeria

“...the protection of TK should last for as long as the TK concerned fulfilled the requirement of eligibility as laid out in Article 4, for instance, of WIPO/GRTKF/IC/11/5(c). The present formulation in Article 9 of that document was a good basis for further development of this issue.”³²⁰

Ethiopia

“...Article 9 of the Draft Provisions were a sufficient basis for future negotiation and deliberation. TK should be protected for perpetuity and Article 9, subparagraph 1, stated that protection of TK against misappropriation should last as long as TK fulfilled the criteria of eligibility for protection according to Article 4. This raised a number of questions. From the wording of this paragraph it seemed that TK had transitory nature. Second, were TK subject to evaluation from time to time to see if they continued to meet the criteria under Article 4? If so, who determined whether protectable TK continued to meet these criteria? National authorities should not be given the discretion to specify the duration of protection as provided for under this sub article. There was a permanent and unchanging association between traditional communities with their knowledge otherwise the right to culture, as solidly elaborated under international human rights system, would have been transitory and time bound. Therefore, it strongly suggested that TK should be protected for perpetuity.”³²¹

(iii) *Guidance from the objectives of protection*

International Chamber of Commerce (ICC)

“...this depends on the type of protection accorded, and the objective sought. Certain moral rights, for example attribution, may last indefinitely. Knowledge that is secret may likewise be protected from use by others as long as it remains confidential.”³²²

Australia

The length of any protection would, again, depend on what is being protected and the objectives being pursued.³²³

(iv) *Guidance from the form of protection*

Japan

The term of protection may vary depending on the form of protection for traditional knowledge. If the protection of traditional knowledge gives incentive for further creation that will lead to industrial development and if traditional knowledge is accorded IP right protection for that reason, as mentioned in the above item 3, the term of IP right for

³²⁰ WIPO/GRTKF/IC/11/15 Prov.

³²¹ WIPO/GRTKF/IC/11/15 Prov.

³²² WIPO/GRTKF/IC/11/5(a)

³²³ WIPO/GRTKF/IC/11/5(a) Add.

traditional knowledge should be limited consideration of the balance between the interests of inventors and public interests. If IP protection is granted to traditional knowledge for a certain period of time, a problem will arise in that only a certain generation will be able to enjoy the benefits.³²⁴

Canada

“It seems premature to address the length of protection at this juncture, given it would depend on the type of protection provided to TK. Indeed, the approach envisaged and the factors to consider will differ whether the protection would be conferred by an active assertion of rights or by defensive measures. The appropriate term of protection could be influenced by a number of factors such as the goal of protection, the scope of subject matter to be protected, and the associated exceptions...”³²⁵

Arts Law Centre of Australia

“...unlike certain intellectual property protection, the duration of protection should exist for as long as the knowledge is eligible to be protected. Accordingly, the provisions of Article 9(1) (Duration of Protection) are the appropriate starting point for the key issues surrounding duration.”³²⁶

(v) *Economic considerations*

Latvia

Hard to answer. One option could be - until profit is made, as some percentage of that profit.³²⁷

B: No fixed term of duration of protection

(i) *perpetual or unlimited protection term*

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

Protection must be granted for an indefinite period owing to the specific nature of the traditional cultural expression, which has been created and/or modified through successive generations. This successive generational path cannot be interrupted since it would affect the very essence of traditional culture, and any provision covering the public domain of traditional cultural expressions, albeit through an underlying payment, should be rejected.³²⁸

³²⁴ WIPO/GRTKF/IC/11/5(a)

³²⁵ WIPO/GRTKF/IC/11/5(a) Add.

³²⁶ WIPO/GRTKF/IC/11/5(a) Add.2

³²⁷ WIPO/GRTKF/IC/11/5(a)

³²⁸ WIPO/GRTKF/IC/11/5(a).

Russian Association of Indigenous Peoples of the North (RAIPON)

Unlimited. A term may be defined freely only by the actual holders of traditional knowledge.³²⁹

South Africa

We support the notion that IK/TCE/GR be protected in perpetuity. The need to protect IK, is quite obvious that they mean ‘protection’ in the sense of safeguarding the continued existence and development of IK. As repeatedly pointed out by SA, this necessarily implies protecting the whole social, economic, cultural and spiritual context of that knowledge, something which simply is not possible to achieve within a confined period of time. Hence, we are proposing for an instrument that protects the holistic, inalienable, collective, and perpetual nature of Indigenous Knowledge Systems for purposes far more expansive than economic benefits.³³⁰

Tunisia

The term of protection must be unlimited.³³¹

Ghana

“Traditional knowledge is to be protected in perpetuity...”³³²

Nicaragua

Indefinitely.³³³

Kyrgyz Republic

The period of traditional knowledge protection shall not be limited.³³⁴

OPDP

“...TK was vital to the indigenous people in sustaining their livelihood and keeping themselves on daily events. Indigenous people were believed to be about three hundred to fifty million in this world, as per one of the ILO document. In his view, there should be no limit in the protection of TK.”³³⁵

³²⁹ WIPO/GRTKF/IC/11/5(a).

³³⁰ WIPO/GRTKF/IC/11/5(a).

³³¹ WIPO/GRTKF/IC/11/5(a).

³³² WIPO/GRTKF/IC/11/5(a).

³³³ WIPO/GRTKF/IC/11/5(a) Add.

³³⁴

³³⁵ WIPO/GRTKF/IC/11/15 Prov.

Ukraine

“...bearing in mind the specific nature of TK...TK could and should not be something that had a duration or term of protection.”³³⁶

(ii) *Indefinite, provided TK continues to fulfil criteria*

India

“...TK was dynamic in nature. In fact, knowledge which was being created based on empirical observations on current TK could become TK in future. Therefore, rights on TK had to be necessarily perpetual in nature. Another reason for these rights to be perpetual was that TK would belong to individuals only in rare circumstances. It was knowledge where holders were either communities, regions or countries. Therefore, providing rights for a limited period to reward the creativity of individual would not be applicable in the case of TK.”³³⁷

Thailand

“...it was not premature to discuss the term of protection for TK and...TK should be protected with no limit in time due to its trans-generational nature. The rationale behind the protection of TK was derived from traditional and spiritual value accumulated from generation to generation. Since the trans-generational measure of TK was one of the determining factors of protection as long as TK fulfilled the protection criteria, protection should be continuously accorded.”³³⁸

(iii) *Unlimited protection based on intergenerational rights*

Sudan

“...Protection should be protection that was afforded without a term in order to ensure this protection from any kind of distortion. This was a right for all generations who should be able to receive that knowledge.”³³⁹

Congolese Association of Young Chefs

“...duration of protection should be in perpetuity, in other words without restriction. This was something that was held as the heritage of the whole Community, it was part of the cultural heritage, it was not something owned by any single individual. It was something that had to be transmitted to future generations.”³⁴⁰

³³⁶ WIPO/GRTKF/IC/11/15 Prov.

³³⁷ WIPO/GRTKF/IC/11/15 Prov.

³³⁸ WIPO/GRTKF/IC/11/15 Prov.

³³⁹ WIPO/GRTKF/IC/11/15 Prov.

³⁴⁰ WIPO/GRTKF/IC/11/15 Prov.

(iv) *Protection endures while TK integral to community: reference to WIPO draft provisions*

Algeria

“...Article 9 in WIPO/GRTKF/IC/11/5(c) was a good basis in that TK should be accorded protection in perpetuity. In view of the distinctive and inter-generational nature of TK, the moral and economic rights of the holders of such knowledge should be protected in perpetuity for as long as the knowledge remained integral to their collective identity.”³⁴¹

China

“...the protection shall not be limited to a fixed term. Article 9 of the part III, Substantive Provisions, in protection the current draft, could be a basis for discussion on this issue.”³⁴²

Indonesia

“...there should be no limitation for the duration of the protection of TK since it was an important element of the cultural heritage of each nation that had been developed in the past and still existed today. Article 9 in WIPO/GRTKF/IC/11/5(c) was a good basis to discuss the duration of protection.”³⁴³

Hokotei Moriori Trust

“The representative of Hokotei Moriori Trust supported generally Article 9 set out in WIPO/GRTKF/IC/11/5(c) and supported the protection of TK in perpetuity because the knowledge was integral to the maintenance and integrity of the cultures and the identities of indigenous peoples...”³⁴⁴

Mbororo Social Cultural Development Association (MBOSCUDA)

“...Article 9 of WIPO/GRTKF/IC/11/5(c) was a good basis for the advancement of this discussion. The protection of TK should last for an indefinite period. He supported the statements made by previous indigenous representatives in the Committee and the African Group.”³⁴⁵

³⁴¹ WIPO/GRTKF/IC/11/15 Prov.

³⁴² WIPO/GRTKF/IC/11/5(a).

³⁴³ WIPO/GRTKF/IC/11/15 Prov.

³⁴⁴ WIPO/GRTKF/IC/11/15 Prov.

³⁴⁵ WIPO/GRTKF/IC/11/15 Prov.

(v) *Issues or considerations concerning an unlimited protection term*

New Zealand

The protection should be accorded to perpetuity, or until there is no one who whakapapa (genealogically connects) to the source of the TK or TCEs, or as long as there are uri (descendants) who want to assert the rights.

Most existing IPRs place limits on how long the accorded protection lasts. Māori stakeholders have clearly indicated that there should not be any ‘economic or innovation driven’ duration limits on the duration of the general protection accorded to TK and TCEs. However, some stakeholders have indicated that the duration for economic type rights accorded in relation to TK and TCEs could be shorter, but the moral type rights should be perpetual as defined by the customary relationship to those TK and TCEs.³⁴⁶

Canada

“...Some Member States and observers have called for perpetual protection, while others Member States have suggested that a better approach might be to consider terms of protection that are more closely tailored to particular objective and the subject matter of protection. Perpetual protection for TK would very likely to be of concern to creators/inventors and users, and would certainly have implications for the broader public interest. Perpetual IP protection for TK could also raise concerns in other forums such as those that are seeking to promote cultural diversity or to protect intangible cultural heritage, for example.

With respect to IP, there is no single domestic or international standard regarding the length of protection for all forms of protected subject matter. While perpetual protection is not unheard of in IP law, such protection is the exception, not the rule. In most cases the length of protection is for a limited period of time in order to support the objectives of encouraging creativity and innovation as well as in promoting the dissemination of information.”³⁴⁷

Intellectual Property Owners Association (IPO)

Trade secrets are generally protected if the information has some commercial value, is maintained as secret, and is subject to reasonable efforts to maintain its secrecy. Such trade secrets are afforded a perpetual term of protection, insofar as each of the three criteria continue to be met. Similarly, TK that has been maintained as secret could also be accorded a perpetual term of protection. In contrast, however, if the TK is patented, licensed or otherwise transferred, or commercialized, or if it becomes public through any other means, it would be necessary to ensure that such TK would no longer enjoy perpetual protection. Such TK may only be subject to a limited term of continued protection – for example, the agreed confidentiality term in a license agreement relating to use of the TK.³⁴⁸

³⁴⁶ WIPO/GRTKF/IC/11/5(a) Add.

³⁴⁷ WIPO/GRTKF/IC/11/5(a) Add.

³⁴⁸ WIPO/GRTKF/IC/11/5(a)

C: Specific terms of protection

(i) *guidance from or application of conventional IP protection*

Switzerland

Several options are possible, depending on the aims and rights attached to traditional knowledge. The duration of protection will depend on the nature of the right of protection, which will be granted to traditional knowledge. In other words, if traditional knowledge is considered rather to be an invention and it could be the subject of a patent, the protection will be rather short (e.g. 20 years). By contrast, if traditional knowledge is considered rather to be a copyright, the protection will be longer (e.g. 70 years after the author's death). Depending on the rights attributed to traditional knowledge, a limited duration could also be envisaged.³⁴⁹

Ghana

“...However derivatives and extractions from the knowledge or secondary / related rights are to be protected in line with the term of protection of intellectual property rights such as patents copyright, etc.”³⁵⁰

International Publishers Association

IPA supports the limitation in time of copyright in literary and artistic works. Any term of protection, with the exception of very important core moral rights, must be limited in time so as to ensure that works can re-enter the creative cycle after a certain period. Otherwise, the public domain as a source of inspiration would be unduly restricted. The same principle should apply to any framework for the protection of TK.³⁵¹

Italy

“...The reason for protection of knowledge through IP was in fact to recognize that the creator of the knowledge should have protection for a limited and defined period. After that period every one should be able to benefit from the knowledge that had been acquired by the creator. In other words, protection should be limited in time.”³⁵²

(ii) *guidance from intrinsic characteristics of TK*

The Ogiek Community

The period under which the TK should be protected demands a long-term approach. This is to ensure that the rights holders benefit for their livelihoods. For instance, when a hunter decides to harvest his honey from a traditional beehive at a particular time,

³⁴⁹ WIPO/GRTKF/IC/11/5(a)

³⁵⁰ WIPO/GRTKF/IC/11/5(a)

³⁵¹ WIPO/GRTKF/IC/11/5(a)

³⁵² WIPO/GRTKF/IC/11/15 Prov.

there are various factors to be considered. E.g. temperature, and meter logical conduction among others, the hunger is using empirical knowledge which generates replicable refutable and verifiable results over time.³⁵³

³⁵³ WIPO/GRTKF/IC/11/5(a)

ISSUE VII: TO WHAT EXTENT DO EXISTING IPRS ALREADY AFFORD
PROTECTION? WHAT GAPS NEED TO BE FILLED?

