

SURVEY ON EXISTING FORMS OF INTELLECTUAL PROPERTY PROTECTION FOR TRADITIONAL KNOWLEDGE (document WIPO/GRTKF/IC/2/5)

QUESTIONS

Question 1: Please provide information on actual examples in which existing intellectual property standards in your country (for States) or region (for regional intergovernmental organizations and associations) have been used or are being used to protect traditional knowledge.

If you wish to provide fuller case-studies on such examples, please do so. An indicative format for such case-studies, attached as Annex A, is suggested to facilitate the comparison, assessment and synthesis of the information submitted.

Question 2: Please indicate if there is a specific (*sui generis*) law providing for intellectual property protection of traditional knowledge and, if so, the name and/or number of the law or regulation.

Question 3: When did it come into force, or, in the case of a draft, at what stage is it in the process of legislative adoption?

Question 4: What are the stated purposes or objectives of the law or regulation?

Question 5: Were the legislation or regulations developed because existing intellectual property standards were regarded as deficient in meeting the purposes or objectives referred to above? Please provide further information on your response.

Question 6: What term is used to determine the subject matter for which protection under the law or regulation may be obtained?

Question 7: How is the subject matter defined or described in the law or regulation?

Question 8: What criteria are used to determine whether subject matter qualifies for protection under the law or regulation?

Question 9: Is there any subject matter expressly excluded from protection?

Question 10: What rights are granted by the law or regulation in respect of the protected subject matter (which acts in respect of the subject matter are subject to authorization or remuneration, as the case may be (see following question)?

Question 11: Are the rights granted exclusive rights or rights to remuneration?

Question 12: Is the protection granted by the law or regulation automatic upon the fulfillment of the criteria referred to in Question 8 above?

If no, please describe the formalities that an applicant for protection must comply with, including any formalities necessary to maintain the rights granted after a period of time has

passed subsequent to the initial grant of rights. Please also provide information on any application, maintenance or other fees that may be applicable.

Question 13: Does the law or regulation make provision for the revocation or forfeiture of rights obtained? If yes, in what circumstances and at whose instance?

Question 14: Is the protection afforded by your laws and regulations limited in time?

If yes:

- (i) For how long? In cases where different terms of protection may be provided for different categories of traditional knowledge, or for different rights, or in respect of different criteria for protection, please provide full information.
- (ii) How is the starting point of protection determined?
- (iii) What happens to the subject matter after the expiry of the period of protection (for example, does it fall into the public domain so that it may be freely used by anyone without restriction?).

Question 15: Does the law or regulation provide for retroactive protection? If yes, please explain how this provision works in practice, particularly in respect of pre-existing rights in overlapping subject matter previously obtained under intellectual property laws.

Question 16: Who is entitled to acquire the protection provided for?

Question 17: Does the law or regulation allow for the acquisition and exercise of the rights by a community or other collective? If yes, please provide further information.

Question 18: Does the law or regulation allow for the acquisition and exercise of the rights by more than one community? If yes, please provide further information, specifically on the obligations of each group towards the other.

Question 20: What are the legal consequences of breaches of the rights granted by the law or regulation?

Question 21: What civil, criminal or other sanctions and remedies are available in cases of breach?

Question 22: Do rightsholders have the right, under the law or regulation, to assign their rights and to conclude licensing contracts? Does the law or regulation provide for the grant of compulsory licenses? If yes, on what terms and in what circumstances?

Question 23: Does the law or regulation establish any institutional agencies, mechanisms or structures to manage or administer rights granted under the law or regulation (such as the office of a registrar, ombudsman or “competent authority”)?

Question 24: Are there special provisions referring to or regulating the relationship between the forms of protection offered by the *sui generis* law or regulations and the protection

provided for by existing intellectual property laws and regulations? If yes, please describe the provisions.

Question 25: Does the law or regulation provide any role for customary laws and protocols in any aspects of the matters provided for in the law or regulations (such as in determining protectable subject matter, the rights granted, the identity of individuals or communities entitled to protection under the legislation or the remedies and sanctions to be applied)? If yes, please provide further information.

Question 26: Are there special measures to assist the traditional knowledge holders in your territory to acquire, exercise, manage and enforce rights in traditional knowledge?

Question 27: Please provide any general information or comments on perceived limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge. Practical, empirical information, based on actual examples, is sought.

For example, are there cases where you consider that existing intellectual property standards did not provide protection but should have done so? Are there any elements of traditional knowledge which require protection additional to that provided by existing intellectual property standards?

SURVEY ON EXISTING FORMS OF INTELLECTUAL PROPERTY PROTECTION FOR
TRADITIONAL KNOWLEDGE (document WIPO/GRTKF/IC/2/5)

RESPONSES

RESPONSE	PAGE NUMBER
Australia	7
Bhutan	10
Bosnia and Herzegovina	11
Republic of Botswana	12
Brazil	13
Canada	18
Colombia	19
Costa Rica	22
Ecuador	60
Egypt	61
Ethiopia	62
France	63
The Gambia	65
Guatemala	66
Hungary	68
Indonesia	69
Japan	70
Kazakhstan	71
Korean, Republic of	72
Kyrgyzstan	74
Latvia	75

Malaysia	76
New Zealand	77
Norway	81
Pakistan	83
Panama	92
Papua New Guinea	96
Peru	97
Philippines	100
Portugal	105
Qatar	107
Romania	108
Russian Federation	109
Samoa	110
Singapore	112
Solomon Islands	113
Sweden	115
Switzerland	116
Tanzania	117
Togo	118
Tonga, Kingdom of	119
Trinidad and Tobago	120
Turkey	121
Tuvalu	122
United States of America	123

Venezuela	126
Viet Nam	128
European Community	130

AUSTRALIA

Response to Question 1: There have been a number of cases which demonstrate the ability of the existing Australian intellectual property regime to protect traditional knowledge.

In *Foster v Mountford (1976) 29 FLR 233* the Court used the common law doctrine of confidential information to prevent the publication of a book containing culturally sensitive information. The case concerned an anthropologist, Dr. Mountford, who undertook an expedition to the Northern Territory outback in 1940. Local Aboriginal people revealed to him tribal sites and objects possessing deep religious and cultural significance for them. The defendant recorded this information some of which he published in a book in 1976. The plaintiffs successfully sought an interlocutory injunction restraining the publication of the book on the basis of breach of confidence. (The plaintiffs could not bring an action for copyright infringement because the work in question - i.e. the book- had not been written by them and they had not acquired the copyright in it). The Court held that the publication of the book could disclose information of deep religious and cultural significance to the Aborigines that had been supplied to the defendant in confidence and the revelation of such information amounted to a breach of confidence.

Milpurrruru v Indofurn Pty Ltd (1995) 30 IPR 209 ('carpets case') highlighted the Courts' capacity to award damages for infringement in a culturally appropriate manner. The case involved the importation of carpets manufactured in Vietnam which reproduced either all or parts of well-known works, based on creation stories, created by Indigenous artists. At no stage did the artists give permission for their artworks to be reproduced on the carpets, nor for the carpets bearing the artworks to be imported into Australia. The artists successfully claimed infringement of copyright (by reason of the unauthorized importation of carpets). The artists were also successful in a trade practices action in respect of the labels attached to the carpets which claimed that the carpets had been designed by Aboriginal artists and that royalties were paid to the artists on every carpet sold.

The judgment recognizes the concepts of 'cultural harm' and 'aggregated damages'. The Court noted in its judgment that "The statutory remedies do not recognize the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories and the imagery such as used in the artworks of the present applicants". The applicants were awarded a collective sum of damages, with the proceeds of the action to be distributed to "those traditional owners who have legitimate entitlements according to Aboriginal law to share compensation paid by someone who has without permission reproduced the artwork of an Aboriginal artist". The Court made an award of exemplary damages, in the sum of \$70,000 for cultural harm and which took into account the calculated and flagrant nature of the infringement.

In *Bulun Bulun & Milpurrruru v R & T Textiles Pty Ltd (1998) 41 IPR 513* the Court found that an Indigenous person had a fiduciary duty to his community. The court found that the relationship between Mr. Bulun Bulun (the artist) and his community in regard to the creation of the painting was one of mutual trust and confidence which was found to be sufficient, under Australian law, for a fiduciary relationship between Mr. Bulun Bulun and his community to arise.

The judge found that, on the evidence of the customary law of the Ganabingu people, Mr. Bulun Bulun owed two fiduciary obligations to his community. First, he was not to exploit the painting in a manner contrary to his community's customary law. Secondly, in the event of infringement by a third party, he was to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the painting.

The court recognized two instances in which equitable relief in favor of a tribal community might be granted, in a court's discretion, in circumstances where copyright is infringed in a work embodying ritual knowledge: first, if the copyright owner fails or refuses to take appropriate action to enforce the copyright; and second, if the copyright owner cannot be identified or found.

In a further case called *Bulun Bulun v Flash Screenprinters* [see discussion in (1989) EIPR Vol 2, pp.346-355], Mr. Bulun Bulun brought a copyright infringement action in relation to the unauthorized reproduction of his artistic works on t-shirts by Flash Screenprinters. This was a clear-cut case of copyright infringement and the case was settled out of court. The successful resolution of this matter suggests that protection under the Copyright Act can be as valuable to Aboriginal and Torres Strait Islander artists as it is to other artists.

