

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

**Traditional Cultural Expressions/Expressions of Folklore
and Traditional Knowledge**

Comments of the United States of America

General Comment:

At the Tenth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), Member States agreed to submit written comments on ten issues (List of Issues) related to the protection of Traditional Knowledge (TK) and Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF) with a view toward facilitating within the IGC a sustained discussion of the many complex substantive issues before the Committee. The United States welcomes that opportunity, and, toward that end, is pleased to submit these preliminary comments on the selected issues related to the protection, preservation and promotion of TK and TCEs/EoF. The United States also believes that reaching agreement on policy objectives and general principles on TK and TCEs/EoF will advance the work of the Committee.

The Lists of Issues for both TK and TCEs/EoF, in the view of the United States, provide a useful point of departure and a helpful framework for facilitating such a sustained discussion. Although many of these issues are not new to the Committee, to date the members of the IGC have not had the opportunity to engage in the kind of focused discussion needed to reach a consensus on these important questions. The United States also understands that these initial Lists of Issues will be further refined and elaborated by the Member States in their comments and during the course of the IGC's deliberations.

The United States notes that a number of the issues in the List of Issues are framed using words such as "protection" and "protected." Such words sometimes have been used within the IGC to refer to legal measures to address issues and concerns related to TK and TCEs/EoF, including protection under intellectual property laws. However, over the course of its deliberations, Committee participants have not placed limits on the discussion of TK and TCEs/EoF. Instead, the Committee consistently has taken a broad approach to addressing issues and concerns related to TK and TCEs/EoF, including discussion of measures to safeguard, preserve, and promote an environment of respect for TK and TCEs/EoF. Such an approach is consistent with the mandate of the Committee, which leaves no outcome excluded. Similarly, the United States believes that the terms of discussion of the List of Issues, which aims to facilitate consensus among Committee participants, must not prejudge the understanding of any particular issue or prescribe any particular outcome.

Traditional Cultural Expressions/Expressions of Folklore

Issues

1. Definition of traditional cultural expressions (TCEs)/expressions of folklore (EoF) that should be protected.

The IGC has made considerable progress in identifying the broad contours of the subject matter of TCEs/EoF. This progress has drawn on the pioneering work of the WIPO-UNESCO Model Provisions for National Laws for the Protection of Expressions Against Illicit Exploitation and Other Prejudicial Actions. It also has benefited from the excellent work of the International Bureau (IB) in compiling a wealth of materials and distilling key elements of definitions for TCEs/EoF from regional frameworks, national copyright laws, and other laws.

Nonetheless, to date, the members of the IGC have not had the opportunity to undertake a focused discussion of the subject matter of TCEs/EoF. Building on its prior work, the IGC is now in the position to examine in greater detail the subject matter of TCEs/EoF. Such a discussion should draw deeply on both national experiences (for example, under national copyright laws, *sui generis* laws, customary laws, and other laws) and the experiences of indigenous peoples and traditional and other cultural communities.¹

By casting its net broadly, the IGC could advance its understanding of many recurring conceptual and practical issues regarding the subject matter of TCEs/EoF. For example, the recurring issue of whether the subject matter of TCEs/EoF is limited to community-oriented artistic and literary productions requires further examination. An important related issue is delineating with greater precision, if possible, the boundaries between TCEs/EoF and traditional knowledge (TK). IGC discussion of the subject matter of TCEs/EoF should be informed by the most recent national experiences, including the approaches of WIPO Members in defining TCEs/EoF, whether for purposes of protection or exclusion.

The IGC would benefit greatly from learning more about the experiences of indigenous peoples and traditional and other cultural communities in defining the subject matter of TCEs/EoF. Such a discussion should be informed by both legal measures (such as the definition of TCEs/EoF under customary law, whether codified or not) and non-legal measures (such as the use of tribal registries and electronic databases). A focused discussion should also address the question of how to identify an association between a particular TCEs/EoF and a particular indigenous people or traditional or other cultural community.

The issue of defining TCEs/EoF also includes the difficult question of identifying TCEs/EoF, or elements thereof, that “should be protected.” As noted in our general

¹ The United States uses the phrase “indigenous peoples and traditional and other cultural communities,” which appears in a number of WIPO IGC documents, but notes that the Committee has not reached agreement on the use of this phrase.

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 TCEs/EoF, or related elements, are capable of protection under existing legal and non-legal mechanisms.

2. Who should benefit from any such protection or who hold the rights to protectable TCEs/EoF?

The IGC has explored in very broad terms the complex issue of the beneficiaries of measures to protect 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 arrive at a consensus on the scope and meaning of such important terms 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 TCEs/EoF, 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.

3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?

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 the actual needs of communities, including both economic and non-economic concerns, for qualifying expressions that are or are related to TCEs/EoF.

Over the last several sessions and 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 TCEs/EoF—not merely their protection, but also the preservation and promotion of TCEs/EoF. To name just a few of these policy objectives, the IGC has underscored the importance of promoting an environment of respect for TCEs/EoF, contributing to the preservation and safeguarding of TCEs/EoF, and encouraging, rewarding, and protecting authentic tradition-based creativity and innovation.

The United States considers that 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 is an extremely useful tool for policymakers at the national, regional, and international levels. The United States notes that many WIPO Member States, informed by the work of the IGC, already are taking steps to address specific issues and concerns related to the protection and promotion of TCEs/EoF.

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 TCEs/EoF. 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 TCEs/EoF 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.