- A. GENERAL OBSERVATIONS ON THE ANALYSIS OF THE SCOPE OF EXISTING IP
- (i) *Systemic considerations*
 - (ii) *Comments on coverage under international treaties*
- B: ANALYSIS OF PROTECTION UNDER EXISTING IP SYSTEM
- (i) *Positive protection*
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- C: SPECIFIC FORMS OF PROTECTION UNDER NATIONAL AND REGIONAL LAW
- (i) *Positive protection*
 - Recognition of TK in IP system
 - Recognition under human rights law
 - Recognition under cultural heritage legislation
 - TK protected through TCE protection
 - (ii) *Current national activities*
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 - Exclusion of TK from patents
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 - Defensive protection in the trademark system
- D: IDENTIFICATION OF GAPS IN PROTECTION
- (i) *Systemic gaps in protection*
 - (ii) *Lack of protection national laws*
 - (iii) *Practical limitations in accessing conventional IP system*
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 - Misappropriation
 - Spiritual and cultural dimension of TK
 - Other factors: communal character, oral tradition, or lack of material form
 - Factors relating to origin or background of TK
- E: APPROACHES TO IDENTIFYING GAPS IN IP LAW
- (i) *General policy considerations*
 - (ii) *Ensuring consistency with biodiversity regulation*
 - (iii) *Linkage with customary law*
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 - (v) *International layer of sui generis protection*
 - (vi) *Evolution of case law*
 - (vii) *Modification or evolution of existing legal doctrines*
 - (viii) *Conventional IP as a point of reference*
- F: CONSIDERATIONS CONCERNING *SUI GENERIS* PROTECTION

Comments dealt extensively with the interrelationship between the conventional or existing IP system, and the scope and specific characteristics of TK, and also addressed methodological questions as to the analysis of gaps in the scope of the existing IP system. These comments are grouped for the sake of ease of reference as follows:

- General observations, that include systemic considerations or observations flowing from the general characteristics of the existing IP system, and the analysis of the coverage of current international treaties on IP law.
- The analysis of the protection of TK under the existing IP system, including the scope of positive and defensive protection (the two aspects of protection that have been earlier defined in the Committee's work)
- Detailed analysis of specific forms of protection that are provided under national and regional law, including within the IP system, under human rights law, and through the protection of TCEs. A range of defensive protection methods was also reviewed.

- The identification of gaps in protection, including at the overall systemic level, under specific national laws, in the practical constraints and limitations in making use of conventional IP systems, and specific shortcomings of conventional IP, such as its failure to address misappropriation, to take account of the spiritual and cultural characteristics of TK, and to address other factors including its communal character, oral tradition, and the lack of material form of TK. Other gaps related to the need to recognize the source or origin of TK.
- Comments relating to how practically to go about identifying gaps in IP law, including the general policy considerations that should guide gap analysis, ensuring the consistency of IP law with biodiversity regulation, establishing linkages with customary law, and addressing dispute settlement. Pathways to addressing gaps discussed included building an international layer of *sui generis* protection, the evolution of case law, the modification or evolution of existing legal doctrines within the IP system, and making use of conventional IP law as a point of reference.

Further comments addressed the question of *sui generis* protection as a means of addressing the gaps identified.

A. General observations on the analysis of the scope of existing IP

(i) *Systemic considerations*

The Ogiek Community

The already existing IPR have got no protection locally, nationally and internationally. This calls for urgent measures to identify, recognize in statutes, register and respect the TK from rightful holders. All the stakeholders must develop procedural and flexible understood statutes that shall set penalties against those who are in breach of TK.³⁵⁴

Japan

“...In conclusion, a fair balance has been kept between the protection of traditional knowledge and the protection of public domain under the IP systems and other laws. At this stage there is no perceivable gap between the current system and the necessary forms/level of protection.”³⁵⁵

Eurasian Patent Office (EPO)

Some TK subjects may be protected under the existing system of intellectual property protection. For instance, some goods may be identified by trademark registration or patent system protection within certain limits. Some kinds of genetic resources may be protected by patents, plant and animal varieties may be protected by special laws. It is necessary to maintain a reasonable balance between the special system of TK protection and system of IP protection. An important role is played by documenting of traditional

³⁵⁴ WIPO/GRTKF/IC/11/5(a)

³⁵⁵ WIPO/GRTKF/IC/11/5(a)

knowledge owned by the representatives of nations and communities in the whole world (creation of databases).³⁵⁶

Australia

Some TK subjects may be protected under the existing system of intellectual property protection. For instance, some goods may be identified by trademark registration or patent system protection within certain limits. Some kinds of genetic resources may be protected by patents, plant and animal varieties may be protected by special laws. It is necessary to maintain a reasonable balance between the special system of TK protection and system of IP protection. An important role is played by documenting of traditional knowledge owned by the representatives of nations and communities in the whole world (creation of databases).³⁵⁷ "...As discussed at question 3 above, it might be useful in this respect to analyse specific priority examples of what might be considered inappropriate use of TK. As discussed such an analysis could consider how the current IP and general legal systems could be used to meet any agreed objectives. Such an analysis would be particularly useful if it considered the possibilities inherent in current IP and general legal concepts as, although such concepts may not have been used in the context of TK to date, they may have potential for such use that is not currently recognised.

It must be recognised that there may well be divergences of opinion among Member States regarding the presence of gaps. For example, one issue that Australia considers can be adequately address by the current IP system is that of the grant of erroneous patents that involve the use of TK. In particular, it considers that the revocation of patents relating to the use of Neem and Turmeric could be viewed as examples of how the existing patent system was able to deal with known TK as a form of prior art. There has been some criticism that the revocation procedures in those cases were expensive and took too long and that, therefore, other mechanisms are needed to ensure such grants do not happen again. A question that arises is how any alternative system, for example a mandatory disclosure system for TK, would work to ensure that the correction of errors, which are inevitable in any system, would be undertaken in a manner that was cheaper and quicker than revocation. Australia very much supports efforts to increase the information available to patent examiners so that fewer errors are made in the first place. However, Australia remains to be convinced that the lack of a mandatory system of disclosure of TK is a gap in the current IP system.

The issue of the proportionality of any responses to problems also arises here. For example, would the introduction of a disclosure system put a burden on the patent system that would be disproportionate in comparison to (a) the likely remedial effect of the solution, and (b) the extent and impact of the problem that is was attempting to deal with?"³⁵⁸

³⁵⁷ WIPO/GRTKF/IC/11/5(a).

³⁵⁸ WIPO/GRTKF/IC/11/5(a) Add.

(ii) *Comments on coverage under international treaties*

European Community

“...The EC Database Directive has established a mechanism to evaluate and protect the continuous updating of databases – a mechanism which could serve *mutatis mutandis* as a model for the evaluation of continuously developing TK...”³⁵⁹

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

International treaties contain virtually zero protection for traditional cultural expressions and such protection is omitted from national legislation, apart from specific provisions which are to be found in Panamanian, Tunisian, Moroccan, etc. legislation.

A reference to folklore exists only in the international WIPO Performances and Phonograms treaty (WPPT) of December 20, 1996, where a performer is defined as the person who acts, sings, declaims, etc... literary or artistic works or expressions of folklore.

In order to resolve this extremely important question, it appears appropriate to draw up an international treaty which contains minimal but effective protection and for said treaty, after its entry into force, to be applied to the nations that sign up to it.³⁶⁰

Guatemala

“...Among the existing legal gaps mention can be made of the absence of a relevant treaty or agreement, promoted by the World Intellectual property Organization.”³⁶¹

B: Analysis of protection under existing IP system

(i) *Positive protection*

European Community

“...Unfair competition (Art 10bis of the Paris Convention) may help to protect TK against unfair exploitation in a way that could create confusion about the origin of the commercialized products.

To a certain extent, trademarks can ensure the protection of TK. Indeed, by protecting through a trademark products manufactured according to traditional methods, one capitalizes on the accumulated know-how. In the case of know-how belonging to a group, the collective trademark can be used. A simple collective trademark is a mark which belongs to a producer group and which makes it possible to members of this group to promote their products under this trademark. The collective mark of certification will be used to indicate and guarantee that the products to which it is applied show certain particular characteristics: the nature, properties or quality of the products in particular.

³⁵⁹ WIPO/GRTKF/IC/11/5(a)

³⁶⁰ WIPO/GRTKF/IC/11/5(a)

³⁶¹ WIPO/GRTKF/IC/11/5(a)

The protection of the geographical indications also makes it possible to indirectly protect local and traditional knowledge. Indeed, the reputation of a geographical name in connection with given products is generally related to the particular know-how of the manufacturers of the corresponding place. The protection of this geographical name against counterfeits thus contributes to the protection of this know-how. The label of origin gives a reinforced protection to products whose characteristics are related to human elements (know-how) but also natural factors. The protection of indications of source and labels of origin can be a tool for safeguarding cultural inheritance. By developing and protecting geographical names, local traditions and know-how are thereby safeguarded...³⁶²

Japan

“To date, there has been no IP system in the world which extends direct protection to traditional knowledge. In certain limited cases, however, traditional knowledge can be protected under such existing systems as patent law, trademark law, or unfair competition prevention law systems. To seek protection under such systems, traditional knowledge will have to be met certain requirements (similar to other forms of inventions). Still, the following problems will remain...”

“...Protection under a trademark law

A trademark right is aimed at protecting signs used for goods and services by entrepreneur but not traditional knowledge or other forms of art. Indirect protection of traditional knowledge under a trademark right might be possible. More specifically, if a trademark right might be able to be granted to a mark of group to which the traditional knowledge belongs, a brand can be established using the mark of the group...³⁶³

Switzerland

It has always been said that existing intellectual property rights (for example, geographical indications, patents or copyrights) could be used or indeed that their use may be envisaged. By contrast, new protection possibilities should be discussed, where intellectual property does not enter into consideration or where protection based on the intellectual property rights mentioned is not the appropriate instrument.³⁶⁴

Tunisia

“...It may, however, be considered that if intellectual property can help in one way or the other to protect traditional knowledge and to lead to the recognition of its lawful owners, it will already have the merit of recognizing their collective creativity.

Protection must not prevent the sharing and transmission of traditional knowledge, and geographical indications represent an important element in the same way as territorial specificity.³⁶⁵

United States of America

³⁶² WIPO/GRTKF/IC/11/5(a)

³⁶³ WIPO/GRTKF/IC/11/5(a)

³⁶⁴ WIPO/GRTKF/IC/11/5(a)

³⁶⁵ WIPO/GRTKF/IC/11/5(a)

“...As mentioned with respect to TCEs/EoF, many provisions of existing IPRs already are available for the protection of TK. Principles and doctrines from existing IPRs could be adapted to address specific issues and concerns of indigenous and local communities. For instance, moral rights, which are provided for under the Berne Convention, could be adapted to meet the actual needs of communities by addressing specific, non-economic concerns related to TK...”³⁶⁶

Australia

“Australia has not carried out a systematic analysis of the extent to which IPRs already afford protection for TK and what gaps need to be filled. As discussed in general terms in various WIPO papers, patents, designs, trade marks, plant breeders’ rights, copyright, confidential information and unfair competition laws clearly all have roles to play...it might be useful in this respect to analyse specific priority examples of what might be considered inappropriate use of TK. As discussed such an analysis could consider how the current IP and general legal systems could be used to meet any agreed objectives.

“ It must be recognised that there may well be divergences of opinion among Member States regarding the presence of gaps. For example, one issue that Australia considers can be adequately addressed by the current IP system is that of the grant of erroneous patents that involve the use of TK. In particular, it considers that the revocation of patents relating to the use of Neem and Turmeric could be viewed as examples of how the existing patent system was able to deal with known TK as a form of prior art. There has been some criticism that the revocation procedures in those cases were expensive and took too long and that, therefore, other mechanisms are needed to ensure such grants do not happen again. A question that arises is how any alternative system, for example a mandatory disclosure system for TK, would work to ensure that the correction of errors, which are inevitable in any system, would be undertaken in a manner that was cheaper and quicker than revocation. Australia very much supports efforts to increase the information available to patent examiners so that fewer errors are made in the first place. However, Australia remains to be convinced that the lack of a mandatory system of disclosure of TK is a gap in the current IP system.

“The issue of the proportionality of any responses to problems also arises here. For example, would the introduction of a disclosure system put a burden on the patent system that would be disproportionate in comparison to (a) the likely remedial effect of the solution, and (b) the extent and impact of the problem that it was attempting to deal with?”³⁶⁷

European Community

“...virtually all branches of traditional IP law can play a part in the protection of TK (directly and indirectly), as TK is protectable subject matter as long as the application criteria are met.

³⁶⁶ WIPO/GRTKF/IC/11/5(a)

³⁶⁷ WIPO/GRTKF/IC/11/5(a) Add.