Further information regarding these and other cases can be located at :-
<http://www.austlii.edu.au>

Australia does not have specific provisions in its patents, trade marks and designs legislation to protect traditional knowledge. However, certification trade marks have been used recently as a mechanism to help protect the interests of indigenous and traditional knowledge owners through identifying or authenticating products or services provided by indigenous owners or in collaboration with indigenous owners. The trade mark system has also been used by, for example, arts centers as a mechanism to promote the arts and crafts of indigenous people. The designs system has been used by traditional knowledge owners to protect indigenous designs.

Response to Question 26: Although Australia has not introduced any special legislative measures, the recent moral rights amendments will assist Indigenous artists to protect their work. The *Copyright Amendment (Moral Rights) Act 2000*, which commenced on 21 December 2000, incorporates the moral rights of integrity and attribution into the Copyright Act. Indigenous artists will benefit, as the right of integrity in particular gives indigenous artists greater control over the use of their works and consequently assists them in protecting the cultural integrity of their work.

The National Association for the Visual Arts (NAVA) this year released indigenous visual arts protocols entitled *Valuing Art, Respecting Culture*. The protocols provide substantial cultural and other information regarding the range of artistic practice and cultural diversity within the indigenous arts environment, providing practical and flexible protocols that will be a useful guide for those involved in the sector. The protocols also provide a description of the legal framework provide under IP laws.

In the field of trademark law, the Australian Government, through ATSIC and the Australia Council, has funded the National Indigenous Arts Advocacy Association (NIAAA) to develop a National Label of Authenticity. The Label of Authenticity is intended to assist consumers make informed choices when they purchase goods and arts works claiming to be

Indigenous, and to help raise general public awareness of Indigenous intellectual property issues and concerns.

In 1997, IP Australia and the Commonwealth Attorney-General's Department developed two videos for indigenous communities to explain how they may be able to utilize the industrial property and copyright system to meet their needs.

Response to Question 27: The existing legal framework in Australia provides Indigenous artists and creators with strong legal protections through which they can exert their control, exclude the use by others and reap financial gain for their efforts, including in international markets should they choose to do so. The cases referred to in Question 1 confirm those protections.

The Australian Government is aware however that indigenous communities remain concerned about the protection of their culture. For example the present regime does not recognize communal interest in the arts and cultural expressions of indigenous creators. The Government is committed to addressing such concerns.

The WIPO case studies on the use of the IP system in Australia by Indigenous people raises the issue, which will be considered further, of the ability of the existing system to protect traditional knowledge trademarks.

BHUTAN

Response to Question 27: The protection of traditional Bhutanese textile designs:

- Bhutan has a well-developed and appreciated traditional weaving practice that has been in existence for centuries. The use of fascinating colors and intricate designs have been passed on and perfected over generations, kept consciously alive as token gifts down the ages from parents to children, mostly from mothers to their daughters although men-folk could also be found engaged to the weaving loom painstakingly working on the ornate patterns.
- Characteristic artistic elements of the textile designs can be clearly discerned and attributed to specific regions of the country. “Matha,” is a well-known design from the Bumthang valley whilst, the region of Kurtoe prides itself to the famous “Kushuthara,” designs.
- There is now a growing concern that these age-old textile designs and the local weaving industry in particular, are being adversely affected by the availability in the market of machine made fabrics with traditional design motifs unique to Bhutan. There is thus, an increasing need to come up with a suitable framework of protection for our indigenous weaving industry.
- As these designs have originated in “antiquity,” they clearly do not meet the “new or original,” criteria of internationally accepted standards for the protection of industrial designs.
- The difficulty in identifying an author/creator of these designs and the requirement of originality again raises problems in a copyright type of protection. The limited duration of protection under intellectual property rights may also pose problems for such traditional/cultural aspects of property that should ideally be protected for perpetuity.

BOSNIA AND HERZEGOVINA

Response to Question 2: No, there is no specific law or regulation.

Response to Question 5: No.

Response to Questions 24 and 25: No.

Response to Question 26: No, there are not.

REPUBLIC OF BOTSWANA

Response to Question 1: None is used to protect traditional knowledge.

Response to Question 2: There is none.

Response to Questions 3-23: Not applicable.

Response to Question 24: No.

Response to Question 25: Not applicable.

BRAZIL

Response to Question 1: There have been no cases in Brazil in which existing intellectual property standards have been used to protect traditional knowledge.

Response to Question 2: We have a specific law – Provisional Measure No. 2186-16 of August 23, 2001, which regulates the protection of and access to traditional knowledge.

Response to Question 3: Provisional Measure No. 2052 came into force following its publication in our Official Government Journal (*Diário Oficial da União*), dated June 29, 2000, and has been reprinted on several occasions, currently under No. 2.186, its sixteenth reprinting, dated August 23, 2001.

A copy of the law may be obtained at the following internet address:

<http://www.planalto.gov.br/ccivil/mpv/2186-16.htm>

There is also Decree No. 3945 which is on a directly related subject, i.e. the establishment of the Genetic Heritage Management Council. This can be found at the following internet address:

http://www.planalto.gov.br/ccivil_03/decreto/2001/d3945.htm

Both versions are in Portuguese:

Response to Question 4: The stated objectives are to legislate on access to the genetic heritage existing in the national territory, the continental platform and the exclusive economic area for scientific research, technological development or bioexploration purposes; access to traditional knowledge relating to the genetic heritage, relevant to the preservation of biological diversity, the integrity of the country's genetic heritage and the use of its components; the fair and equitable distribution of the benefits derived from the exploration of the genetic heritage and related traditional knowledge; access to technology and the transfer of technology for the preservation and use of biological diversity.

Response to Question 5: Yes. One of the functions of our law is to compensate for the deficiency, in this specific area, of protection provided by intellectual property standards. In addition, other related factors exist such as national sovereignty, regulation of the Convention on Biological Diversity, so as to allow protection and conservation of genetic resources, as regards the law of local communities, and so on.

Response to Question 6: The terms are as follows: access to the genetic heritage, protection for and access to related traditional knowledge, benefit sharing and access to technology, and technology transfer.

Response to Question 7: Article 7, the Chapter on Definitions, of Provisional Measure No. 2186-16, contains a number of paragraphs that can be applied to traditional knowledge, including:

“(…) II – related traditional knowledge: information or individual or collective practice of the indigenous or local community, with real or potential value, relating to the genetic heritage;

III – local community: human group, including the remnants of the *quilombos* communities, distinct in terms of its cultural conditions, and which is organized traditionally

through successive generations and its own customs, and preserves its social and economic institutions;

V – access to related traditional knowledge: obtaining information on individual or collective knowledge or practice, relating to the genetic heritage, from the indigenous or local community, for the purposes of scientific or technological research or bioexploration, with a view to its industrial or other application;

VI – access to technology and technology transfer with a view to access, development and transfer of technology in order to preserve and use the biological diversity or technology developed from the sample of the related genetic heritage or traditional knowledge;

VII – bioexploration: exploratory activity which aims to identify the genetic heritage and information on related traditional knowledge, with potential for commercial use; (...)

X – Authorization for Access and Shipping: a document which, subject to specific conditions, allows access to the genetic heritage sample and its shipping to the receiving institution, as well as access to related traditional knowledge;

XI – Special Authorization for Access and Shipping: a document which, subject to specific conditions, allows access to the genetic heritage sample and its shipping to the receiving institution, as well as access to related traditional knowledge, for a period of up to two years, renewable for equal amounts of time;

XII – Equipment Transfer Contract: accession instrument to be signed by the receiving institution prior to the shipping of any genetic heritage sample, indicating, where necessary, that access to related traditional knowledge was obtained;

XIII – Contract for Use of the Genetic Heritage and Benefit Sharing: multilateral legal instrument which describes the parties, purpose and conditions of access and shipping of the genetic heritage and related traditional knowledge, as well as the conditions for benefit sharing; (...)."

Response to Question 8: As regards the protection of traditional knowledge by means of patents, it is important to observe the patentability requirements of novelty, inventive step and industrial applicability.

Response to Question 9: Yes, there is. Article 3 of this Provisional Measure does not apply to the human genetic heritage.

Response to Question 10: Our law – Provisional Measure No. 2186 –16 – contains two articles on this subject: Article 8 provides protection, through the Provisional Measure, for the traditional knowledge of indigenous and local communities, relating to the genetic heritage, against the use and unlawful exploration, and other acts that are prejudicial or unauthorized by the Management Council referred to in Article 10, or by an approved institution (...)

Article 9: The indigenous and local communities which generate, develop, hold or preserve the traditional knowledge relating to the genetic heritage are guaranteed the right to:

I – have the origin of the access to traditional knowledge stated in all publications, uses, explorations and disclosures;

II – prevent unauthorized third parties from:

- (a) using, or carrying out tests, research or exploration relating to, the relevant traditional knowledge;
- (b) disclose, transmit or retransmit data or information contained in or constituting relevant traditional knowledge;

III – obtain benefits through economic exploration by third parties, either directly or indirectly, of the relevant traditional knowledge, whose rights are under their ownership, in terms of the Provisional Measure.

