

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

**EU CONTRIBUTION
TO THE LIST OF ISSUES ON TRADITIONAL KNOWLEDGE**

Germany, on behalf of the European Community (EC) and its 27 Member States would like to thank the Secretariat for preparing the list of Issues on Traditional Knowledge (TK) and for inviting delegations and observers to submit comments on these issues.

The EC wishes to reiterate its readiness to participate constructively in the discussion in the Committee on the protection of Traditional Knowledge. As reflected in particular in points 15 and 142 of the Initial Draft Report of the 10th Session of the IGC prepared by the WIPO Secretariat, we would like to reiterate our support for further work towards the development of international *sui generis* models or other non-binding options for the legal protection of TK. Moreover, in line with our preference for internationally agreed *sui generis* models, the Delegation would also like to reiterate that the final decision on the protection of TK should be left to the individual Contracting Party.

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?".

We believe that in order 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 analysed.

The European Community looks forward to continuing and deepening the discussion of these issues, with a view toward enriching all IGC members' understanding of these complex questions.

**1. Definition of traditional knowledge that should be protected.
Définition des savoirs traditionnels à protéger.**

The European Community (EC) and its Member States note that 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.

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. 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.

We welcome a deeper discussion on TK definition and further clarification of its scope followed by the drafting of a new TK definition generally more acceptable for all WIPO Member States.

2. Who should benefit from any such protection or who hold the rights to protectable traditional knowledge?

Qui devrait bénéficier d'une telle protection ou qui est titulaire des droits sur les savoirs traditionnels susceptibles d'être protégés ?

Considering existing human rights instruments, the EC and its Member States believe that 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 constitutes such communities is hard to obtain.

**3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?
Quel objectif vise l'octroi de la protection de la propriété intellectuelle (droits économiques, droits moraux) ?**

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.

The EC and its Member States believe that 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.

**4. What forms of behavior in relation to the protectable traditional knowledge should be considered unacceptable/illegal?
Quelles formes de comportement à l'égard des savoirs traditionnels susceptibles d'être protégés devraient être considérées comme inacceptables/illégales ?**

The EC and its Member States believe that, 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.

**5. Should there be any exceptions or limitations to rights attaching to protectable traditional knowledge?
Les droits attachés aux savoirs traditionnels susceptibles d'être protégés devraient ils faire l'objet d'exceptions ou de limitations ?**

The EC and its Member States believe that 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.

**6. For how long should protection be accorded?
Quelle devrait être la durée de la protection ?**

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 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.

**7. To what extent do existing IPRs already afford protection? What gaps need to be filled?
Dans quelle mesure les droits de propriété intellectuelle existants confèrent ils déjà une protection? Quelles lacunes doivent être comblées ?**

The EC and its Member States believe that virtually all branches of traditional IP law can play a part in the protection of TK (directly or indirectly), as TK is protectable subject matter as long as the application criteria are met.

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. 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.

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.

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.

The EU and its Member States believe that a deeper analysis of these questions is necessary.

**8. What sanctions or penalties should apply to behavior or acts considered to unacceptable/illegal?
De quelles sanctions ou peines devraient faire l'objet les comportements ou les actes considérés comme inacceptables/illégaux ?**

The EC and its Member States believe that 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).

**9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?
Quelles questions devraient être traitées respectivement au niveau international et au niveau national, ou quelle division devrait être établie entre la réglementation internationale et la réglementation nationale ?**

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.

**10. How should foreign rights holders/beneficiaries be treated?
Quel traitement devrait être accordé aux ressortissants étrangers titulaires/bénéficiaires de droits?**

The EC and its Member States believe that 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).