Under Patent law TK is patentable when the general conditions of novelty, inventive step and industrial applicability are met. While patent law seems more or less capable of appropriately protecting TK-derived inventions, it is normally not applicable to the TK stock itself, because it is limited to inventions adding an inventive step to the state of the art, thus deliberately not protecting the existing state of the art, but only new products. Protection of trade secrets and confidential information can represent both a protection instrument for spiritually valuable TK against any commercial exploitation and a flexible framework for fair contractual know-how licences in the TK field. It is also (contrary to patent protection) capable of covering the TK stocks itself as long as they are not freely available outside the range of the respective indigenous groups.

The role of copyright law will remain substantially limited to folklore protection rather than in the protection of the remaining "practical" TK. Some concepts of copyright law (the system of collecting societies and the paying public domain concept) could however deliver valuable examples of how to manage collectively held TK stakes effectively. Also, copyright law lately tends to go beyond its classic aesthetic subject matter, and has been extended to modern creations, namely computer programs and databases...³⁶⁸

International Publishers Association (IPA)

Patent, trademarks, copyright and the protections for designs provide ample protection of economic rights. Moreover, other areas of law may equally afford protection (geographic indications; confidentiality/trade secrets). IPA is not aware of any acute gaps in the area of publishing of TK.³⁶⁹

Intellectual Property Owners Association (IPO)

“Under the guidelines outlined above, a review of existing IPRs may establish that sufficient protection is already afforded to TK...”³⁷⁰

(ii) *Defensive protection*

Norway

“Existing IPRs (as i.e. regulated in treaties under the auspices of WIPO) already provides varying degrees of protection, depending on the circumstances. The conditions for patentability will for instance prevent that someone is granted a patent on an invention that does not involve the necessary inventive step compared to existing publicly known traditional knowledge...”³⁷¹

India

“...TK could be protected to a limited extent only through existing IP laws like patents, trademarks, GI, trade secrets, copyright, industrial designs, plant variety protection, etc.

³⁶⁸ WIPO/GRTKF/IC/11/5(a).

³⁶⁹ WIPO/GRTKF/IC/11/5(a).

³⁷⁰ WIPO/GRTKF/IC/11/5(a).

³⁷¹ WIPO/GRTKF/IC/11/5(a) Add.2

Many of these laws in India had provisions which had scope for protection against misappropriation and misuse of TK. However, most of these except GI were defensive protection against misappropriation and misuse of TK...³⁷²

Thailand

“...the IP system may, to a limited extent, provide some defensive measure aiming at preventing misappropriation of TK such as mandatory requirement of disclosure of origin for patent registration...”³⁷³

C: Specific forms of protection under national and regional law

(i) *Positive protection*

Recognition of TK in IP system

Colombia

“...Andean Decision 486 states that the protection granted to industrial property elements shall be granted while safeguarding and respecting their biological and genetic heritage, as well as the traditional knowledge of their indigenous communities. However, no intellectual property standard exists to protect traditional knowledge explicitly...”³⁷⁴

Recognition under human rights law

Japan

“...As regards the protection of traditional knowledge as a human right, traditional knowledge can be protected under a civil code or other general laws against serious human right infringements...”³⁷⁵

Recognition under cultural heritage legislation

Guatemala

“Law for the Protection of the National Cultural Heritage, decree No. 26-97, revised by Decree No. 81-98, establishes rules for the protection, defense, research, conservation and recovery of the property included in the National Cultural Heritage...”³⁷⁶

³⁷² WIPO/GRTKF/IC/11/15 Prov.

³⁷³ WIPO/GRTKF/IC/11/15 Prov.

³⁷⁴ WIPO/GRTKF/IC/11/5(a).

³⁷⁵ WIPO/GRTKF/IC/11/5(a)

³⁷⁶ WIPO/GRTKF/IC/11/5(a)

TK protected through TCE protection

Arts Law Centre of Australia

“Existing Australian law protects traditional knowledge to an even lesser extent than they protect traditional cultural expressions. Indeed protection afforded to traditional knowledge under Australian law generally takes the form of protection of TCEs. These protections operate under the following types of laws:

Copyright, Moral Rights, Trademark, Performer’s Rights, Consumer Protection and Trade Practices, Passing Off, Trade secrets, Confidentiality, Heritage Protection...”³⁷⁷

(ii) *Current national activities*

Australia

“...The Australian Government has undertaken to introduce legislation to give indigenous communities legal standing in certain circumstances to safeguard the integrity of creative works that embody traditional community knowledge. Work is currently being progressed on that legislation.

The Australian Cultural Ministers Council (CMC) has also agreed to give priority to Indigenous Intellectual property (IIP) issues. The key IIP objectives for CMC are:

- Promoting greater links between business and Indigenous communities about IPP to enhance greater economic independences;
- Raising awareness in indigenous communities, consumers and commercial operators of the need to protect IIP; and
- Enhancing coordination of existing networks of Indigenous and non-Indigenous organisations working in the area of IIP.

An Indigenous Intellectual Property Toolkit is currently being finalised to progress these objectives...”³⁷⁸

(iii) *Defensive protection*

Exclusion of TK from patents

South Africa

“...IPR applications that include or are based on IK should be specifically excluded from existing IPR protection. In IP terms for example patent claims would fail to meet the test of innovation, novelty or inventiveness. But more importantly for local and indigenous communities, such patent claims should be automatically denied because IK is in the community domain; that is, it is already under the jurisdiction of customary practice systems, which protect the IK in perpetuity as the inherent and inalienable cultural property of local and indigenous communities. Given this cross generation, communal nature of Indigenous

³⁷⁷ WIPO/GRTKF/IC/11/5(a) Add.2

³⁷⁸ WIPO/GRTKF/IC/11/5(a) Add.

Knowledge an international instrument is thus most likely to adequately protect - but will have to include elements that goes beyond traditional IPR...³⁷⁹

Legal deposit of cultural heritage

South Africa

“...In perusing the literature on indigenous knowledge we observe that provisions acknowledge an individual can own knowledge, not merely as trustee on behalf of others, but outright. By extension this would apply to innovations and practices...”

“...The South African Legal Deposit Act, 1997, provides for the protection of the national documentary heritage of the country. As IKS becomes more available in written form and as it stored in electronic databases, provision should be made for the National Library of SA on the other places of legal deposit to receive copies of such documents when published commercially. Provision should also be made for places of legal deposit to gain access to the relevant information stored in such databases (being mindful of the protection of intellectual property rights). The designated places of legal deposit would help preserve published IKS documents and would promote access to heritage information. IKS should therefore be provided for the Legal Deposit Act, 1997, which is now being amended. This holds true for other countries with legal deposit legislation...”³⁸⁰

Defensive protection in the trademark system

New Zealand

“...The review of the Trade Marks Act 1953, in New Zealand, introduced a series of measures to address concerns of Māori over inappropriate registration of Māori text and imagery as Trade Marks. These took the form of provisions to prevent individuals and enterprises from registering Trade Marks that are likely to be offensive to a significant portion of the population, including Māori.

Subsection 17(c) of the Trade Marks Act 2002 prescribes that the Commissioner of Trade Marks “must not register as a Trade Mark or part of a Trade Mark any matter, the use or registration of which would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including Māori.”

In relation to any Trade Marks registered under the former Act, which might today be considered offensive, the 2002 Act provides that any person (including a person who is culturally aggrieved) may seek a declaration of invalidity under the Act. This means that the Commissioner of Trade Marks or the Courts have the ability to declare a Trade Mark invalid if it would not have been registrable under the current 2002 Act.

The Trade Marks Act 2002 also provided for the establishment of an Advisory Committee to the Commissioner of Trade Marks. The function of this Committee as prescribed under the Act is to advise the Commissioner whether the proposed use or

³⁷⁹ WIPO/GRTKF/IC/11/5(a)

³⁸⁰ WIPO/GRTKF/IC/11/5(a)

registration of a Trade Mark that is, or appears to be, derivative of Māori sign, including text and imagery, is, or is likely to be offensive to Māori...³⁸¹

D: Identification of gaps in protection

(i) *Systemic gaps in protection*

China

“Although the existing IPR system could afford protection for TK to some extent, it is not enough...”³⁸²

Tunisia

“Traditional knowledge is considered to be a nebulous concept which cannot be protected with a single system of laws, in this case those relating to intellectual property...”³⁸³

Thailand

“...Nevertheless, existing IP regime were not sufficient to protect TK. They only protected creations and innovations based on TK, not the substance of TK itself.”³⁸⁴

Indonesia

“...the existing IP right system may not be the right one for the protection of TK. One of the reasons was that TK possessed a different nature and distinctive characteristics that did not fit to the existing IPR regime. These obstacles demonstrated that there was intrinsic insufficiency between the IPR regime and the characteristic of TK...”³⁸⁵

Peru

“...IPR which had been enforced did not take account of the particular features of TK nor the needs and expectations of indigenous peoples in relation to this TK. This was why it required a new instrument for this protection which would take account of these very special features and the needs and expectations of TK right holders. In addition a type of link between conventional IP and the new regime will need to be established for TK in such a way that conventional IP can collaborate with this new regime. One way of achieving this would be through the inclusion of prerequisites of disclosure of origin particularly in the case of requests for patents related to inventions obtained or

³⁸¹ WIPO/GRTKF/IC/11/5(a) Add.

³⁸² WIPO/GRTKF/IC/11/5(a)

³⁸³ WIPO/GRTKF/IC/11/5(a)

³⁸⁴ WIPO/GRTKF/IC/11/15 Prov

³⁸⁵ WIPO/GRTKF/IC/11/15 Prov.

developed on the basis of TK. In this way an IP system which would be more equitable, fair and therefore stronger could be achieved.”³⁸⁶

(ii) *Lack of protection national laws*

Colombia

“...In addition, neither does any other national law contain a regulation for access to traditional knowledge, or mechanisms either allowing communities to protect their traditional knowledge and obtain ownership of that knowledge, which can be recognized internationally.

In conclusion, no legislation exists to protect said traditional knowledge.”³⁸⁷

Nicaragua

There is no protection for traditional knowledge in Nicaragua.³⁸⁸

Kyrgyz Republic

There is no normative and legal base regulating traditional knowledge protection – this is a gap in legislation of the Kyrgyz Republic. At the same time it should be noted that we have elaborated the draft law “On the Protection of Traditional Knowledge”, which is currently reviewed by the Parliament of the Kyrgyz Republic.³⁸⁹

(iii) *Practical limitations in accessing conventional IP system*

International Chamber of Commerce (ICC)

While in many cases a variety of IPRs (patents on improvements, design rights, trademarks, plant breeders’ rights, geographical indications, contracts for use of confidential information) may be used to shelter traditional knowledge from exploitation by the general public, nevertheless these rights are not readily used by indigenous people. It needs to be discussed further whether a proper case can be made for a new right to control useful knowledge specific to a given group, and if so under what circumstances.³⁹⁰

Latvia

“In our opinion at present in some cases IPRs can be obtained in the form of patents or trade marks or designs but only to those who are familiar with procedures of acquiring

³⁸⁶ WIPO/GRTKF/IC/11/15 Prov.

³⁸⁷ WIPO/GRTKF/IC/11/5(a)

³⁸⁸ WIPO/GRTKF/IC/11/5(a) Add.

³⁸⁹

³⁹⁰ WIPO/GRTKF/IC/11/5(a)

these rights and have finances to do that. As we understand most of TK holders do not belong to this group...”³⁹¹

New Zealand

“...Some aspects of existing IPRs can be used to protect TK. For example, the assertion of copyright (including moral rights) over artistic and literary works, which meet the criteria under copyright law, may be possible. However, we note that the resources (financial and otherwise) required for TK and TCEs holders to effectively monitor and enforce their IPRs domestically and internationally may be beyond the means of many indigenous and local communities.

Certain exceptions and criteria in current IP law, such as novelty/prior art and inventiveness/non-obviousness, contrary to morality (such as scandalousness or offensiveness), may also provide grounds upon which indigenous and local communities may object to the granting of IPRs to third parties wishing to inappropriately exploit their TK and TCEs. Again, an issue arises in terms of the capacity for indigenous and local communities to undertake such objections...”³⁹²

(iv) *Shortcomings of conventional IP*

Misappropriation

Brazil

“IPR rules have so far proved insufficient to safeguard TK holders against misappropriation...”³⁹³

Spiritual and cultural dimension of TK

New Zealand

“...That is not to say that the IPR system does not provide some form of protection for Māori. There have been many examples given in evidence where Māori have used trademarks and copyright to protect the commercial aspects of their works. The key issue for the claimants is that the IPR system is limited to the protection of economic and commercial rights. It was not designed to protect cultural values and identity associated with *mātauranga Māori*...”³⁹⁴

³⁹¹ WIPO/GRTKF/IC/11/5(a)

³⁹² WIPO/GRTKF/IC/11/5(a) Add.

³⁹³ WIPO/GRTKF/IC/11/5(a)

³⁹⁴ WIPO/GRTKF/IC/11/5(a) Add.