There is also Chapter VII of the same Law – on benefit sharing – which deals with remuneration. In general, this must be fair and equitable, and may constitute a share of the profits; the payment of royalties; access to and transfer of technologies; licensing, free of charges, products and processes; and human resources training.

We would also like to highlight Chapters VI and VII, along with Article 31.

Response to Question 11: There are exclusive rights since the intellectual property subject matter is owned by the community. As for the right to remuneration, this is defined in Article 9, paragraph III of our Law (see also the above response).

Response to Question 12: Yes.

Response to Question 13: Yes, through Article 31 which establishes the interconnection between Provisional Measure 2.186 and the patent system, for which the duration of the protection obtained will follow the conditions established by the Industrial Property Law (LPI – 9.279).

Response to Question 14: Yes. Traditional knowledge *strictu sensu* is not a temporary concept. The inclusion of traditional knowledge in an invention protected by the patent system (Article 31 of Provisional Measure 2.186) shall have the periods of protection stipulated in Law 9.279.

- (i) Traditional knowledge *strictu sensu* is not a temporary concept. The inclusion of traditional knowledge in an invention protected by the patent system (Article 31 of Provisional Measure 2.186) shall have the periods of protection stipulated in Law 9.279.
- (ii) The inclusion of traditional knowledge in an invention protected by the patent system (Article 31 of Provisional Measure 2.186) shall have the periods of protection stipulated in Law 9.279 (protection begins from the filing date, if the patent is granted).
- (iii) There is a clear distinction between traditional knowledge *strictu sensu*, which is fundamentally non-temporary, and the inventions stemming from its inventive use. What is in the public domain, once the patent has expired, is the invention stemming from the use of the traditional knowledge, not the traditional knowledge *per se*.

Response to Question 15: No, the law does not provide for retroactive protection.

Response to Question 16: Local communities such as those defined in law.

Response to Question 17: Yes.

Article 31. The granting of the industrial property right by the appropriate authorities for the process or product obtained from the genetic heritage sample is dependent on the Provisional Measure being observed, for which reason the applicant must provide information on the origin of the genetic material and related traditional knowledge, where necessary.

Article 24. The benefits resulting from the economic development of the product or process created from the genetic heritage sample and the related traditional knowledge, obtained by a national institution or one which has its headquarters abroad, shall be shared in a fair and equitable manner, between the contracting parties, in accordance with the relevant regulations and legislation.

Thus, the inventions developed from the genetic heritage and which serve as sources of information relating to relevant traditional knowledge shall clearly explain the origin of the genetic resource and the information relating thereto, as well as being based on a principle of equal sharing of benefits obtained through the economic development of such knowledge.

Response to Question 18: Yes. There is no explicit limitation in the law on the number of communities which shall have the right over the benefits generated from the protection of a traditional knowledge item.

Response to Question 19: Article 43 - The provision contained in the previous article does not apply to.

I – acts carried out by unauthorized third parties, for private purposes and with no commercial aim, without harming the economic interest of the patent owner;

II – acts carried out by unauthorized third parties as experiments, relating to studies or scientific or technological research;

III – the preparation of medicines based on a medical prescription for individual cases, drawn up by a skilled professional, as well as for the medicine thus prepared;

IV - a product manufactured according to a process or product patent which has been placed on the domestic market directly by the patent owner or with his consent;

V - third parties which, in the case of patents relating to living organisms, use, for non-economic purposes, the patented product as an initial source of variation or propagation in order to obtain other products; and

VI - third parties which, in the case of patents relating to living organisms, use, circulate or market a patented product which has been lawfully traded by the patent owner or by a license holder, since the patented product has not been used for commercial propagation of the living organism in question.

Response to Question 20: Legal consequences: caution; fine; seizure of the genetic heritage samples and of the instruments used in the collection or processing of the products obtained from the information relating to the relevant traditional knowledge; seizure of the products derived from the sample of the genetic heritage or related traditional knowledge; suspension of the sale of the product derived from the sample of the genetic heritage or related traditional knowledge and its seizure; embargo on the activity; partial or total prohibition of the establishment, activity or undertaking; suspension of the registration, patent, license or authorization; cancellation of the registration, patent, license or authorization; loss or restriction of the share in the funding line in an official credit institution; operation in the institution; prohibition on contracts with the Public Administration for a period of up to five years.

Response to Question 21: The law provides for administrative sanctions, without prejudice to possible civil or criminal sanctions.

Response to Question 22: Yes, owners may assign their rights and conclude licensing contracts (see the response to question No.10). No such legal instrument exists in relation to compulsory licenses.

Response to Question 23: Yes, the law provides for the creation of the Genetic Heritage Management Council (Provisional Measure 2186-16, Article 10, wording below – governed by Decree No. 3945). Article 10 – Within the Ministry of the Environment, the Genetic Heritage Management Council is hereby established, for discussion and standard-setting purposes – comprising the representatives of the bodies and entities of the Federal Public Administration, the jurisdiction of which covers the various activities dealt with by this Provisional Measure.”

Response to Question 24: Yes. The provisions are described in Articles 8(4) and 31 of the law (see wording below).

“Article 8(4) – The protection introduced shall not affect, prejudice or limit the rights relating to intellectual property.”

“Article 31 – The grant of an industrial property right by the competent bodies, for a process or product obtained from the genetic heritage sample shall be determined according to whether this Provisional Measure is observed, and the applicant shall provide information on the origin of the genetic material and related traditional knowledge, where appropriate.”

Response to Question 25: No.

Response to Question 26: Yes, the Industrial Property Office usually organizes events relating to the subject; for example the *International Seminar on the Role of Intellectual Property Protection in the Areas of Biodiversity and Traditional Knowledge*, which took place in Manaus, Amazonas from September 9 to 11, 2001; and *the Meeting of the Shamans: Wisdom and Science of Indigenous People and Industrial Property: Discussion and Debates*, which was held in São Luís, Maranhão, from December 4 to 6, 2001, and the *Introductory Intellectual Property Course for Training of Indigenous Lawyers and Representatives of Traditional Communities*, Rio de Janeiro, on May 9, 2002, Salvador, Bahia on May 13, 2002, and Belo Horizonte, Minas Gerais, on May 16, 2002.

CANADA

Response to Question 1: Copyright protection under the Copyright Act has been widely used by Aboriginal artists, composers and writers of tradition-based creations such as wood carvings of Pacific coast artists, including masks and totem poles, the silver jewelry of Haida artists, songs and sound recordings of Aboriginal artists, and Inuit sculptures.

Trademarks, including certification marks, are used by Aboriginal people to identify a wide range of goods and services, ranging from traditional art and artwork to food products, clothing, tourist services and enterprises run by First Nations. Many Aboriginal businesses and organizations have registered trademarks relating to traditional symbols and names. The number of unregistered trademarks used by Aboriginal businesses and organizations is considerably greater than those that are registered. Some trademarks are registered in order to prevent improper utilization of symbols or names.

Industrial designs protection under the Industrial Design Act has not been widely used by Aboriginal persons or communities. The West Baffin Eskimo Cooperative Ltd. filed over 50 designs in the late 1960s, for fabrics using traditional images of animals and Inuit people.

It is becoming increasingly common for Aboriginal communities in Canada to sign confidentiality agreements with governments and non-Aboriginal businesses when sharing their traditional knowledge. For example, the Unaaq Fisheries, owned by the Inuit people of Northern Quebec and Baffin Island is involved in fisheries management. The company regularly transfers proprietary technologies to other communities using its own experience in the commercial fishing industry. The techniques it develops are protected as trade secrets.

Response to Question 27: In 1999, the Departments of Indian and Northern Affairs and Industry Canada contracted a study which resulted in a publication entitled "Intellectual Property and Aboriginal People: A Working Paper". The paper provides an overview of Aboriginal perspectives on traditional knowledge, and areas of Canadian IP law of most relevance to Aboriginal people. It sets out brief examples of Aboriginal peoples' use of and their perspectives on copyright, industrial design, trade-marks, patent and trade secrecy protection. This paper is available at www.ainc-inac.gc.ca/pr/ra/intpro/intpro.

The government is currently seeking the views of national Aboriginal organizations and specifically soliciting examples where existing IP standards have not provided protection for TK but arguably should have.

COLOMBIA

Response to Question 1: Colombia has made provision for the application of a number of existing intellectual property standards.

MARKS

Article 136(g) of Decision 486 of the Commission of the Andean Community provides that «signs, whose use in trade may unduly affect a third party right, may not be registered, in particular when they consist of the name of indigenous, Afro-American or local communities, denominations, words, letters, characters or signs used to distinguish their products, services, or the way in which they are processed, or constitute the expression of their culture or practice, except where the application is filed by the community itself or with its express consent.»

In Colombia, a case has been presented in which the mark has been rejected as a result of the exception mentioned above. This example will be submitted as an annex at the end of the survey.