4. What forms of behavior in relation to the protectable TCEs/EoF should be considered unacceptable/illegal?

Over the last several years, the IGC has made considerable progress in identifying specific forms of behavior regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities. The work of the IB in conducting regional consultations and in sponsoring research has been particularly helpful in facilitating this aspect of the work of the IGC. The members of the IGC also have benefited greatly from hearing directly from representatives of indigenous peoples and traditional and other cultural communities on forms of behavior that are considered unacceptable or illegal.

Despite the wealth of materials that have been generated, it remains difficult to generalize regarding specific behaviors that are regarded as unacceptable or illegal, sometimes broadly called "misappropriation." Part of the explanation is that views on forms of behavior that may be regarded as unacceptable or illegal vary widely depending on local social, cultural, and economic circumstances. Another part of the explanation is that acts of misappropriation cover a wide range of behaviors. In this regard, the IGC has distilled a broad range of behaviors regarded indigenous peoples and traditional and other cultural communities as unacceptable or illegal, including:

- (a) unauthorized reproduction, adaptation and subsequent commercialization of TCEs/EoF, with no sharing of economic benefits;
- (b) use of TCEs/EoF in ways that are insulting, degrading and/or culturally and spiritually offensive;
- (c) unauthorized access to and disclosure and use of sacred/secret materials;
- (d) appropriation of traditional languages;
- (e) unauthorized fixation of live performances of TCEs/EoF and subsequent acts in relation to those fixations;
- (f) appropriation of the reputation or distinctive character of TCEs/EoF in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and ‘style’;
- (g) failure to acknowledge the traditional source of a tradition-based creation or innovation;
- (h) granting of erroneous industrial property rights over TCEs/EoF and derivatives thereof²

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.

5. Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?

The United States believes that it is premature for the IGC to undertake a focused discussion of “exceptions and limitations attaching to rights to protectable TCEs/EoF.” First, as currently framed, the issue may tilt in a particular policy direction that is not warranted at this stage of the Committee’s deliberations. 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 specific issues and concerns that have been raised in the Committee and identifying any perceived gaps, including appropriate and applicable exceptions and limitations.

6. For how long should protection be accorded?

For the reasons set forth in our response to Issue five, the United States believes that it is premature for the IGC to undertake a focused discussion of the duration of possible rights with respect to TCEs/EoF. This question also appears to presume a particular outcome,

² Paragraph 53, Document 7/3.

which is not helpful in advancing the work of the Committee. There are many mechanisms available for the protection, preservation and promotion of TCEs/EoF. Some mechanisms that may preserve and maintain TCEs/EoF may be indefinite in length of time. On the other hand, many existing forms of intellectual property protection are time-limited such as copyright.

7. To what extent do existing IPRs already afford protection? What gaps need to be filled?

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 TCEs/EoF, including the role of national copyright, trademark, and trade secret laws, among other laws.

Many provisions of existing IPRs already are available for the protection of TCEs/EoF. For example, an original work of visual art created by an individual community artist inspired by or interpreting a traditional design would be eligible for copyright protection. Other 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 address specific non-economic issues and concerns related to TCE/EoF. Existing IPR principles and doctrines also may be integrated with customary law.

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 TCEs/EoF. The Secretariat should provide an update on recent efforts to use existing IPRs to address TCEs/EoF. 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, national or regional issues and concerns related to TCEs/EoF.

The IGC should not stop with canvassing the use of existing IPRs to address TCEs/EoF issues. The United States believes that discussion of selected principles and doctrines of unfair competition, contract, cultural heritage, and customary law, where well-suited to address specific issues 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 TCEs/EoF. 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 TCEs/EoF in a particular context. Such an exchange would help the IGC to identify gaps, if any, in the existing international framework. These perceived gaps could then be considered and addressed.

8. What sanctions or penalties should apply to behavior or acts considered to unacceptable/illegal?

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 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.

9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?

The United States believes that a focused discussion of the preservation, promotion and protection of TCEs/EoF requires a careful consideration of both the national and international aspects of the complex issues before the Committee, without excluding any outcome. At this time, the Committee should concentrate its efforts on engaging in sustained, robust discussions of the substantive issues before it. Further, 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.

10. How should foreign rights holders/beneficiaries be treated?

For the reasons set forth in our response to Issue five, the United States believes that 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 nondiscrimination 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.

Traditional Knowledge

Issues

1. **Definition of traditional knowledge that should be protected.**

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.

As was noted in document WIPO/GRTK/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.

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.³

³ See WIPO/GRTK/IC/5/8, para. 69 and WIPO/GRTK/IC/5/12, para. 45.

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?

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.

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.

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

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 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.

3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?

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.

The United States believes that 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.

4. What forms of behavior in relation to the protectable traditional knowledge should be considered unacceptable/illegal?

The IGC has made considerable progress in identifying specific forms of behavior 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.

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.

5. Should there be any exceptions or limitations to rights attaching to protectable traditional knowledge?

The United States believes that 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.

6. For how long should protection be accorded?

For the reasons set forth in our response to Issue five, the United States believes that 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 time. On the other hand, many existing forms of intellectual property protection are time-limited.

7. To what extent do existing IPRs already afford protection? What gaps need to be filled?

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.

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. 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.

8. What sanctions or penalties should apply to behavior or acts considered to unacceptable/illegal?

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.

9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?

The United States believes that 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.

10. How should foreign rights holders/beneficiaries be treated?

For the reasons set forth in our response to Issue five, the United States believes that 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 nondiscrimination 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.

March 30, 2007
Washington, DC