Other factors: communal character, oral tradition, or lack of material form

Tunisia

“...The intellectual property system cannot recognize the collective ownership of practices and knowledge handed down from generation to generation...”³⁹⁵

Arts Law Centre of Australia

“...Given the limited protections available to TCEs under Australian law, Arts Law supports the introduction of principles which recognise:

- communal ownership/custodianship of traditional knowledge;
- traditional knowledge that is not reduced to a material form;
- duration of protection that is perpetual.

Recognition of any of these principles will increase the scope of protection to a significant extent.”³⁹⁶

Colombia

“Colombia reiterates the difficulties raised by the conventional intellectual property system for the protection of traditional knowledge. This system was devised for the protection of knowledge with an identifiable owner, the characteristics of which differ greatly from those of traditional knowledge which, as pointed out, is holistic, collective, and dynamic in nature, is handed down from generation to generation orally, forms part of the collective identity etc. For this reason, it is necessary to devise a special system for the protection of such knowledge. Conventional intellectual property rights do not apply, in the strict sense of the term, to traditional knowledge, since they are not known to communities, but especially because they are not suited to the characteristics of traditional knowledge...”³⁹⁷

Factors relating to origin or background of TK

Japan

“...Protection under patent law

Certain traditional knowledge has already been in the public domain. Thus, such traditional knowledge is not regarded as having novelty. To satisfy the novelty requirement, traditional knowledge, at the very least, should be maintained and passed on by persons who have a duty to keep the traditional knowledge confidential. Basically, inventors have the right to seek a patent. In the case of traditional knowledge, on the other hand, it is often difficult to specify to whom the right to seek a patent belongs because traditional knowledge is maintained/ developed over generations in indigenous groups or local communities, etc. As mentioned in the above item 2, similar problems might arise in cases involving two or more communities or countries...”

³⁹⁵ WIPO/GRTKF/IC/11/5(a)

³⁹⁶ WIPO/GRTKF/IC/11/5(a) Add.2

³⁹⁷ WIPO/GRTKF/IC/11/5(a)

“...Protection as a trade secret

To seek protection as a trade secret, the information subject to protection must satisfy the requirements of nondisclosure, utility, and maintenance of secrecy. Problems similar to those in the case of protection under a patent law will arise in terms of nondisclosure and the maintenance of secrecy...”³⁹⁸

South Africa

“...Already written and recorded information – does not recognise origin (Community). Under the current provision there are no obligations to the source community, such as obligations to acknowledge the origin of their inspiration, share benefits or respect the cultural and spiritual values and meanings associated with the underlying expression of folklore...”

“... Community rights:

Definition of novelty and obviousness (patents) are not recognized: we note the difficulty in meeting these requirements such as novelty or originality, and inventive step or non-obviousness (this may be due at least in part to the fact that IK often dates back prior to the time periods associated with conventional IP systems, or are developed in a more diffuse, cumulative and in a collective manner, making invention or authorship difficult to establish at a fixed time);

We draw attention to the fact that issue of oral history/ orature is conspicuously omitted. We propose that any provision must include oral history which is generally unwritten, and is based on oral traditions tracing back to the customs, habits, and usages of local and indigenous communities from generation to generation...”³⁹⁹

E: Approaches to identifying gaps in IP law

(i) *General policy considerations*

Canada

Both IP and non-IP laws and policies can, depending on the objective, protect TK. Concerns have been expressed that there is a “gap” in IP law because only someone from the source community should be able to use the TK as the basis of a new invention. Whether this represents a gap in IP protection may depend on a number of factors, in particular, the policy objective of protection. For example, is the policy objective to allow only a member of the source community to access and use all TK of his or her community, or is the objective to achieve such protection for a select category of TK only? The implications of such broad protection for users and the broader public interest should be considered. An identification and analysis of the gaps in the current system would advance the work of the Committee to the benefit of all Member States.⁴⁰⁰

³⁹⁸ WIPO/GRTKF/IC/11/5(a)

³⁹⁹ WIPO/GRTKF/IC/11/5(a)

⁴⁰⁰ WIPO/GRTKF/IC/11/5(a) Add.

New Zealand

“...It is possible to register collective patents, if the traditional knowledge-based innovation or creation meets the criteria for registration. Traditional knowledge that is passed on from generation to generation will in most instances constitute prior art, unless it has been kept secret, and therefore it will most often not be patentable...”

“...The issue as to what extent does the current IPRs system afford protection for TK and TCEs arose in the context of the Treaty of Waitangi claim WAI 2626 in New Zealand. The Ngāti Kuri, Ngāti Wai and Te Rarawa claimants⁷ described the relationship between *mātauranga Māori* (Māori knowledge) and intellectual property rights as follows:

“The Intellectual Property Rights (“IPR”) system, whilst providing a very limited form of protection for *mātauranga* does not reflect or protect the underlying values of traditional and customary knowledge systems. For example IPR are private, monopolistic rights that provide economic protection for the holders of those rights and are for a limited duration in time. Whereas *mātauranga Māori* (as with indigenous knowledge systems worldwide) are collective by nature, intergenerational and are integral to the ongoing maintenance and survival of Māori culture and identity...”

“...In both circumstances, current trade marks law does not fully take account of the realities associated with the protection of TK and TCEs...”

“...Some elements of protection can also be found in the common law principle of passing-off, in legal provisions relating to competition and fair trading, and in the law of contracts (e.g. confidentiality agreements, ABS agreements, trade secrets, breach of confidence). However, none of these possible mechanisms of protection have been designed with the primary objective to protect TK and TCEs, hence they often do not fully address the concerns and needs of TK and TCEs holders, and often require a trade-off or compromise on the part of the TK and TCEs holders. For example, many IP experts have praised the merits of the law on trade secrets as a possible option for TK and TCEs holders who wish to protect sacred TK and TCEs from misappropriation and misuse. The compromise may be that the indigenous peoples and local communities that are trying to protect those sacred elements of TK and TCEs, by using such a legal mechanism, are restricted in their ability and liberty to transmit and promote those sacred elements of TK and TCEs within their communities. Those sacred elements may get locked up and kept away from the people and the community. This may have some significant ramifications in terms of the survival, vitality, and integrity of the culture...”⁴⁰¹

Norway

“...the specific characteristics and needs in relation to the protection of traditional knowledge are not necessarily appropriately addressed in the traditional IPR systems. Furthermore, the protection accorded is fragmented and varies between different jurisdictions and does not recognize the value of traditional knowledge as such.”⁴⁰²

⁴⁰¹ WIPO/GRTKF/IC/11/5(a) Add.

⁴⁰² WIPO/GRTKF/IC/11/5(a) Add.2

China

“...So it’s necessary to consider the amendment of the existing IPR system to meet the requirements for the protection directly or indirectly, that is, to functionally facilitate protection from other related system...”⁴⁰³

(ii) *Ensuring consistency with biodiversity regulation*

Brazil

“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 regulating access to those components of biological diversity. Permission to access and/or use traditional knowledge does not imply permission to access and/or use associated genetic resources and vice versa.” (Convention on Biological Diversity, article 12)⁴⁰⁴

(iii) *Linkage with customary law*

New Zealand

“...In order for trade secrets instruments to be efficient in protecting TK and TCEs, the provisions in such instruments should be in accordance with customary laws and practices, and allow for controlled dissemination of the TK and TCEs within the indigenous and local communities, without the risk of them falling into the public domain. It may be difficult for indigenous and local communities to control the dissemination of TK and TCEs in such a way, given the social context and the prevalence of modern information-sharing technologies such as the internet. The protection context is different from secret-knowledge held by businesses or corporate entities.”⁴⁰⁵

(iv) *Dispute settlement*

Latvia

“...Gaps to be filled are an affordable protection and enforcement mechanisms mainly internationally either through sui generis system or by some specific provisions in existing IP laws and out of court dispute resolution system. Something like the dispute resolution mechanism established for disputes between domain names and trade marks.”⁴⁰⁶

⁴⁰³ WIPO/GRTKF/IC/11/5(a)

⁴⁰⁴ WIPO/GRTKF/IC/11/5(a).

⁴⁰⁵ WIPO/GRTKF/IC/11/5(a) Add.

⁴⁰⁶ WIPO/GRTKF/IC/11/5(a)

(v) *International layer of sui generis protection*

Indonesia

“...it was necessary to establish an international treaty system of *sui generis* protection of TK. Finally, a *sui generis* system at the national level was not adequate to ensure comprehensive protection of TK.”⁴⁰⁷

(vi) *Evolution of case law*

Australia

“...Within the legal systems of countries with common law traditions such matters may be dealt with through case law. This form of common law has an enduring and powerful impact while being open to further judicial evolution...”⁴⁰⁸

(vii) *Modification or evolution of existing legal doctrines*

Brazil

“...Respect for prior informed consent and for fair and equitable sharing of benefits arising from the use of their traditional knowledge should be incorporated into the IP system. Where traditional knowledge is associated with genetic resources, the sharing of benefits should be consistent with measures established in accordance with the Convention on Biological Diversity, and, in this connection, the draft provision of Article 12, transcribed below, represents adequate basis to discuss the issue...”

“...Without prejudice to the decision Members may take to protect TK via “*sui generis*” systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TK by examining, for example, possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TK.”⁴⁰⁹

Australia

It may be that traditional IP concepts could be altered to address particular objectives regarding TK. More general legal concepts such as contract law, unfair enrichment, fraud and unconscionable conduct may also have strong roles to play.⁴¹⁰

Colombia

“...Furthermore, the current intellectual property system should be harmonized in order to promote the protection of traditional knowledge. More and more frequently we encounter patents granted for inventions which do not satisfy patentability requirements in that they are not justly novel since traditional

⁴⁰⁷ WIPO/GRTKF/IC/11/15 Prov.

⁴⁰⁸ WIPO/GRTKF/IC/11/5(a) Add.

⁴⁰⁹ WIPO/GRTKF/IC/11/5(a)

⁴¹⁰ WIPO/GRTKF/IC/11/5(a) Add.

knowledge exists which relates to a patented invention (for example, Ayahuasca, Neem Tree, Enola Bean)...”⁴¹¹

Brazil

A crucial gap that needs to be filled is the lack of a rule that requires IPR applications to disclose compliance with prior informed consent and benefit-sharing. Draft policy objective number (xiv) – Preclude the grant of improper IP rights to unauthorized parties –, transcribed below, should be turned into a substantive provision:

“Preclude the grant of improper IP rights to unauthorized parties
(xiv) 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 have been complied with in the country of origin;”
(Convention on Biological Diversity, article 12)⁴¹²

(viii) Conventional IP as a point of reference

Colombia

They do (Conventional Intellectual Property Rights), however, constitute a valid reference point for the construction of a protection system which is actually applicable to traditional knowledge.⁴¹³

F: <u>Considerations concerning <i>sui generis</i> protection</u>

China

And it’s also valuable to bear in mind establishment and enforcement of a *sui generis* system given the unique characteristics of TK.⁴¹⁴

New Zealand

Intellectual property mechanisms were not designed with the protection of TK and TCEs in mind. New Zealand is therefore giving thought to the possible development of *sui generis* models of protection for cultural and intellectual property of Māori, beyond existing intellectual property rights systems. We are mindful that intellectual property rights protection is only one aspect of a broader set of concerns relating to the protection of traditional knowledge and cultural heritage. For New Zealand this means that alternative means of providing protection, additional to that which can be

⁴¹¹ WIPO/GRTKF/IC/11/5(a)

⁴¹² WIPO/GRTKF/IC/11/5(a)

⁴¹³ WIPO/GRTKF/IC/11/5(a)

⁴¹⁴ WIPO/GRTKF/IC/11/5(a) Add.

accommodated under the existing intellectual property regime, is being explored at the national level.

New Zealand supports further work by the Committee on sui generis systems to protect elements of traditional knowledge not covered by existing intellectual property rights systems.⁴¹⁵

India

“...Therefore a *sui generis* mechanism legally protecting TK as a whole should be developed. Such a protection system had to be on a global basis to be effective.”⁴¹⁶

F. Approaches to further gap analysis

Australia

“...As discussed at question 3 above, it might be useful in this respect to analyse specific priority examples of what might be considered inappropriate use of TK. As discussed such an analysis could consider how the current IP and general legal systems could be used to meet any agreed objectives. Such an analysis would be particularly useful if it considered the possibilities inherent in current IP and general legal concepts as, although such concepts may not have been used in the context of TK to date, they may have potential for such use that is not currently recognised.

It must be recognised that there may well be divergences of opinion among Member States regarding the presence of gaps. For example, one issue that Australia considers can be adequately address by the current IP system is that of the grant of erroneous patents that involve the use of TK. In particular, it considers that the revocation of patents relating to the use of Neem and Turmeric could be viewed as examples of how the existing patent system was able to deal with known TK as a form of prior art. There has been some criticism that the revocation procedures in those cases were expensive and took too long and that, therefore, other mechanisms are needed to ensure such grants do not happen again. A question that arises is how any alternative system, for example a mandatory disclosure system for TK, would work to ensure that the correction of errors, which are inevitable in any system, would be undertaken in a manner that was cheaper and quicker than revocation. Australia very much supports efforts to increase the information available to patent examiners so that fewer errors are made in the first place. However, Australia remains to be convinced that the lack of a mandatory system of disclosure of TK is a gap in the current IP system.