PATENTS

Article 3 of Decision 486 of the Andean Community establishes that «the member countries shall ensure that the protection granted for industrial property subjects shall safeguard and respect their biological and genetic heritage, as well as the traditional knowledge of their indigenous, Afro-American or local communities. As a result, the grant of patents relating to inventions developed from material obtained from said heritage or knowledge shall be subject to the material having been acquired in accordance with the community, national and international legal order. Member countries shall recognize the right and entitlement of indigenous, Afro-American or local communities to take decisions on their collective knowledge.»

“The provisions of this Decision shall be applied and interpreted so as not to contravene those of Decision 391, with the amendments in force.”

In order to meet the requirements of Article 3, Article 26(h) and (i) of the same decision provide that the application for obtaining a patent shall be filed with the competent national office and shall contain the following:

“(h) where appropriate, the copy of the access contract, when the products or procedures for which a patent is requested have been obtained or developed from genetic resources or their derived products, from whichever of the member countries is the country of origin.”

Response to Question 27: As regards patents, the main problem in guaranteeing that the protection granted shall safeguard and respect the biological and genetic heritage as well as the traditional knowledge of indigenous, Afro-American or local communities, is the determination of the place of origin of the resource which serves as a basis for the invention and thus the difficulty in establishing whether the copy of the access contract and/or of the document accrediting the license or authorization for use of the traditional knowledge contained in the documents, which should accompany the patent application, should be submitted.

COLOMBIA (ANNEX)

TAIRONA CULTURE CASE

Overview

The case basically consists of the application for registration as a mark of the expression Tairona, which coincides with an indigenous culture that inhabited Colombian territory.

Description of Traditional Culture

The Taironas were a pre-Hispanic Colombian culture which inhabited the lowlands of the foothills of the Sierra Nevada of Santa Marta. The dense population lived in large villages, many of which are worthy of the name of cities.

The main basis of subsistence was large-scale maize cultivation, but also cassava, pumpkins, beans and a large number of fruit trees were grown. Another important source of food was the sea and, in a number of regions, beekeeping was practiced. The Taironas practiced vertical control of environmental aspects and each river basin appeared to contain various redistribution centers in the form of cities.

At the beginning of the sixteenth century, a large number of Tairona populations had settled around two important urban centers and two federations therefore began to be established in the form of two small incipient opposing States; one center was Bonda, located in the flat part, close to which was Santa Marta, and the other was Pocigüeica, located on the steep slopes and dominating the areas at the head of the rivers Frío and Don Diego. Rivalries existed between both centers; it is noted that a powerful class of priests were engaged in more or less open warfare with the civil chiefs. However, as is obvious the Tairona had not achieved the complete consolidation of a centralized government.

Secondly, the first large villages, which used extensive constructions of lithic foundations, were preferably built in defensive positions, although part of the population lived in low-lying areas. Thirdly, the search for the oldest phases of Tairona culture has been in vain; the architectonic complex appeared more suddenly around the eleventh or twelfth century, without any clear local precedents. This lack of continuity brings to mind the possibility that the Taironas are of Central American origin and that they reached the coast of Santa Marta by sea, since all the signs of a migration over land are absent. Also the current Kogi culture contains many ideological elements which recall a Meso-American origin and are essentially Maioid in nature.

Tairona ceramics of the protohistoric period are very elaborate. Characteristic are certain receptacles with shiny black surfaces, small vessels with four supports, cups and large plates. The decoration is generally modeled and cut, and almost never painted. Many plastic features are combined with the receptacles, representing animals such as cats, marsupials, bats, birds and reptiles.

Some of the Tairona-Kogi cosmological and religious concepts show a universe formed by various horizontal strata superimposed with the world, i.e. the Sierra Nevada, in the center. The Sun and the Moon are divinities which were created by the Magna Mater in order to establish and maintain a cyclical order in the world. The observance of this order, i.e. of the cycle of solstices and equinoxes, together with the formulation of an agricultural and ceremonial

calendar, was the responsibility of the priests who constructed their temples and ceremonial centers on the basis of these astronomical and meteorological phenomena.

The archeological remains of Tairona culture, which were badly damaged by looters, continue to offer great surprises. The investigations conducted in the first few decades of this century revealed a number of villages where the houses had stone foundations: series of roads, containing walls, cultivation terraces and drainage channels. This complex is now known by the name of the Lost Buritic City 200, and is an important tourist attraction¹.

Decision

Considering that the denomination applied for as the mark TAIRONA for distinguishing Class 30 products in the Nice International Classification coincided with the name of the indigenous culture which inhabited Colombian territory and of which relics still exist, as already noted in the previous paragraph, it was considered that the title with which they are distinguished was protected as part of its heritage and of the country as such. In that regard, only representatives of this culture or persons with the authorization of those representatives are entitled to request the expression in question for use as a distinctive sign and, in this particular case, as a mark.

Rights and remedies

It should be stated that the decision taken was not based on any opposition raised by representatives of the culture, governmental organization or third party concerned, but as part of the formal study conducted by the administration in the light of Decision 486 of the Commission of the Andean Community, which contains the rules governing the subject. In that regard:

Article 136(g) of Decision 486 of the Commission of the Andean Community states that signs may not be registered as marks, which consist of the name of indigenous, Afro-American or local communities, denominations, words, letters, characters or signs used to distinguish their products, services or the way in which they are processed, or which constitute the expression of their culture or practice, except where the application is filed by the community itself or with its express consent.

An important and integral feature of the country is the Tairona culture and the significance of its history in terms of the different ways of life and customs, knowledge, degree of artistic and scientific development, as well as traditions and customs, *inter alia*, of its people. All the above represent for the country an invaluable heritage which is worthy of protection and respect by society, thereby making it necessary to achieve consistency with the global vision and the mechanisms that have been developed to provide them with the guarantees allowing them to be preserved, especially if consideration is given to human groups which are weak and have a strong tendency to die out, thereby generating a necessary interest on the part of the different States which, together, ensure that they are protected and maintained.

However, industrial property has not been neglected and according to Decision 486 of the Commission of the Andean Community those characters, denominations or symbols specific to the indigenous communities relating to our region, such as those of Afro-American character (descendants of the African negroes who were transported to America) or local communities do not form part of the series of features that may be appropriated by individuals with a view to their use as trademarks, thereby protecting and maintaining them in an environment which ensures that they are respected.

COSTA RICA

Response to Question 1: Currently, a draft Central American protocol is being drawn up under the title CENTRAL AMERICAN PROTOCOL FOR ACCESS TO GENETIC AND BIOCHEMICAL RESOURCES AND RELATED TRADITIONAL KNOWLEDGE, which to date has met with the approval of the different Central American Ministries of the Environment and will shortly be submitted to the different legislatures. This protocol is designed to regulate access to genetic and biochemical resources and knowledge, and related innovations and practices existing in whichever of the Member States, in order to guarantee the conditions for fair and equitable sharing of the benefits derived from access to genetic and biochemical resources and knowledge, as well as innovations and practices of local communities, guarantee the conservation of biological diversity and the sustainable use of its components as a mechanism for maintaining and improving the quality of life of its inhabitants, ensure the creation and development of scientific, technical and technological capacities, at the local, regional and national levels for the use of genetic and biochemical resources and related traditional knowledge, establish an appropriate system for access to the resources and knowledge described above, based on prior informed consent and on mutually agreed terms which promote the fair and equitable sharing of the benefits, strengthen the negotiating capacity of the member States in the above-mentioned fora on the subject of access to and sharing of benefits; recognize, compensate and protect local communities in relation to their knowledge, innovations and practices for the preservation and sustainable use of biological diversity; and provide appropriate institutional mechanisms for implementing and complying with this protocol.

In addition, there is also a subsequent draft to be submitted during the current legislative session relating to rules for access to biological material, which we have not managed to obtain.

Response to Question 2: In Costa Rica, there is no existing *sui generis* law for the protection of traditional knowledge. However, Law No. 7788 on Biodiversity of April 30, 1998, provides that this type of rights shall be protected through traditional intellectual property systems, and is restricted to regulating what is particular to it, i.e. the systems for protecting rights of local communities, indigenous peoples and so-called *sui generis* systems.

In general terms, the State recognizes the existence and validity of the forms of knowledge and innovation and the need to protect them, through the use of appropriate mechanisms for each specific case (Article 77 of the Law on Biodiversity).. These mechanisms include “patents, trade secrets, phytoenhancement rights, *sui generis* community intellectual rights, copyrights and rights of farmers” (Article 78 of the Law on Biodiversity).

In relation to *sui generis* community intellectual rights, the Law on Biodiversity establishes certain general criteria relating to the community rights and leaves room for the same local and indigenous communities to define, through a process of participation, the way in which the rights will be protected and registered.

The State recognizes and protects expressly, under the common name of *sui generis* community intellectual rights, the knowledge, practices and innovations of indigenous peoples and local communities in relation to the use of the features of biodiversity and related knowledge.

This right exists and is legally recognized by the sole existence of the cultural practice or knowledge related to genetic and biochemical resources, it does not require prior declaration, express recognition or formal registration, and may therefore comprise practices which, in the future, are included in such a category. This recognition implies that none of the forms of protection for industrial or intellectual property rights, special laws and international law shall affect such historical practices (Article 82).

In addition to the Law on Biodiversity, there is Law No. 6867 on Patents, Industrial Drawings and Designs and Utility Models of April 5, 1983, reformed by Law No. 7979 of January 31, 2000, Law No. 7978 on Marks and other Distinctive Signs of February 1, 2000, Law No. 7975 on Undisclosed Information of January 18, 2000, the Law on Copyright and Related Rights, and Law No. 8039 on the Observance of Intellectual Property Rights, published on October 27, 2000.

Response to Question 3: The following drafts are currently being examined by the legislature:

UPOV Convention on plant varieties

Regulations under National Law No. 6289 on Seeds, which are in the process of being approved.

Response to Question 4: The aims and objectives of this law include the recognition and protection of the breeder's rights for a novel, distinct, uniform and stable plant variety.

Response to Question 5: Yes. The intellectual property laws in force did not duly include certain important aspects such as the expansion of protection focusing on traditional knowledge and especially *sui generis* intellectual knowledge. It is the Law on Biodiversity which in reality grants a degree of protection by means of prior monitoring for access to said resources with special attention being paid to local communities and indigenous peoples.

Response to Question 6: Where the subject matter for which protection is granted is covered by patents, the protection period is 20 years, ten years for industrial drawings and designs and utility models, ten years for marks, and an indefinite period for undisclosed information, while in the Law on Biodiversity bioexploration contracts shall be protected for an extendable three-year period, according to Articles 70, 71 and 74.

Response to Question 7: See response to Question 5.

Response to Question 8: Article 1 of Law No. 6867 on Patents provides as patentable any product of the human intellect, which is industrially applicable, be it a product, a machine, a tool or a manufacturing process.

Article 77 of Law No. 7788 on Biodiversity protects the existence and validity of the forms of knowledge and innovation relating to biological resources or biodiversity, and *sui generis* intellectual rights.

Law No. 7978 on Marks protects factory and trade marks, collective marks, certification marks, appellations of origin and geographical indications.

Law No. 7975 on Undisclosed Information protects trade and industrial secrets.

Response to Question 9: Article 1 of the Law on Patents excludes inventions whose industrial application has to be prevented objectively and necessarily so as to protect public order, morality, the health or life of persons or animals, or in order to avoid serious environmental damage or preserve plants, diagnostic, therapeutic and surgical methods for the treatment of animal organisms, plants and animals, and essentially biological procedures for the protection of plants and animals.

The Law on Biodiversity excludes the protection of deoxyribonucleic acid sequences per se, plants and animals, non-genetically modified micro-organisms, essentially biological procedures for the production of plants and animals, processes or cycles which are natural in themselves, inventions essentially derived from the relevant knowledge, or biological, traditional or cultural practices in the public domain, and inventions which, when exploited commercially as a monopoly, may affect the agricultural processes or products fundamental to the nutrition and health of the country's inhabitants.

Article 4 of the Law on Undisclosed Information excludes subject matter which is in the public domain, subject matter which appears to be obvious to a person skilled in the art, based on the prior available information, and that which should be disclosed by legal provision or court order.

Response to Question 10: In the case of patents, the rights conferred include the right to the exclusive use of the invention and to grant exclusive licenses for its use, where the subject matter of the patent is a product, thereby preventing third parties from carrying out manufacture, use, offer for sale, sale or import of the subject matter of the patent for these purposes, without the owner's consent. Where the subject matter of the patent is a procedure, third parties are prevented from using the procedure and carrying out acts relating to use, offer for sale, sale or import for these purposes, without the owner's consent, and at least the product obtained directly by means of said procedure.

In the case of the Law on Biodiversity, it should be emphasized that the Law recognizes and expressly protects, under the common name of *sui generis* community intellectual rights, the knowledge, practices and innovations of indigenous peoples and local communities, concerning the use of the features of biodiversity and related knowledge. This right exists and is recognized by the law through the sole existence of the cultural practice or knowledge relating to genetic and biochemical resources, which does not require a declaration subject to express recognition or official registration.

Response to Question 11: Where the subject matter is protected by patents or marks, the rights granted to its owner are exclusive. Remuneration rights exist, as envisaged in the Law on Biodiversity, as is the case with the bioexploration and access contracts which establish the obligation of the interested party to deposit up to ten per cent of the research budget and up to 50 per cent of the royalties paid in support of the national conservation areas system by the indigenous territory or the private owner supplying the elements required for access; in addition, the amount will be determined that in each case shall be paid by the interested parties for procedural expenses as well as any other benefit or technology transfer that forms part of the prior informed consent.

Response to Question 12: No. The protection granted by the law is not automatic, since certain formalities have to be observed, for example when the subject matter is protected by a patent, it must meet certain substantive requirements, i.e. novelty, inventive step and industrial applicability. When protection is granted through marks, the subject matter shall

meet the requirements of novelty and originality, irrespective of the formal requirements established in the law and regulations. When the right has been granted, certain formalities must be observed if it is to be maintained, for example in the case of patents it must be shown that it has been applied industrially within three years of the patent being granted, or four years after the application has been filed. As regards licenses for access to genetic and biochemical material, as established in the Law on Biodiversity, this shall be for a renewable three-year period for bioexploration and research programs, as decided by the competent authority.

In the same way as in industrial property legislation, certain formalities must be observed, including the prior entry of natural and legal persons in the register, so as to be able to carry out bioexploration.

Response to Question 13: Yes, industrial property legislation provides for the possibility of revoking or forfeiting the rights obtained by means of invalidity incidents or actions. In specific terms, the Law on Patents establishes the possibility of declaring a patent granted to be invalid, where the substantive requirements have not been met, i.e. the patent is not novel, does not involve an inventive step and is not industrially applicable. Similarly, the Law on Marks establishes the possibility of canceling or withdrawing a registered mark, where that mark has become widely known, owing to the non-use of the distinctive marking, voluntary cancellation of the mark owner and *ex officio* cancellation, where the registration of the mark was the result of an administrative error. As regards the Law on Biodiversity, this contains a relevant provision as regards the revocation of the licenses for genetic manipulation, based on the technical, scientific and safety criteria able to modify or revoke any license granted in the face of imminent danger, unforeseen circumstances or the failure to fulfill formal requirements, whereby genetically modified or other types of organisms may be confiscated, seized, destroyed or redistributed, in addition to their transfer, experimentation, release into the environment, manipulation and marketing being prohibited, so as to protect human health and the environment. Additionally, provisions contained in the General Law on Public Administration are also applicable thereto.

Response to Question 14: Yes.

Where the protection granted by our legislation is limited in time, this is for 20 years for patents for example, and ten years for drawings, industrial designs and utility models. As regards the Law on Biodiversity and specifically in relation to access contracts or licenses, the period of said license or contract will be three years. The period of protection for patents will begin as of the filing date in the country of origin and for marks protection begins from the date of grant. The Law on Biodiversity does not establish the starting point for protection. Once the protection period has expired, in the case of patents, drawings, industrial designs and utility models, the information passes into the public domain, whereas marks may be used by any person once their period of validity has expired. In relation to biodiversity, once their validity has expired access contracts or licenses may or may not be renewed.

Response to Question 15: National legislation provides for retroactive protection in the case of patents. In this regard, Article 16 establishes that the rights conferred by a patent may not be opposed by those persons who, prior to the filing date or where appropriate to the priority date of the corresponding patent application, were in the country where the product is produced or where the invention procedure is used, and who shall have the right to continue to do so.

Response to Question 16: Any natural or legal person may request protection for rights.

Response to Question 17: Yes. The Law on Biodiversity recognizes and protects, under the common name of *sui generis* intellectual rights, the knowledge, practices and innovations of indigenous peoples and local communities.

Response to Question 18: Yes. The law of Costa Rica does not contain any express or specific provision in this regard, although it does not prohibit it either, for which reason it may be possible for more than one community to acquire and exercise the rights.

Response to Question 19: According to the Law on Biodiversity, access to human biochemical and genetic material is excluded from protection, as is the exchange of biochemical and genetic resources, and access to related knowledge resulting from practices, uses and customs, for non-profitmaking purposes, among indigenous peoples and local communities. The law in question does not affect universities either as regards teaching and research in the field of biodiversity, except for research for profitmaking purposes.

Response to Question 20: The Law on Observance of Intellectual Property Rights establishes the possibility, in case of the violation of any intellectual property right established in national legislation or international agreements in force, of imposing administrative sanctions, bringing legal proceedings and taking civil action in claiming damages for the injuries caused by the infringing party to the rights owner.

Response to Question 21: The measures governed by the Law on Observance of Intellectual Property Rights include precautionary administrative and penal measures, border-related measures, and the destruction and seizure of merchandise. In addition, provision is made for terms of imprisonment of up to three years for the infringing parties.

Response to Question 22: In fact, as regards patents Costa Rican legislation envisages the possibility of granting licenses and similarly of assigning related rights. As to licenses, Articles 18 and 19 of the Law and 28, 29 and 30 of the regulations establish and regulate compulsory licenses, compulsory licenses for public use, compulsory licenses against anti-competitive practices, compulsory licenses in case of dependent patents and the compulsory license for industrial application.