The issue of the proportionality of any responses to problems also arises here. For example, would the introduction of a disclosure system put a burden on the patent system that would be disproportionate in comparison to (a) the likely remedial effect of the solution, and (b) the extent and impact of the problem that is was attempting to deal with?”⁴¹⁷

⁴¹⁵ WIPO/GRTKF/IC/11/5(a) Add.

⁴¹⁶ WIPO/GRTKF/IC/11/15 Prov.

⁴¹⁷ WIPO/GRTKF/IC/11/5(a) Add.

United States of America

“Consistent with the mandate of the WIPO to “promote the protection of intellectual property rights,” thereby stimulating innovation and creativity, the IGC has made considerable progress in identifying the role of existing IPRs in addressing specific issues and concerns related to TK, including the role of national copyright, trademark, and trade secret laws, among other laws...”

“...Existing IPR principles and doctrines also may be integrated with customary law approaches.

The IGC should build on the national experiences of WIPO Member States as well as experiences of indigenous peoples in using or adapting existing IPRs to address issues and concerns related to TK. The Secretariat should provide an update on recent efforts to use existing IPRs to address TK. With a new factual baseline, the IGC may wish to consider activities and programs (including regional programs and tool kits) designed to facilitate the exchange of best practices on the use of existing IPRs to address specific local issues and concerns related to TK.

The IGC should not stop with canvassing the use of existing IPRs to address TK issues. Discussion of selected principles and doctrine of unfair competition, contract, cultural heritage, and customary law, where well-suited to address specific issue or concerns, are fully within the mandate of the IGC. For example, the IGC may wish to consider more closely examining the use of unfair competition law by WIPO Member States to address specific issues related to TK. The exchange of information on current national legal and policy developments and identification of successful national practices would advance the work of the IGC.

Some Members may raise concerns or specific examples where intellectual property systems are perceived or considered not to be sufficient to preserve, protect or promote TK in a particular context. Such an exchange would help the IGC to identify gaps, if any, in existing international frameworks. These perceived gaps could then be considered and addressed. For example, concerns may be raised with respect to unauthorized access to and lack of benefits deriving from the use of TK. In this light, access and benefit-sharing systems may need to be analyzed and discussed. Once these gaps are identified, proposals may be considered to redress concerns in a manner leading to convergence among Members. For example, Japan has identified concerns relating to potential granting of erroneous patents with respect to genetic resources and related traditional knowledge and has provided a proposed solution relating to improved databases of prior art in the patent context.”⁴¹⁸

⁴¹⁸ WIPO/GRTKF/IC/11/5(a)

ISSUE VIII: WHAT SANCTIONS OR PENALTIES SHOULD APPLY TO BEHAVIOUR
OR ACTS CONSIDERED UNACCEPTABLE/ ILLEGAL?

A: GENERAL CONSIDERATIONS

- (i) *Linkage with other issues*
- (ii) *Policy considerations*
- (iii) *Linkage to objectives of protection*
- (iv) *Proportionality to harm caused*

B: REFERENCES TO EXISTING INSTRUMENTS

- (i) *International law*
- (ii) *International and regional models*
- (iv) *National laws in cognate areas*

C: PROPOSALS FOR SPECIFIC SANCTIONS OR REMEDIES

- (i) *Economic damages*
- (ii) *Criminal and administrative remedies*
- (iii) *Various penalties: civil, criminal, financial or invalidation of rights*

D: PREFERRED IMPACT OF SANCTIONS

- (i) *Deterrent effect through loss of validity of IP*
- (ii) *Assessment of the gravity of the breach*
- (iii) *Need to consider specific harms caused as basis of remedies*

Some comments on the question of sanctions, penalties or remedies for breach of TK protection pointed to the linkage of this question with other issues, such as the nature of TK and the objectives of protection. Comments identified a range of relevant policy considerations, and some highlighted the need for sanctions to be proportional to the harm caused by the infringement of protection. A range of legal sources were cited to guide the development of sanctions or penalties, including existing international law, current models or drafts at the international and regional level, and national laws in cognate areas such as the protection of cultural heritage.

A range of proposals for specific sanctions or remedies was put forward, and these are grouped in the general categories of economic remedies, criminal and administrative remedies, and proposals that set out a range of mixed penalties, covering civil, criminal, financial or invalidation of rights, depending on the circumstances or character of the illegitimate use of protected TK. Other comments considered the impact that sanctions should have, such as a deterrent effect, an impact dependent on the gravity of the breach, and a need to assess the specific harm caused as the basis for determining sanctions.

A: <u>General considerations</u>

- (i) *Linkage with other issues*

International Publishers Association (IPA)

IPA is concerned by the introduction of the notion of “unacceptability” in the ongoing discussions. “Unacceptability” is not a legal term and means different things to different people. IPA recommends the use of clear and unambiguous terms throughout the ongoing discussions.

IPA opposes a hasty protection of TK and therefore does not at this stage want to comment on the question of sanctions or penalties.⁴¹⁹

New Zealand

It may be too early in the process to fully assess this issue. It is important to first build an ethical foundation and behavioural practices which are consistent with the needs and aspirations of indigenous and local communities before determining what types of sanctions or penalties would be most effective to foster adherence to those practices and deter unacceptable or illegal use of TK and TCEs.⁴²⁰

Kyrgyz Republic

Currently legislation of the Kyrgyz Republic does not provide any sanctions or penalties for violation of traditional knowledge use. We intend to identify liability similar to legislation in the field of Intellectual Property.⁴²¹

International Chamber of Commerce (ICC)

It is not possible to answer this question in the abstract. The answer will depend on many factors including the definition of protectable traditional knowledge, the objective of its protection and the nature of rights given to those who control the knowledge.⁴²²

Intellectual Property Owners Association (IPO)

It is premature to discuss sanctions without a fuller understanding of the metes and bounds of TK to be protected, or even whether a statutory system distinct from existing trade secret laws is necessary to protect TK.⁴²³

(ii) *Policy considerations*

Japan

Sanctions/penalties against unacceptable/illegal acts may vary depending on the level of protection for traditional knowledge or the level of illegality. As mentioned in the above item 3, there is no clear justifiable reason why traditional knowledge is eligible for IP right protection. Japan is greatly concerned about extending IP right protection to traditional knowledge. A fair balance has been kept between the protection of traditional knowledge and the protection of public domain under the IP systems and other laws. Japan sees no need to introduce any other sanctions/penalties than those that have been already adopted under the existing systems. Japan does not believe that such a discussion is necessary, but when discussing what sanctions/penalties should be introduced, consideration should be given as to the form of protection for traditional

⁴¹⁹ WIPO/GRTKF/IC/11/5(a)

⁴²⁰ WIPO/GRTKF/IC/11/5(a) Add.

⁴²¹

⁴²² WIPO/GRTKF/IC/11/5(a)

⁴²³ WIPO/GRTKF/IC/11/5(a)

knowledge and the scope of illegal acts. Discussion based on factual information about what damage has been caused by what illegal acts is essential.⁴²⁴

(iii) *Linkage to objectives of protection*

Switzerland

Several options are possible, depending on the aims and rights attached to traditional knowledge. Illegal behaviour could be the subject of civil or criminal sanctions, according to the nature of the act and national legislation. Sanctions could, inter alia, be in the form of a fine or damages paid to the victim.⁴²⁵

(iv) *Proportionality to harm caused*

Canada

It is premature to determine if sanctions or penalties should be applied. Should there be sanctions or penalties, they should be proportional to the harm caused and must be consistent with a Member State's international legal obligations.⁴²⁶

Australia

"...any sanction or penalties should be designed to meet the objectives of the measures put in place and be proportionate and appropriate to any harm caused. It is only once an understanding of objectives and possible measures is developed further that fruitful and detailed discussion regarding appropriate sanctions or penalties could be undertaken. As indicated at question 7 a consideration of whether sanctions/penalties under existing laws can be applied should occur before exploration of other mechanisms, if considered necessary, is undertaken. Introduction of measures without proper evaluation of their enforceability, proportionality to the likely harm, their impact and role is likely to cause uncertainty and not deliver the desired objectives."⁴²⁷

Russian Federation

"...there should be adequate and appropriate penalties, appropriate to the infringement occurred. They should cover a number of points such as the type of protection. There should therefore be a fine or some other compensatory measure."⁴²⁸

Morocco

"...Protection of TK was something that could only be effective if that protection was appropriate. Therefore, the protection had to be genuinely implemented and when there was a violation or an infringement of the protection of TK then clearly measures had to

⁴²⁴ WIPO/GRTKF/IC/11/5(a)

⁴²⁵ WIPO/GRTKF/IC/11/5(a)

⁴²⁶ WIPO/GRTKF/IC/11/5(a) Add.

⁴²⁷ WIPO/GRTKF/IC/11/5(a) Add.

⁴²⁸ WIPO/GRTKF/IC/11/15 Prov.

be taken to deal with that. It was necessary to either have preventive measures to end it once and for all or else some kind of sanctions and penalties had to be applied or one had to have a system for compensation to be paid to the injured party. Of course the compensation, the damages to be paid would have to be adequate and proportional to the damage caused. There was a need for penalties or sanctions when there had been a violation of the protection of TK.”⁴²⁹

B: References to existing instruments

(i) *International law*

European Community

“...any acts that contravene the laws could be subject to effective sanctions such as warnings, fines, confiscation of products etc. Existing rules penalising unfair competition could be used (Art. 10bis of the Paris Convention).”⁴³⁰

Norway

Appropriate and effective sanctions should be provided for in national law depending upon the infringement in question. Part III of the TRIPS Agreement provides guidance in this respect.⁴³¹

(ii) *Draft WIPO provisions*

Indonesia

“...article 2 paragraph (1) in WIPO/GRTKF/IC/11/5(c) was a good basis to discuss sanctions or penalties. Sanctions or penalties should not be limited to redress through criminal sanctions only. In this regard, civil redress through civil litigation (for damages) shall also apply. In addition to this, it was also important to consider the role of national law. This inclusion was pertinent since national law played a very important role in ensuring effective protection of TK.”⁴³²

Brazil

“...The draft instrument contained in the Annex of document WIPO/GRTKF/IC/10/5 should incorporate a specific provision to this effect, that could draw upon the provision proposed, for example, in the draft instrument regarding protection of TCEs/EoFs (Article 8 (a)), transcribed below:

“(a) Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil

⁴²⁹ WIPO/GRTKF/IC/11/15 Prov.

⁴³⁰ WIPO/GRTKF/IC/11/5(a)

⁴³¹ WIPO/GRTKF/IC/11/5(a) Add.2

⁴³² WIPO/GRTKF/IC/11/15 Prov.

remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.”⁴³³

(ii) *International and regional models*

Ghana

We suggest that the following provisions in the African Union model law be considered.

Without prejudice to the existing agencies and authorities, the state shall establish appropriate agencies with the power to ensure compliance with the provisions of the instrument.

Without prejudice to the exercise of civil and penal actions which may arise from violations of the provisions of the instrument and subsequent regulations, sanctions and penalties to be provided may include:

- i) written warning
- ii) fines
- iii) automatic cancellation / revocation of the permission for access
- iv) confiscation of collected biological specimens recorded information and equipment
- v) permanent ban from access to traditional knowledge such as biological resources / community knowledge and technologies in the country.

The violation committed shall be publicized in the national and international media and shall be reported by the national competent authority to the secretariats of relevant international conventions and regional bodies.

When the collector innovator conducts his / her operation outside of national jurisdiction, any alleged violations by such a collector may be prosecuted through the co-operation of the government under whose jurisdiction the collector operates based on the guarantee that the latter has provided.⁴³⁴

Guatemala

Model provisions for National Law on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

Confiscation.

Prohibition of storage, import and export.⁴³⁵

(iv) *National laws in cognate areas*

Tunisia

The same sanction adopted in the field of archaeological heritage (the looting of sites) and the sanctions relating to copyright (piracy).⁴³⁶

⁴³³ WIPO/GRTKF/IC/11/5(a)

⁴³⁴ WIPO/GRTKF/IC/11/5(a)

⁴³⁵ WIPO/GRTKF/IC/11/5(a)

⁴³⁶ WIPO/GRTKF/IC/11/5(a)

Guatemala

Guatemalan Penal Code

Establishes offences against the public faith and national heritage, as well as the looting of that heritage.

Article 332A, added by Article 23 of Decree No. 33-96, which reads: theft and robbery of national treasures. A prison sentence of two to 10 years shall be imposed in the case of Article 246 and a sentence of four to 15 years in the case of Article 251, where appropriation of the following is undertaken:

- (9) collections and rare specimens of fauna, flora or minerals, or items of palaeontological interests;
- (10) property of scientific, cultural, historical or religious value;
- (11) antiques more than 100 years old, inscriptions, coins, engravings, tax or postal stamps of philatelic value;
- (12) objects of ethnological interest;
- (13) manuscripts, books, documents and old publications with historical or artistic value;
- (14) original artefacts, pictures, paintings and drawings, engravings and lithographs with historical or cultural value;
- (15) sound, photographic or cinematographic archives with historical or cultural value;
- (16) articles or objects of furnishing more than 200 years old and old musical instruments with historical or cultural value.