Response to Question 23: In Costa Rica, the Industrial Property Registry and the National Registry of Copyright and Related Rights are responsible for administering intellectual property rights. Similarly, the Law on Observance of Intellectual Property Rights empowers both the Registries and the courts of justice to deal with any related infringements. On the other hand, the Law on Biodiversity establishes the National Commission for the Management of Biodiversity (CONAGEBIO) which has a technical office whose duties include processing, approving, rejecting and supervising requests for access to biodiversity resources, conserving and coordinating conservation areas, the private sector, indigenous peoples and rural communities, matters relating to access, organizing and keeping up to date a register of requests for access to the features of biodiversity, *ex situ* collections of natural and legal persons dedicated to genetic manipulation, compiling and updating the standards relating to the failure to comply with biodiversity agreements and guidelines.

Response to Question 24: Yes. Articles 77 and 78 of the Law on Biodiversity make special provision for the means to protect elements of biodiversity and related traditional knowledge, and refer literally to forms and limits of protection. Under Article 78, the State will grant the protection indicated in the previous article (Article 77), which refers to the recognition,

existence and validity of the forms of knowledge and innovation, and the need to protect them through the use of the legal mechanisms appropriate to each specific case), *inter alia*, through patents, trade secrets, *sui generis* community intellectual rights, phytoimprovement rights, copyrights and rights of agricultural workers.

Response to Question 25: No.

Response to Question 26: Costa Rican legislation does not contain any special measures for assistance to the holders of traditional knowledge, be it the acquisition, exercise or administration of such knowledge. This assistance is provided through the exercise and defense of intellectual property rights.

Response to Question 27: It should be pointed out that one of the problems or failings of the intellectual property system is that it does not specifically regulate the traditional knowledge aspect and that there is no *sui generis* system for protecting such knowledge, which in all senses represents an obstacle to locating the legal framework to be used for the relevant protection. At the same time and depending on the framework assigned for such protection, the subject matter for which protection is sought may pass into the public domain.

COSTA RICA (ANNEX)

BORRADOR DE PROTOCOLO CENTROAMERICANO DE ACCESO A LOS RECURSOS GENÉTICOS Y BIOQUÍMICOS Y AL CONOCIMIENTO TRADICIONAL ASOCIADO

PREÁMBULO

Versión 08/06/00

CONSIDERANDO:

Que los Estados centroamericanos, de acuerdo con el derecho internacional y en especial con el Convenio sobre la Diversidad Biológica suscrito en Río de Janeiro, el 5 de junio de 1992, son soberanos para decidir sobre la conservación y el uso sostenible de sus recursos, de conformidad con sus políticas ambientales y de desarrollo;

Que los Estados centroamericanos cuentan con un importante patrimonio biológico, que debe ser conservado y utilizado de manera sostenible;

Que los Estados centroamericanos poseen una importante diversidad cultural y étnica, reflejada en la existencia de numerosas comunidades locales;

Que la diversidad cultural, incluyendo las distintas prácticas e innovaciones de las comunidades locales, está íntimamente vinculada con la conservación y manejo de la biodiversidad;

Que la diversidad biológica, así como los conocimientos, innovaciones y prácticas de las comunidades locales asociados a estos recursos, poseen un valor estratégico en el contexto internacional;

Que la utilización de estos recursos o conocimientos debe realizarse de forma tal que los beneficios derivados se compartan justa y equitativamente;

Que resulta imprescindible la creación y el fortalecimiento de capacidades nacionales para usar en forma sostenible la diversidad biológica y facilitar la conservación por parte de las comunidades locales, que tienen una estrecha e indisoluble relación con estos recursos;

Que es necesario fortalecer la cooperación regional en los niveles científico, técnico y cultural, así como el desarrollo armónico y la integración de los Estados centroamericanos;

Que los recursos genéticos y bioquímicos y el conocimiento innovaciones y prácticas asociadas son elementos de gran relevancia para el desarrollo económico de los Estados.

DECIDEN SUSCRIBIR EL SIGUIENTE:

PROTOCOLO CENTROAMERICANO DE ACCESO A LOS RECURSOS GENÉTICOS Y BIOQUÍMICOS Y AL CONOCIMIENTO TRADICIONAL ASOCIADO

CAPÍTULO I

DE LOS OBJETIVOS, DEFINICIONES Y PRINCIPIOS GENERALES

Artículo 1. Objetivos: Este Protocolo tiene por objetivo regular el acceso a los recursos genéticos y bioquímicos y al conocimiento, innovaciones y prácticas asociadas existentes en cualesquiera de los Estados miembros, con el fin de:

- a) Asegurar las condiciones para una participación justa y equitativa en los beneficios derivados del acceso a los recursos genéticos y bioquímicos y al conocimiento, innovaciones y prácticas de las comunidades locales;
- b) Asegurar la conservación de la diversidad biológica y el uso sostenible de sus componentes como un mecanismo para mantener y mejorar la calidad de vida de sus habitantes;
- c) Asegurar la creación y desarrollo de capacidades científicas, técnicas y tecnológicas, en los niveles local, nacional y regional sobre el uso de sus recursos genéticos y bioquímicos y el conocimiento tradicional asociado;
- d) Establecer un sistema apropiado de acceso a los recursos y conocimientos antes descritos basado en el consentimiento previamente informado y en términos mutuamente acordados que promuevan la distribución justa y equitativa de beneficios;
- e) Fortalecer la capacidad de negociación de los Estados miembros ante los foros relacionados con el tema del acceso y la distribución de beneficios;
- f) Reconocer, compensar y proteger a las comunidades locales, por sus conocimientos, innovaciones y prácticas para la conservación y el uso sostenible de la diversidad biológica; y
- g) Proporcionar mecanismos institucionales apropiados para implementar y cumplir con este Protocolo.

Artículo 2. Definiciones: Los términos contenidos en este Protocolo deberán ser interpretados de conformidad con los establecidos en el Convenio sobre la Diversidad Biológica. Además, este Protocolo deberá interpretarse de conformidad con los siguientes términos:

Acceso a los Recursos Genéticos y Bioquímicos: Autorización otorgada por la autoridad nacional competente para obtener muestras de los elementos de la biodiversidad silvestre nativa o domesticada existente en condiciones ex situ o in situ y de su conocimiento tradicional asociado para fines de investigación básica, conservación, bioprospección o aprovechamiento comercial.

Autoridad Nacional Competente: Autoridad designada por cada Estado miembro para autorizar el acceso, firmar y monitorear los contratos de acceso; asimismo, asegurar la adecuada transferencia tecnológica y científica y la justa y equitativa distribución de los beneficios derivados, de conformidad con los términos de este Protocolo.

REPÚBLICA DE COSTA RICA

REGISTRO NACIONAL

Acuerdos de Transferencia de Material: Convenio celebrado entre centros de conservación ex situ u otras entidades que mantienen recursos en condiciones ex situ para la transferencia de material genético, previa autorización expresa de la autoridad nacional competente.

Biopiratería: Extracción y/o uso de material biológico con fines de acceso a los recursos genéticos o bioquímicos que contiene, realizada sin la obtención de la autorización de acceso correspondiente otorgada por la autoridad competente.

Bioprospección: Búsqueda sistemática, clasificación e investigación de nuevas fuentes de compuestos químicos, genes, proteínas y otros productos que poseen un valor económico actual o potencial y que se encuentran en los elementos de la biodiversidad.

Comunidades Locales: Se refieren a comunidades campesinas, afroamericanas e indígenas.

Conocimiento: Producto derivado de la actividad intelectual y generado de manera tradicional o siguiendo el método científico.

Conocimiento Tradicional: Todo conocimiento, innovación y práctica, individual o colectiva, con valor real o potencial, asociado a los recursos biológicos, protegido o no por los sistemas de propiedad intelectual.

Consentimiento Previamente Informado: Acto mediante el cual el Estado, cuando corresponda, los propietarios privados o las comunidades locales, en su caso, previo suministro de toda la información exigida y cumplimiento de los procedimientos correspondientes, consienten en permitir el acceso a sus recursos o al conocimiento tradicional asociado, bajo condiciones mutuamente acordadas.

Contrato de Acceso: Acuerdo de voluntades entre el Estado y un particular, que autoriza la realización de investigación básica o bioprospección y establece los términos y condiciones para la obtención o comercialización de recursos genéticos y bioquímicos y del conocimiento tradicional asociado, como resultado del otorgamiento de una autorización de acceso.

Creación de Capacidades Nacionales e Instituciones Generadoras de Valor Agregado: Adquisición, desarrollo y fortalecimiento de las destrezas y posibilidades científicas, técnicas y tecnológicas para la conservación y el uso sostenible de la biodiversidad, que permitan avanzar progresivamente en las capacidades de investigación y desarrollo de productos y procesos con valor agregado.

Innovación: Cualquier conocimiento que añada un uso o valor mejorado a la tecnología, las propiedades, los valores y los procesos de cualquier recurso biológico.

Autorización de Acceso: Autorización otorgada por el Estado para la realización de investigación básica, bioprospección, para la obtención o la comercialización de recursos genéticos o bioquímicos y del conocimiento tradicional asociado, a personas o instituciones nacionales o extranjeras, solicitado mediante un procedimiento normado en este Protocolo y en las leyes nacionales.

Principio Precautorio: La adopción, por parte de los Estados conforme a sus capacidades, de medidas eficaces para impedir la degradación del medio ambiente, en los casos en que haya peligro de daño grave o irreversible.

Proveedor del Recurso: Persona natural o jurídica que posea derechos sobre el recurso orgánico, genético o bioquímico, el predio en que estos se encuentren o sobre el conocimiento tradicional asociado a ellos y que pueda autorizar su acceso, previo cumplimiento de los procedimientos legales relativos al mismo.

Recurso Bioquímico: Cualquier material derivado de plantas, animales, hongos o microorganismos que contenga características específicas, moléculas especiales o evidencias para el diseño de las mismas.

Artículo 3. Ámbito de Aplicación: Los procedimientos y demás disposiciones sobre acceso establecidas en este Protocolo serán de aplicación a los recursos genéticos y bioquímicos de los cuales los Estados miembros son propietarios y a las especies, cualquiera sea su procedencia, que se encuentren por causas naturales en sus territorios, así como a los conocimientos, innovaciones y prácticas tradicionales asociadas. Se aplica a los recursos antes indicados se encuentren en condiciones ex situ o in situ, sean silvestres o domesticados. Sin embargo, los Estados podrán establecer mecanismos diferenciados para el acceso a colecciones ex situ.

Artículo 4. Exclusiones: Se excluyen del ámbito de aplicación de este Protocolo:

- a) Los recursos genéticos humanos y sus productos derivados;
- b) El intercambio de recursos genéticos y bioquímicos y productos derivados o de los conocimientos, innovaciones y prácticas asociados a los anteriores que realicen entre sí las comunidades locales, de conformidad con sus propias prácticas consuetudinarias;
- c) El acceso y el uso de los recursos biológicos distintos a su utilización como fuente de recursos genéticos y bioquímicos; y
- d) Cualquier otra que los Estados miembros consideren de conformidad con su legislación nacional.

Artículo 5. Soberanía Nacional: Los Estados miembros de este Protocolo, de acuerdo con el derecho nacional e internacional aplicable, son soberanos sobre sus recursos genéticos y bioquímicos; en consecuencia, tienen potestad de determinar las condiciones del acceso a estos recursos y la justa y equitativa distribución de los beneficios, y la obligación de asegurar que las actividades que se lleven a cabo dentro de su jurisdicción o bajo su control no perjudiquen a los otros Estados.

Artículo 6. Derecho de los Recursos: Corresponde a cada uno de los Estados, de conformidad con su legislación y políticas, definir los derechos que detentan las personas naturales o jurídicas sobre estos recursos o sobre estos recursos biológicos que contienen recursos genéticos y bioquímicos y por ende, la participación de los mismos en los procedimientos de acceso.

Artículo 7. Reconocimiento y Compensación por el Conocimiento Tradicional: Los Estados miembros reconocerán y protegerán, por medio de la autoridad competente, cuando proceda, el conocimiento, innovaciones y prácticas de las comunidades locales útiles para la conservación, el manejo y el uso sostenible de los componentes de la biodiversidad; por consiguiente, tutelarán la facultad de los mismos para decidir sobre sus conocimientos, innovaciones y prácticas.

Artículo 8. Creación de Capacidades Nacionales: Los Estados miembros establecerán programas apropiados para la creación y el desarrollo de capacidades nacionales para incorporar valor agregado a sus recursos genéticos y bioquímicos y al conocimiento tradicional asociado.

Artículo 9. Aplicación del Principio Precautorio: Los Estados miembros tomarán en cuenta el principio precautorio en los procedimientos de acceso, de conformidad con el derecho aplicable.

Artículo 10. Cumplimiento de las Regulaciones Internacionales Sobre Comercio: Sin perjuicio del cumplimiento de las disposiciones relativas al comercio de flora y fauna en Vías de extinción, de la aplicación de medidas zoonosanitarias y fitosanitarias, normas técnicas y de bioseguridad, entre otras. Lo dispuesto en este Protocolo no deberá constituir un obstáculo innecesario al comercio o una restricción encubierta del mismo.

Artículo 11. Planificación Nacional de la Biodiversidad: Cada Estado miembro considerará dentro de sus planes, políticas, programas y estrategias sobre biodiversidad, el acceso a los recursos genéticos y bioquímicos y al conocimiento tradicional asociado y la necesidad de la distribución justa y equitativa de beneficios.

CAPÍTULO II DEL PROCEDIMIENTO DE ACCESO

Artículo 12. Del Procedimiento de Acceso: De conformidad con su legislación nacional cada Estado miembro determinará el tipo de instrumento y procedimiento a seguir para autorizar el acceso y otorgar su consentimiento previamente informado. Sin embargo, los presentes lineamientos deberán ser considerados al momento de adoptar los procedimientos internos. Los procedimientos de acceso deberán ser, en todo caso, claros, transparentes, expeditos, fundamentados y debe contemplarse la posibilidad de recurrir apropiadamente las decisiones y permitir la participación de todos los interesados.

Artículo 13. Procedencia del Consentimiento Previamente Informado: El acceso a los recursos genéticos y bioquímicos estará sujeto al consentimiento previamente informado de las personas naturales o jurídicas titulares de derechos. En todo caso, el consentimiento previamente informado será refrendado por el Estado.

Artículo 14. Inicio del Procedimiento: El procedimiento de acceso se iniciará con la solicitud presentada por el interesado, sea una persona natural o jurídica, nacional o extranjera, de acuerdo al procedimiento de cada Estado miembro en concordancia con el presente Protocolo. Antes de la autorización, cualquier acceso se considerará ilegal y será sancionado de conformidad con las leyes nacionales de cada Estado.

Artículo 15. Designación de la Autoridad Nacional Competente: Cada Estado miembro designará una autoridad nacional competente para recepcionar, tramitar, resolver y monitorear todas las solicitudes de acceso, no importando el tipo de recurso ni su ubicación.

Artículo 16. Requisitos de la Solicitud: Los Estados miembros al elaborar el procedimiento interno de acceso deberán solicitar a los interesados, como mínimo, el cumplimiento de los siguientes requisitos:

- a) La identificación del solicitante, los documentos que justifiquen su capacidad legal y copia del respectivo proyecto de investigación.
- b) Información detallada y específica sobre los recursos o conocimientos sobre los cuales el acceso es solicitado, incluyendo sus usos presentes y futuros y los riesgos que pueden derivarse del acceso;
- c) Presentación y aprobación del estudio de impacto ambiental, cuando la legislación interna de cada Estado miembro así lo disponga;
- d) Los propósitos del acceso, incluidos los tipos de usos comerciales esperados del acceso solicitado;
- e) Mecanismos propuestos para la distribución de beneficios, incluida la transferencia de tecnología y otras formas de compartir beneficios con los sectores apropiados del Estado;
- f) La existencia de una contraparte nacional en la investigación, cuando corresponda en los Estados miembros;
- g) El sitio preciso donde el acceso tendrá lugar y los métodos a ser empleados. En el caso de acceso a recursos en condiciones ex situ, la información sobre la institución que los mantiene;
- h) Una indicación del destino potencial de los recursos y de sus destinos subsecuentes y los términos de transferencia de este material a terceros;
- i) Una indicación de los beneficios económicos, sociales, culturales, científicos y espirituales que se derivarán para el Estado y los sectores involucrados en el acceso;
- j) La descripción del conocimiento, innovaciones y prácticas de las comunidades locales cuando corresponda;
- k) La identificación del proveedor de los recursos genéticos y bioquímicos y del conocimiento asociado y los términos del consentimiento previamente informado obtenido de aquellos y de la distribución de beneficios acordada; y
- l) Cualquier otra información pertinente que la autoridad competente pueda exigir.

En ningún caso podrá autorizarse que el solicitante ceda o transfiera a un tercero el material obtenido.

Artículo 17. Restricciones al Acceso: La autoridad competente podrá imponer restricciones parciales o totales al acceso a los recursos para asegurar su conservación y uso sostenible, para lo cual podrá prohibir su acceso, condicionarlo, fijarle límites, regular los métodos de colecta, entre otros. La aplicación del principio precautorio será obligatoria para la autoridad competente de conceder el acceso.

Para establecer restricciones totales o parciales se considerarán entre otros:

- a) El estado de conservación de las especies o variedades;
- b) Razones de endemismo o rareza;
- c) Condiciones de vulnerabilidad o fragilidad en la estructura o función de los ecosistemas;
- d) Efectos adversos sobre la salud humana, las especies y los ecosistemas o sobre elementos esenciales de la autonomía o identidad cultural de las comunidades locales; y
- e) Recursos genéticos o áreas geográficas calificados como estratégicos.

En todo caso, se prohíbe el acceso a los recursos y conocimiento para fines militares.

Artículo 18. Tasas Administrativas: La autoridad competente en cada uno de los Estados miembros podrá cobrar tasas y otros cargos razonables derivados de la tramitación de las solicitudes de acceso.