The penalty will be raised by one third where an offence is committed by public servants or officials or persons who, owing to their position or function, are responsible for guarding and keeping custody of the property protected by this Article.

Article 332A, added by article 24 of Decree 33-96, reads as follows: theft and robbery of archaeological property. A prison sentence of two to 10 years shall be imposed in the case of Article 246 and a prison sentence of four to 15 years in the case of Article 251, where appropriation of the following is undertaken:

- 4. products of lawful or unlawful archaeological excavations, or of archaeological discoveries;
- 5. ornaments or parts of archaeological monuments;
- 6. items or objects of archaeological interest, although they are scattered or located in abandoned areas.

The penalty will be raised by one third where an offence is committed by public servants or officials or persons who, owing to their position or function, are responsible for guarding and keeping custody of protected property.

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 45. Unlawful export of cultural property. Any person unlawfully exporting property which is part of the National Cultural Heritage shall be sanctioned with a prison sentence of six to 15 years, plus a fine equivalent to twice the value of the cultural property which shall be

confiscated. The monetary value of the cultural property shall be determined by the Directorate General of the Cultural and Natural Heritage.⁴³⁷

C: Proposals for specific sanctions or remedies

(i) *Economic damages*

Eurasian Patent Office (EPO)

Prohibition of further use and compensation of damages (penalties) may be envisaged as means of protection from misappropriation of TK. Damages arising from misappropriation include lost profits and unjust enrichment. An important measure may be introduction of legislative norms that would cease monopolistic or exclusive rights in cases of their unjustified granting to patent owners as well as to holders of traditional knowledge.⁴³⁸

(ii) *Criminal and administrative remedies*

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

In general, criminal protection should be granted against infringers and appropriators of traditional cultural expressions, although reserved for the most serious cases.

We consider that administrative measures and border control, with the imposition of heavy fines for offenders, could give excellent results where infringements affect important elements of different nationalities.⁴³⁹

(iii) *Various penalties: civil, criminal, financial or invalidation of rights*

Latvia

Sanctions could include invalidation of rights obtained, may be some other pecuniary penalties.⁴⁴⁰

Russian Association of Indigenous Peoples of the North (RAIPON)

The unlawful use, without the voluntary and conscious consent of authors, of traditional cultural expressions for commercial purposes shall be punishable by the complete removal of profit and circulation of such expressions for the benefit of authors.⁴⁴¹

⁴³⁷ WIPO/GRTKF/IC/11/5(a)

⁴³⁸ WIPO/GRTKF/IC/11/5(a)

⁴³⁹ WIPO/GRTKF/IC/11/5(a)

⁴⁴⁰ WIPO/GRTKF/IC/11/5(a)

⁴⁴¹ WIPO/GRTKF/IC/11/5(a)

Colombia

We consider the imposition of civil and criminal sanctions which envisage financial and non-financial compensation in favour of communities and against those engaging in unacceptable or illegal behaviour or acts to be in conformity with the rules of each country.⁴⁴²

Nicaragua

Financial sanctions and terms of imprisonment according to the seriousness of the offense;⁴⁴³

Arts Law Centre of Australia

As mentioned in Issue 5 above, Arts Law supports the tenets espoused in Article 8(1). Criminal and civil sanctions should be introduced to domestic law to address these transgressions.⁴⁴⁴

New Zealand

“...For existing intellectual property rights, infringement is usually a civil matter rather than criminal, although criminal penalties apply to some forms of copyright infringement. This means that IP rights holders must take action against infringers. This may not be the most desirable and effective way of enforcing potential IP rights in relation to TK and TCEs, if the holders of those rights have limited resources and capacity to monitor their rights and take action against infringers. Criminal penalties and appropriate resourcing of enforcing agencies, or a combination of both criminal and civil remedies, might be more appropriate.

The need for strong legal sanctions (economic or otherwise) was expressed in most of the submissions received by the New Zealand Government on the draft policy objectives and principles for the protection of TK and TCEs. Education and awareness-raising were also seen as important for compliance and enforcement.”⁴⁴⁵

Algeria on behalf of the African Group

“...appropriate, civil and criminal sanctions and penalties should be applied to behavior or acts considered to be unacceptable and illegal.”⁴⁴⁶

⁴⁴² WIPO/GRTKF/IC/11/5(a)

⁴⁴³ WIPO/GRTKF/IC/11/5(a) Add.

⁴⁴⁴ WIPO/GRTKF/IC/11/5(a) Add.2

⁴⁴⁵ WIPO/GRTKF/IC/11/5(a) Add.

⁴⁴⁶ WIPO/GRTKF/IC/11/15 Prov.

D: Preferred impact of sanctions

(i) *Deterrent effect through loss of validity of IP*

Brazil

“Measures should be put in place to ensure that enforcement procedures are available under Members legislation so as to permit effective action against any act of misappropriation, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. In this respect, the Committee might consider possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TKs in the cases where the granting of IPRs has infringed rules on TK protection...”⁴⁴⁷

China

“...the issue of sanctions and penalties is not an isolated one but has a very close relationship with protective measures. Behaviour and acts considered to be unacceptable/ illegal should be applied for sanctions or penalties including but not limited to those IPRs-related, such as rejection of patent application or revocation (invalidation) of patent and civil or criminal penalties, etc. The application of sanctions and penalties should be deterrent enough to illegal behaviour and acts, but not be an unreasonable burden for legal acts.

Paragraph 1, Article 2 of the part III, Substantive Provisions, in the current draft, could be a basis for the discussion on this issue.”⁴⁴⁸

(ii) *Assessment of the gravity of the breach*

South Africa

“...We are of the view that penalties could be set in order to recognise the particular gravity of the breach, as well as the financial means of the party involved. Civil procedures would be followed, including use of the civil standard of proof. A suitable appeal mechanism would need to be available to review the exercise of the regulator’s or issuing officer’s discretion.

Following evaluation document 10/4, it could potentially be extended to other areas of environmental regulation and other regulatory agencies. Our proposed regulations on access and benefit could be used to benchmark standards...”⁴⁴⁹

⁴⁴⁷ WIPO/GRTKF/IC/11/5(a)

⁴⁴⁸ WIPO/GRTKF/IC/11/5(a)

⁴⁴⁹ WIPO/GRTKF/IC/11/5(a)

(iii) Need to consider specific harms caused as basis of remedies

United States of America

For the reasons set forth in our response to Issue five, the United States believes that a discussion of “sanctions and penalties” will not advance the work of the IGC at this time.

As noted in the same response, however, the United States believes that the IGC should undertake a focused discussion of specific behaviors and acts regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities.

Once the IGC reaches a more informed understanding of the specific harms at issue, the IGC will be in a better position to canvas remedies under existing law (including copyright, trademark, patent, unfair competition, trade secret, criminal, and customary law) to determine whether there are gaps in the existing remedial schemes of WIPO member states.⁴⁵⁰

⁴⁵⁰ WIPO/GRTKF/IC/11/5(a)

ISSUE IX: WHICH ISSUES SHOULD BE DEALT WITH INTERNATIONALLY AND WHICH NATIONALLY, OR WHAT DIVISION SHOULD BE MADE BETWEEN INTERNATIONAL REGULATION AND NATIONAL REGULATION?

A: ISSUES TO BE DEALT WITH AT THE INTERNATIONAL LEVEL

- (i) *General approach to the international level*
- (ii) *Role of international law or guidelines*
- (iii) *Specific issues to be addressed at the international level*

B: ISSUES TO BE DEALT WITH AT A NATIONAL LEVEL

- (i) *Administration and enforcement of rights*
- (ii) *Defining scope for national policymaking*

C: INTERPLAY BETWEEN THE INTERNATIONAL AND NATIONAL DIMENSIONS

- (i) *Defining the respective roles of international and national regulation*
- (ii) *Feedback between national and international norms*
- (iii) *Need for national flexibility under international framework: subsidiarity*

D: LINKAGES WITH OTHER AREAS OF INTERNATIONAL LAW AND POLICY

E: APPROACHES TO FURTHER WORK ON INTERNATIONAL AND NATIONAL ASPECTS

Comments referring to the international and national levels of regulation of TK fell into five general categories:

- The kind of issues that had to be dealt with at the international level, discussing also the role of international law and other instruments, as well as the specific issues that had to be addressed internationally
- Those issues that had to be dealt with nationally, such as the administration and enforcement of specific rights in TK and specific areas of national policymaking
- Comments on forms of interplay between international and national dimensions, considering how to define the respective roles of international and national regulation, describing how feedback is established between national and international norms, and setting out the need for national flexibility within an international framework, including through applying the principle of subsidiarity
- Comments touching on linkages with other areas of public policy at the international level
- Proposals for how further work on delineating the international and national levels should be undertaken

A: Issues to be dealt with at the international level

- (i) *General approach to the international level*

Eurasian Patent Office (EPO)

The main principles and legal norms should be defined on the international level. On the basis of norms of the International Law it may be necessary to create supranational bodies (committees) and special groups (commissions) to work with indigenous peoples and communities.⁴⁵¹

⁴⁵¹ WIPO/GRTKF/IC/11/5(a)

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“...in order to focus appropriately on the protection under consideration, there is no more effective formula than the drawing-up of an international treaty to which the majority of Member States could sign up. Once this international treaty has been prepared, it would be necessary to complement or establish original legal protection for traditional cultural expressions.

Since there is virtually no national rule on the subject, it is difficult to determine it at the national level.”⁴⁵²

(ii) *Role of international law or guidelines*

Arts Law Centre of Australia

“...there are limits to the protection afforded to TK under existing Australian domestic law. An international framework, whether that take the form of a treaty or a convention of universal principles which Australia would implement into its domestic laws.”⁴⁵³

New Zealand

“Any protection that is provided in New Zealand for TK and TCEs does not extend to other States, unless provided for in international bilateral or multilateral instruments. The New Zealand experience has shown that numerous incidents of misappropriation, misuse, and misrepresentation of TK and TCEs have occurred outside of New Zealand and for this reason, we consider that protection of TK and TCEs is needed at an international level in order to provide Members States and its citizens with recourse mechanisms to prevent such misappropriation, misuse, and misrepresentation from occurring outside of the source country.

Our domestic experience has also shown that individuals and organisations from the international community who wish to use indigenous TK and TCEs from New Zealand are often not aware of the customary laws and protocols applicable to such use. Some of those customary laws and protocols are common to a number of indigenous and local communities around the world. The development and promotion of international codes of ethics, guidelines, and/or best practice mechanisms for users of TK and TCEs would be one way of ensuring a certain level of respect and appreciation for those common customary laws and practices associated with the use of TK and TCEs...”⁴⁵⁴

Colombia

“...Although the individuals who belong to indigenous peoples and traditional communities are the subject of special rights, it should also be borne in mind that traditional knowledge protection is collective in nature and therefore benefits must also be collective. The rules governing the sharing of benefits must be universal insofar as the scope of and benefits from intellectual property rights transcend national borders. The people who go beyond political borders must undoubtedly be treated as nations in

⁴⁵² WIPO/GRTKF/IC/11/5(a)

⁴⁵³ WIPO/GRTKF/IC/11/5(a) Add.2

⁴⁵⁴ WIPO/GRTKF/IC/11/5(a) Add.

their entirety, for which reason the regional management of traditional knowledge must be dealt with a priority. The most appropriate action at the national level would be the generation of a “sui generis” –type law which does not replace but rather complements the protection applicable to traditional knowledge under other laws or legal measures at the national and international level. The above instrument should be directed more towards preventive protection than towards positive action, or to a combination of the two. This is true taking into account that since a number of measures in this regard have already been put forward, there is also the urgent need to have interpretations which prevent countries from granting exclusive rights in traditional knowledge which has been misappropriated. The Government of Colombia recommends the promotion of regional discussion and consultation to devise viable proposals on this subject.”⁴⁵⁵

Libya

“...there was a need for an international binding instrument. There were two reasons for that. On the one hand, national legislation alone was not sufficient to protect TK particularly in developing countries as their legislation was changing very quickly as indeed were the institutions in those countries. That meant that often things were overlooked and that was a problem. Secondly, having a binding international instrument for TK would make it possible to protect TK from developed countries who often legislated just in their own interest taking account purely of their own interests and this very much to the detriment of developing countries. The international instrument should take due account of all situations which existed both within countries and between countries when it came to TK. The instruments should also take particular account of the need for a compensation to be paid for the pillaging that had been carried out by colonialists in the past.”⁴⁵⁶

MBOSCUA

The representative of MBOSCUA strongly supported an international binding instrument. Considering that most African States had very hostile policy towards indigenous people and communities, he believed an international instrument would set these excess of the African States towards indigenous people and their culture and TK. He gave an example of what was happening in his country, Cameroon. Whereby, their traditional spiritual leaders died two weeks ago and, according to their own cultures and traditions, they needed to follow spiritual and sacred way to enthrone a new traditional ruler to take over the throne. Unfortunately, they had been refused this right because of a world rich multimillionaire who was violating the right of the Mbororo indigenous people in Cameroon and had corrupted the local administration to impose an imposter on their throne. The government of Cameroon was supporting him because he was a Member of the Ruling party in the country and he was extremely rich. An international instrument could be able to check such misbehavior of some State authority.⁴⁵⁷

⁴⁵⁵ WIPO/GRTKF/IC/11/5(a)

⁴⁵⁶ WIPO/GRTKF/IC/11/15 Prov.

⁴⁵⁷ WIPO/GRTKF/IC/11/15 Prov.

(iii) *Specific issues to be addressed at the international level*

Sudan

“...National legislation was not sufficient in itself to provide protection because misappropriation of TK also entailed the appropriation of the culture and values of the society in question. Of course this was knowledge which evolved each day in accordance with the local context and in the challenges of each environment. Therefore, equitable benefit-sharing was something related to contemporary knowledge and this was justification for providing for an international legal instrument.”⁴⁵⁸

B: Issues to be dealt with at a national level

(i) *Administration and enforcement of rights*

International Chamber of Commerce (ICC)

Rights will have to be administered and enforced nationally. As yet there is no consensus on the need for or contents of an international agreement.⁴⁵⁹

(ii) *Defining scope for national policymaking*

South Africa

“...As South Africa is signatory to most of the internationally binding legal treaties, there is no way it can operate without constructively engaging with the big and small windows of opportunity that exist within those legal frameworks. We propose that the following simultaneous challenge of protection “from” (i.e. continued unjust exploitation) on the one hand, and protection “to”, which entails creating new spaces for what was marginalized or subjugated to begin its self definition, and determine its parameters for its interaction with other knowledge systems. This latter contains the crucial imperatives for the development, promotion as well as integration with their concomitant implications for the way formal institutions operate.

We fully support the insertion of “customary law” under this question given that South African Constitution provides for customary law and that the courts in South Africa apply customary law when the law is applicable.”⁴⁶⁰

Tunisia

“Currently no legal framework exists for the protection of traditional knowledge at the national level.

The protection of traditional knowledge at the national level is essential, and the Code of Protection for the Archaeological, Historical and Traditional Arts Heritage, enacted

⁴⁵⁸ WIPO/GRTKF/IC/11/15 Prov.

⁴⁵⁹ WIPO/GRTKF/IC/11/5(a)

⁴⁶⁰ WIPO/GRTKF/IC/11/5(a)

under Law No. 94-35 of February 24, 1994, and which relates essentially to sites and monuments, can be broadened to extend to traditional knowledge...⁴⁶¹

C: Interplay between the international and national dimensions

(i) Defining the respective roles of international and national regulation

Brazil

The international instrument on the protection of TK should set out minimum standards with a view to facilitate enforcement of provisions of national legislations in third countries, in particular those targeted against acts of misappropriation. The international dimension of the work of the Committee lies on determining general rules applicable to the protection of TK, such as (i) the requirement for prior informed consent and, when applicable, benefit-sharing; (ii) reference to cases that constitute acts of misappropriation; (iii) a rule requiring the need to put in place effective enforcement measures.

At the national level, legislation would lay down specific relevant definitions as well as the applicable procedures for the identification of parties eligible to protection, maintenance and exercise of rights over TK.⁴⁶²

Latvia

Nationally - definition of TK holders, cataloguing TK, mechanisms of access to TK; internationally - acknowledgement of TK rights, facilitation of contesting improperly acquired rights, simple dispute resolution mechanism.⁴⁶³

Russian Association of Indigenous Peoples of the North (RAIPON)

At the international level general principles of protection and defense: the right of priority to use traditional knowledge for commercial purposes, granted by representatives of indigenous peoples and encouragement of persons related to indigenous peoples, to make commercial use of traditional knowledge through the provision of essential capital and conditions for such use by persons and organizations of indigenous peoples.

Documentation by specialists of traditional knowledge (including their whole range as listed above) of persons and communities related to indigenous peoples, which they wish to use for commercial purposes, or in cases of the unlawful use of such knowledge by persons not related to indigenous peoples.

At the national level – mechanisms providing protection and defense.⁴⁶⁴

Switzerland

⁴⁶¹ WIPO/GRTKF/IC/11/5(a)

⁴⁶² WIPO/GRTKF/IC/11/5(a)

⁴⁶³ WIPO/GRTKF/IC/11/5(a)

⁴⁶⁴ WIPO/GRTKF/IC/11/5(a)

Minimum standards (terminology, definitions, protection conditions, rights granted, duration, holders...) could be regulated at the international level. The whole implementation and precise regulation for a territory could be dealt with at the national level and, as we have seen above, an intellectual property right is a right limited in its geographical territory.⁴⁶⁵

Indonesia

“...this question actually posed a cause to identify reasons in justifying the need for an internationally legally binding instrument and relationship of national legislation with the international instrument. National legislation may regulate the owners of TK and its utilization but in fact national legislation could not address the whole issue in a comprehensive manner such as the issues of territoriality, globalization and international commercialization of TK as well as the appropriate recognition of foreign right holders. Therefore, it was necessary to have an international system for the protection of TK. The International system will also sufficiently deal with the issue of disputes and enforcement on the one hand and on the other hand international instrument will also offer positive protection which was required in order to address cross boundary issues. In addition to this, regional instruments could also be an effective way of addressing those issues.”⁴⁶⁶

OPDP

internationally ... to identify the use of IPR globally, monitoring the use and keeping the database while nationally was domestication of existing laws and also providing space for the protection and the promotion of IPR.⁴⁶⁷

Ghana

Every issue concerning Traditional Knowledge should be dealt with at both the national and international levels especially where, the issue involves two or more different nationals or nations;⁴⁶⁸

(ii) *Feedback between national and international norms*

China

“...the issues concerning protection of TK should be taken into account on both international and national dimensions. On the one hand, national legislation could afford experiences for international harmonization. On the other hand, international harmonization would facilitate and guide national legislation, preventing their conflicts, and help to solve those common problems. And it's more important that international

⁴⁶⁵ WIPO/GRTKF/IC/11/5(a)

⁴⁶⁶ WIPO/GRTKF/IC/11/15 Prov.

⁴⁶⁷ WIPO/GRTKF/IC/11/15 Prov.

⁴⁶⁸ WIPO/GRTKF/IC/11/5(a)

harmonization is irreplaceable to solve the problem of access and misappropriation of TK abroad, which is becoming prevalent.”⁴⁶⁹

(iii) *Need for national flexibility under international framework: subsidiarity*

New Zealand

“...An international instrument, while facilitating protection of New Zealand TK and TCEs in other countries, may limit the ability of New Zealand to tailor its protection system to suit the particular domestic circumstances, as the instrument will need to be acceptable to and appropriate for groups in the rest of the World.

In the Waitangi Tribunal claim WAI 2628, the Ngāti Kuri, Ngāti Wai and Te Rarawa claimants (three Māori tribal entities from the Northern portion of New Zealand) submitted that:

“While there are efforts being made at the international level such as the World Intellectual Property Organisation (WIPO), to develop policies and guidelines for protection of traditional knowledge this is occurring within and thus subject to, the existing IPR system. New Zealand has a unique opportunity to develop a new and innovative system that draws from both *tikanga Māori* (Māori protocol and values) and *tikanga Pakeha* (Western protocol and values) systems to create a new and innovative system of protection. ... Such a framework would have *tikanga Māori* (Māori protocol and values) as a starting point and would provide more protection for Māori whilst providing greater certainty for non-Māori who wish to access *mātauranga* (Māori knowledge) or work collaboratively with Māori in research and development of indigenous flora and fauna.”⁴⁷⁰

European Community

Even if it is premature at this stage to deal with this question, the EC and its Member States support a flexible approach and consider such an approach essential in order to take account of the diverse measures of TK protection which already exist at national/regional level. We believe that the final decision on the legal protection of TK should be left to national legislators. National authorities should have necessary flexibility in determining the appropriate measures which best reflect the needs of their local/indigenous communities in the domestic context.

At international level the EC has a preference for a non-binding legal outcome, i.e., *sui generis* models or other non-binding options. TK protection should also be consistent with already existing IP systems and international treaties.⁴⁷¹

⁴⁶⁹ WIPO/GRTKF/IC/11/5(a)

⁴⁷⁰ WIPO/GRTKF/IC/11/5(a) Add.

⁴⁷¹ WIPO/GRTKF/IC/11/5(a)

International Publishers Association (IPA)

The principle of subsidiarity requires that only those tasks should be performed at international level which cannot be performed effectively at a more immediate or local level. Respect for the same principle also requires that international harmonisation should be the conclusion, not the precursor of the development of national regulation.⁴⁷²

Norway

The core elements should be dealt with internationally, thus providing a minimum standard of protection. However, the need for flexibility should also be recognized. One system of protection does not necessarily fit all and different concerns locally or related to the specific subject matter should also be taken into account.⁴⁷³

Australia

Acknowledging that no outcome is excluded from the work of the IGC, Australia favours solutions to particular issues in the form of non-binding mechanism/s as this provides for greater flexibility and choice of implementation at the national level.

As discussed at question 3 above, a flexible approach to the protection of TK helps ensure that appropriate mechanisms are available to suit the range of needs of Indigenous peoples, and that an appropriate balance is achieved between those needs and the needs of the broader community more generally. This flexibility should also extend to respect for the diversity of legal systems amongst Member States.

We also acknowledge that consultation and cooperation with other international forums is important and consistency with relevant provisions of existing international instruments is critical to ensure their continued and effective operation.⁴⁷⁴

New Zealand

“...it is also important to retain flexibility for countries to develop solutions and mechanisms appropriate to their own unique characteristics and circumstances. While the development of sui generis systems at the international level is an objective that many states support, this should not preclude the development of country or region-specific alternative approaches to protecting the knowledge and practices of indigenous communities. This is particularly important given the ‘culturally distinctive’ nature of TK and TCEs, and the possibility of other domestic legal sources of rights in relation to TK and TCEs that may need to be taken into account (e.g. indigenous and human rights, Treaty of Waitangi)...”⁴⁷⁵

D: Linkages with other areas of international law and policy

⁴⁷² WIPO/GRTKF/IC/11/5(a)

⁴⁷³ WIPO/GRTKF/IC/11/5(a) Add.2

⁴⁷⁴ WIPO/GRTKF/IC/11/5(a) Add.

⁴⁷⁵ WIPO/GRTKF/IC/11/5(a) Add.

South Africa

“...there needs to be coordination and clarification of linkages with the other elements of other international protocols and conventions. We propose that mechanisms for enabling or facilitating notification or registration as the basis for recognizing an IP right under national law and regional policy be taken into consideration. Hence we are of the view that OAU model law be tabled as a possible mechanism. We propose that the model law could be harmonised with the provisions in the IGC, so as to provide a more integrated scheme for recognition and protection of Indigenous and local communities’ intellectual property. If a system for community decision-making and financial returns is devised, it could also pave the way for greater economic, as well as cultural self reliance for these communities...”⁴⁷⁶

Tunisia

“...Agreements and charters between international organizations and States can be produced for the protection of traditional knowledge, similar to what is applied in the field of the built heritage or the environment.”⁴⁷⁷

E: Approaches to further work on international and national aspects
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United States of America

“...a focused discussion of the promotion, preservation and protection of TK requires a careful consideration of both the national and international aspects of the complex issues before the Committee. Moreover, no outcome should be excluded. The United States further considers that the discussion within the IGC should be informed by, not driven by, any particular possible outcome. At this time, the Committee should concentrate its efforts on engaging in sustained, robust discussions of the substantive issues before it. However, it should be recognized that all issues raised in the IGC are being dealt with internationally even if the result of the international deliberations would be for agreed actions to be taken at the national level.”⁴⁷⁸

Russian Federation

“...it had already spoken in favor of a progressive approach for setting up a system for the protection of TK as regard to identifying issues that should be dealt with internationally. It was important first of all to define the different types of measures and to look at national experiences in implementing national provisions which already existed. Based on the principle that an international instrument should set out minimum standards for protection, the wording of such an international instrument should be flexible by necessity.”⁴⁷⁹

⁴⁷⁶ WIPO/GRTKF/IC/11/5(a)

⁴⁷⁷ WIPO/GRTKF/IC/11/5(a)

⁴⁷⁸ WIPO/GRTKF/IC/11/5(a)

⁴⁷⁹ WIPO/GRTKF/IC/11/15 Prov.

Algeria speaking on behalf of the African group

“...protection of TK was far from a purely national issue. WIPO had the responsibility to develop international framework for norms and standards leading to a legally binding international instrument. In view of the multicultural and transnational nature of TK Member countries will concurrently develop appropriate national legal framework to protect and promote TK.”⁴⁸⁰

⁴⁸⁰ WIPO/GRTKF/IC/11/15 Prov.

ISSUE X: HOW SHOULD FOREIGN RIGHTS HOLDERS/BENEFICIARIES BE
TREATED?

A: EQUAL TREATMENT AS DOMESTIC NATIONALS: NATIONAL TREATMENT

- (i) *Comments on draft WIPO provisions*
- (ii) *Comparable treatment between foreign and domestic nationals*
 - Equal treatment
 - Non discrimination
 - Exceptions to national treatment
- (iii) *The principle of reciprocity*
- (iv) *Regional and cross-border considerations*

B: IMPLICATIONS OF THE TERRITORIALITY OF RIGHTS

- (i) *General comments on the territoriality of rights*

C: OTHER POLICY CONSIDERATIONS

- (i) *Reference to existing drafts and instruments*
- (ii) *Legal issues concerning foreign right holders*

D: NEED FOR FURTHER CONSIDERATION

These comments addressed in general the question of how a national system for protection of TK should recognize the rights and interests of foreign right holders. A number of comments proposed various forms of non-discriminatory treatment, expressed in various forms as equal treatment, non-discrimination, or national treatment, with some comments identifying appropriate exceptions to national treatment. Comments also considered the principle of reciprocity (rights to a foreign national being available to the extent they are made available to relevant TK holders in their country of origin), and addressed the question of regionally-held TK that spanned national borders. In considering the applicable policy considerations, the comments drew on existing drafts and legal instruments, and assessed a range of legal issues that arose in recognizing foreign right holders. Several comments identified a need for further consideration of these issues.

A: Equal treatment as domestic nationals: national treatment

- (i) *Comments on draft WIPO provisions*

Algeria speaking on behalf of the African Group

“...foreign rights holders and beneficiaries as referred to Article 14 of WIPO/GRTKF/IC/11/5(c) should be treated in the same way as the local beneficiaries by virtue of an international legally binding instrument. To this end all limitation and possible sanction should be applied to both foreign and local beneficiary on equal basis...”⁴⁸¹

Brazil

Foreigners should be afforded the same treatment as nationals or treatment not less favorable. The draft provision of Article 14 in the Annex to document

⁴⁸¹ WIPO/GRTKF/IC/11/15 Prov.

WIPO/GRTKF/IC/10/5, transcribed below, represents adequate basis to discuss the issue:

“International and regional protection

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 traditional knowledge holders, who nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign holders of TK should enjoy benefits of protection to at least the same level as traditional knowledge holders 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.”⁴⁸²

Mexico

“...Article 14 of WIPO/GRTKF/IC/11/5(c) was a good basis for discussion of this point. Moreover, the principle of “national treatment” should be taken into account during future deliberations on this subject.”⁴⁸³

Arts Law Centre of Australia

The principle of national treatment should apply. Arts Law agrees that the provisions set forth in Article 14 provide a useful basis for answering this question.⁴⁸⁴

(ii) *Comparable treatment between foreign and domestic nationals*

Equal treatment

Ghana

Nothing in this convention may be interpreted as altering the status or diminishing the level of protection under any convention affecting the rights and obligations of states parties deriving from international instruments relating to intellectual property rights or to the use of biological and ecological resources to which they are parties. Foreign right holders / beneficiaries should be given equal treatment.⁴⁸⁵

International Publishers Association (IPA)

All beneficiaries should be treated equally.⁴⁸⁶

⁴⁸² WIPO/GRTKF/IC/11/5(a)

⁴⁸³ WIPO/GRTKF/IC/11/15 Prov.

⁴⁸⁴ WIPO/GRTKF/IC/11/5(a) Add.2

⁴⁸⁵ WIPO/GRTKF/IC/11/5(a)

⁴⁸⁶ WIPO/GRTKF/IC/11/5(a)

Kyrgyz Republic

It is presumed that foreign traditional knowledge owners shall receive their rights pursuant to appropriate legislation of respective country.⁴⁸⁷

Indonesia

“...Eligible foreign holders of TK should enjoy benefits of protection at the same level as TK holders whose nationals were from the country of protection...”⁴⁸⁸

Non discrimination

International Chamber of Commerce (ICC)

In the same way as nationals. There is no reason to discriminate.⁴⁸⁹

United States of America

“...it is premature for the IGC to undertake a focused discussion of the treatment of foreign rights holders/beneficiaries. However, the United States notes that one of the guiding principles extensively discussed within the IGC is respect for relevant international agreements. The United States understands this principle to include the fundamental principle of national treatment, or non-discrimination with respect to foreign rights holders. In the view of the United States, this bedrock principle of international intellectual property rights should continue to inform the spirit of discussions within the IGC.”⁴⁹⁰

Nicaragua

National treatment (without discrimination).⁴⁹¹

Exceptions to national treatment

New Zealand

Comments received to date from stakeholders indicate that if New Zealand provides protection for TK and TCEs originating from New Zealand, the same protection should extend to TK and TCEs originating from other States, if they so choose. However, some of the IPRs and obligations in relation to TK and TCEs may originate from domestic non-IP sources of law (e.g. indigenous rights contained in the Treaty of Waitangi). Those unique and exclusive rights should not have to be reciprocal, unless agreed by Member States.

⁴⁸⁷

⁴⁸⁸ WIPO/GRTKF/IC/11/15 Prov.

⁴⁸⁹ WIPO/GRTKF/IC/11/5(a)

⁴⁹⁰ WIPO/GRTKF/IC/11/5(a)

⁴⁹¹ WIPO/GRTKF/IC/11/5(a) Add.

The protection should apply to all foreign TK and TCEs, not only those which come from countries that provide protection to New Zealand TK and TCEs; and New Zealand rights holders should receive the same treatment in other countries.⁴⁹²

(iii) *The principle of reciprocity*

European Community

“...the principle of national treatment should apply (e.g. the same protection to TK originated in other States as is accorded to TK originating in its own territory).

In exactly the same way as nationals, with the establishment of appropriate systems of reciprocity. In other words, the principle of national treatments should apply.”⁴⁹³

Eurasian Patent Office (EPO)

Foreign physical and legal persons should enjoy benefits of protection to the same level as traditional knowledge holders who are nationals of the country by virtue of international agreements and reciprocity principle. And, accordingly, all limitations and possible sanctions should apply to foreign physical and legal persons as well.⁴⁹⁴

Norway

With regard to the custodian’s economic and moral rights, as provided for in accordance with the proposed recommendation set out in document WIPO/GRTKF/IC/9/12 paragraph 38 national treatment and MFN should be granted, with the possibility for reciprocity provisions.⁴⁹⁵

Italy

“...the applicable principles should be the principles of reciprocity of protection.”⁴⁹⁶

Yemen

“...foreign nationals should be granted rights in this area as in similar areas of IP. This would mean that obviously reciprocity would have to be applied as it was under the Bern Convention.”⁴⁹⁷

Morocco

“...The principles underpinning those agreements were very important, in particular the principle of reciprocity. On that basis, States would be able to afford rights to foreign right holders on the same basis as nationals...”⁴⁹⁸

⁴⁹² WIPO/GRTKF/IC/11/5(a) Add.

⁴⁹³ WIPO/GRTKF/IC/11/5(a)

⁴⁹⁴ WIPO/GRTKF/IC/11/5(a)

⁴⁹⁵ WIPO/GRTKF/IC/11/5(a) Add.2

⁴⁹⁶ WIPO/GRTKF/IC/11/15 Prov.

⁴⁹⁷ WIPO/GRTKF/IC/11/15 Prov.

⁴⁹⁸ WIPO/GRTKF/IC/11/15 Prov.

(iv) *Regional and cross-border considerations*

Colombia

The subject is complex and requires regional and national discussions to identify common issues and differences, in order to establish simple, flexible and applicable measures. Positive actions or differential treatment in such cases are very relevant. Although the individuals who belong to indigenous people and traditional communities are the subject of special rights, it should also be borne in mind that traditional knowledge protection is collective in nature and therefore benefits must also be collective. The people who go beyond political borders must undoubtedly be treated as nations in their entirety, for which reason the regional management of traditional knowledge must be dealt with a priority. The Government of Colombia recommends the promotion of regional discussion and consultation in order to devise viable proposals.⁴⁹⁹

B: Implications of the territoriality of rights

(i) *General comments on the territoriality of rights*

Switzerland

Several options are possible, depending on the aims and rights attached to traditional knowledge. It may be useful to recall that existing intellectual property rights are territorial rights, in sense that they are geographically limited by the State which has granted the right of protection.⁵⁰⁰

(ii) *TK rights not available to foreign nationals*

Tunisia

The right of ownership of traditional knowledge is linked to the community and the nation, and territoriality is therefore an important element. Foreign nationals cannot be owners or beneficiaries of rights.⁵⁰¹

C: Other policy considerations

(i) *Reference to existing drafts and instruments*

China

“...foreign rights holders/beneficiaries should be treated according to the relevant international conventions or bilateral/ multilateral treaties. Before the conventions or

⁴⁹⁹ WIPO/GRTKF/IC/11/5(a)

⁵⁰⁰ WIPO/GRTKF/IC/11/5(a)

⁵⁰¹ WIPO/GRTKF/IC/11/5(a)

treaties come into being, national protection could be afforded on the principles of reciprocity.

Article 14 of the part III, Substantive Provisions, in the current draft, could be a basis for answering this question.”⁵⁰²

Guatemala

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 65. Conclusion of agreements. The government of Guatemala shall conclude with the foreign governments it deems appropriate bilateral and regional agreements in order to avoid the unlawful trafficking of the cultural property of the contracting countries.

Model provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

Protection of expressions of foreign folklore:

- (j) subject to the reservation of reciprocity, or
- (k) on the basis of treaties and other agreements.⁵⁰³

(ii) Legal issues concerning foreign right holders

Japan

“...any justifiable reasons why IP right protection should be extended to traditional knowledge have not been clearly identified and sufficiently explained. Japan has a serious concern about establishing a new type of intellectual property right or a sui-generis right for protection of TK, as well as about creating a legally binding international instrument that obligates member States to establish such a regime. Treatment of foreign right holders and beneficiaries would depend on the type of protection TK would be granted and the corresponding international regulations.”⁵⁰⁴

South Africa

“At international level there is significant level of support for opposing the grant of patents on non-original inventions. For example, more than a dozen organizations from around the world got together to oppose the EPO Neem patent and the entire process took five years. However we take note of the process of opposition is, however, extremely expensive and time consuming. A recent suggestion by USPTO provides a rational approach to solve these problems.

International instrumentations should take into consideration to redress for past abuse and the vulnerability of the communities. This instrument should seek to elevate the rights of communities over the rights of multinational consortiums...”⁵⁰⁵

⁵⁰² WIPO/GRTKF/IC/11/5(a)

⁵⁰³ WIPO/GRTKF/IC/11/5(a)

⁵⁰⁴ WIPO/GRTKF/IC/11/5(a)

⁵⁰⁵ WIPO/GRTKF/IC/11/5(a)

Morocco

“...National legislation was something very important but it did not cross borders therefore, in itself it was not sufficient to deal with this problem. The provisions of international agreements were particularly important...”⁵⁰⁶

Libya

“...national treatment was not enough to ensure that the rights of foreign holders be the same as those of other holders. There was a need for this principle of national treatment but rights and freedoms had also to be enforced and respected under international law. Therefore, this treatment was not sufficient. It could also lead to perverse effects and it was important to ensure that this protection be effective and protect the rights of foreign holders particularly in developing countries.”⁵⁰⁷

Congolese Association of Young Chiefs

supported the African Group’s position of giving the same rights to national and foreign rights holders. It also supported the idea that same rights should be given to nationals and foreigners because if they were two different scenarios this would provide for two measures. This would mean that under developed countries could have the same rights as developed countries. If there was one right this should mean that it would be possible for everyone to enforce international legislation to provide for the protection of TK. This should allow for all indigenous peoples to benefit from the same rights at an international level. The same applied in the Congo in the misappropriation of the fauna and the savanna. There was destruction of TK because the only resource the Congo had was the forest and the legislation did not allow certain peoples to benefit from this resource. This was why there was a need for protection of TK. It was a question of urgency now.⁵⁰⁸

<u>D: Need for further consideration</u>
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Intellectual Property Owners Association (IPO)

IPO seeks further clarification on the meaning of the question, and will be happy to offer comments as the meaning of the question is clarified through further discussion in the IGC.⁵⁰⁹

Canada

It seems premature to determine the type of treatment that should be afforded to foreign rights holders/beneficiaries prior to determining the type of protection to be afforded to TK and the identification of the intended beneficiaries. Doing so would also prejudice the outcome of present discussions. Should future work of the IGC focus on foreign

⁵⁰⁶ WIPO/GRTKF/IC/11/15 Prov.

⁵⁰⁷ WIPO/GRTKF/IC/11/15 Prov.

⁵⁰⁸ WIPO/GRTKF/IC/11/15 Prov.

⁵⁰⁹ WIPO/GRTKF/IC/11/5(a)

rights holders/beneficiaries, it should be guided by the overarching principle of consistency with international obligations of Member States.⁵¹⁰

Australia

“...further work is needed to determine how foreign rights holders/beneficiaries should be treated, including consideration in light of existing obligations and commitments. As discussed at question 2 above, this is a very important aspect given that many cultures have common wellsprings and that in many cases TK crosses political boundaries.”⁵¹¹

[End of Annex and of document]

⁵¹⁰ WIPO/GRTKF/IC/11/5(a) Add.

⁵¹¹ WIPO/GRTKF/IC/11/5(a) Add.