Artículo 19. Términos del Contrato: Sin perjuicio de que la decisión sea tomada en cada caso concreto y tomando en consideración las diferencias entre los fines de las investigaciones y del acceso, los Estados miembros velarán para que los contratos de acceso incluyan, como mínimo, las siguientes previsiones:

- a) Límites de muestras que el solicitante puede obtener;
- b) Participación de nacionales en la investigación;
- c) Mecanismos de transferencia de tecnología, conocimientos y habilidades incluida la biotecnología, que sean ambientalmente sanas y seguras;
- d) Suministro de información sobre antecedentes, estado de la ciencia u otros datos que contribuyan a mejorar el conocimiento de los recursos y productos;
- e) Depósito de duplicados del material recolectado en instituciones nacionales autorizadas por la autoridad competente;
- f) Reconocimiento en cualquier publicación del aporte del país en la investigación sobre el recurso;
- g) Reportes de los resultados de las investigaciones realizadas y su utilidad para el Estado;
- h) Términos de transferencia de productos y subproductos del material a terceros.
- i) Fortalecimiento de la capacidad institucional, nacional y local asociada a la conservación y el uso sostenible de los componentes de la biodiversidad y el conocimiento tradicional asociado;
- J) Un porcentaje de las ganancias netas sobre productos o procesos comercializables derivados del acceso;
- k) Presentación de reportes periódicos sobre los usos comercializables detectados, sin perjuicio de los derechos de propiedad intelectual sobre los mismos;
- l) El compromiso de cumplir con las regulaciones ambientales, incluidas las reglas sobre bioseguridad, bioética y el respeto a las costumbres de las comunidades locales, cuando sea pertinente; y
- m) Las causas de terminación del acuerdo. En todo caso, la autoridad competente podrá dar por terminado el mismo, cuando se deba al incumplimiento de las condiciones bajo las cuales el acceso ha sido concebido.

Las condiciones de acceso deben establecer los términos de transferencia de tecnología y una justa y equitativa distribución de beneficios para el Estado, incluyendo las comunidades locales, sector científico y sector privado, en cada caso.

Artículo 20. Consideración de los Intereses de Otros Estados Miembros: Cuando en la negociación de los términos de los contratos de acceso a los recursos o al conocimiento asociado apareciere que otro Estado miembro también es proveedor, la autoridad nacional competente solicitará su opinión. Esta opinión deberá verterse en un plazo máximo de treinta días a partir de la notificación y podrá acompañarse de las consideraciones técnicas e información que considere pertinente. La autoridad nacional competente deberá ponderar las opiniones vertidas en el procedimiento.

Artículo 21. Certificado de Origen: La autoridad competente expedirá un certificado de origen que establezca la legalidad del acceso al recurso y al conocimiento.

Artículo 22. Información Pública y Confidencialidad: la información contenida en las solicitudes y contratos de acceso será de libre acceso al público. Sin embargo, cada autoridad competente protegerá la información confidencial que presente el solicitante, previa justificación de su carácter, de conformidad a la legislación de cada Estado miembro.

Artículo 23. Registro de Acceso: La autoridad competente llevará un registro de solicitudes y contratos de acceso.

Artículo 24. Convenios Marco: La autoridad competente podrá celebrar convenios marco de acceso para investigación o docencia con universidades o centros de investigación, que amparen la ejecución de varios proyectos con el fin de facilitar el acceso a los recursos y conocimientos.

Artículo 25. Regulación de Acuerdos de Transferencia de Materiales: Los centros de conservación ex situ u otras entidades que mantengan recursos en condiciones ex situ para poder celebrar Acuerdos de Transferencia de Materiales con instituciones similares, deberán contar con autorización expresa de la autoridad nacional competente.

Artículo 26. Registro y Aprobación de Productos y Procesos: Los registros de propiedad intelectual y las autoridades competentes en su caso, previo registro de productos y procesos que puedan implicar el uso de recursos y conocimientos, exigirán la presentación del certificado de origen que ampare la legalidad del acceso. La falta de cumplimiento de lo anterior o la violación de las leyes sobre acceso o de las condiciones de los contratos de acceso impedirán el otorgamiento de cualquier aprobación o registro al solicitante.

Artículo 27. Sanciones: Los Estados miembros crearán los mecanismos jurídicos necesarios para impedir la biopiratería de recursos genéticos y bioquímicos y conocimientos asociados y para aplicar las respectivas sanciones administrativas, civiles y penales.

CAPÍTULO III

DE LA PROTECCIÓN DE LOS CONOCIMIENTOS, INNOVACIONES Y PRÁCTICAS INDIVIDUALES DE LAS COMUNIDADES LOCALES

Artículo 28. Conservación de los Conocimientos, Innovaciones y Prácticas de las Comunidades Locales: Cada Estado miembro reconoce la existencia y validez de distintas formas de conocimiento e innovación y la necesidad de protegerlas mediante el uso de los mecanismos legales apropiados para cada caso específico.

Artículo 29. Derecho de Propiedad Individual y Colectiva: Cada Estado miembro reconoce el derecho de las comunidades sobre sus conocimientos, innovaciones y prácticas y por ende, la facultad de decidir sobre ellos.

Artículo 30. Objetivos: Los objetivos de conservación, utilización sostenible y distribución justa y equitativa de los beneficios derivados del uso de los recursos y conocimientos prevalecerán sobre los derechos de propiedad intelectual, especialmente las patentes, los Estados miembros deberán velar porque esos derechos apoyen y no se opongan a los objetivos del presente Protocolo y del Convenio sobre la Diversidad Biológica.

Artículo 31. Consentimiento Previamente informado: El conocimiento, prácticas e innovaciones de las comunidades locales no podrán ser utilizadas sin el consentimiento previamente informado de quien tenga el derecho de otorgarlo.

Artículo 32. Proceso de consulta: Inmediatamente después de la vigencia de este Protocolo, los Estados miembros iniciarán un proceso participativo con las comunidades locales sobre los alcances y requisitos de un sistema de derechos por ser establecido.

Artículo 33. Elementos a Considerar: Dentro de los elementos a ser considerados en el proceso participativo se encuentran:

- a) Identificación de los requisitos y procedimientos exigidos para que sea reconocido el derecho *sui generis* y la titularidad del mismo;
- b) Consideración de un sistema de registro para los derechos *sui generis*, de conformidad con las prácticas culturales de los interesados;
- c) Obligaciones y derechos que confiere el registro; e
- d) Identificación de causales de nulidad o cancelación de la inscripción del derecho y las causales o cancelaciones de derechos otorgados sobre el conocimiento, innovaciones y prácticas.

Artículo 34. Existencia del Conocimiento: En todo caso el derecho *sui generis* existe y se reconoce por la sola existencia de la práctica, conocimiento e innovación, sin que requiera de declaración previa ni de registro oficial. Este reconocimiento conlleva la imposibilidad de que los derechos de propiedad intelectual puedan ser otorgados sobre esos conocimientos, innovaciones y prácticas. Cada Estado miembro establecerá mecanismos para asegurar el cumplimiento de lo dispuesto en este artículo.

Artículo 35. Derecho de Objeción Cultural: Se reconoce el derecho de objeción cultural de las comunidades locales sobre el acceso a los recursos o conocimientos por motivos culturales, espirituales, sociales, económicos o de otra índole. La autoridad competente ponderará la objeción resolviendo lo procedente.

CAPÍTULO IV *DE LA COOPERACIÓN REGIONAL Y LOS MECANISMOS INSTITUCIONALES*

Artículo 36. Cooperación Regional: los Estados miembros cooperarán para alcanzar los objetivos aquí propuestos.

Artículo 37. Comunicación sobre Adopción de Normas: Los Estados miembros, por medio de la autoridad competente o de los canales regionales existentes, se comunicarán de manera inmediata la adopción de normas que tengan relación con lo dispuesto en este Protocolo.

Artículo 38. Potestades de las Autoridades Competentes: Cada autoridad nacional competente deberá ser investida con las autoridades y potestades apropiadas para emitir las resoluciones administrativas necesarias para el cumplimiento de este Protocolo, para procesar las solicitudes de acceso y seguir adelante con los procedimientos establecidos y para firmar los contratos o convenios de acceso.

Artículo 39. Grupo Centroamericano Sobre Acceso: Créase el Grupo Centroamericano de Trabajo sobre Acceso a los Recursos Genéticos y Bioquímicos y al Conocimiento Tradicional Asociado, el cual estará conformado por las autoridades nacionales competentes de cada Estado miembro. Este grupo contará con el apoyo de instancias regionales o multilaterales y tendrá entre sus funciones las siguientes:

- a) Emitir en el nivel regional las recomendaciones apropiadas para el cumplimiento de este Protocolo;
- b) Emitir recomendaciones cuando le sean solicitadas por alguno de los Estados miembros;

- c) Promover acciones conjuntas de fortalecimiento de las capacidades de los Estados miembros en materia de investigación, acceso y transferencia de tecnología relacionada con los recursos y conocimientos;
- d) Recomendar las medidas apropiadas para el desarrollo de capacidades nacionales e institucionales para dar valor agregado al uso de los recursos y conocimientos;
- e) Proponer modelos de documentación comunes en los procedimientos de acceso;
- f) Facilitar el intercambio de información y experiencias sobre las condiciones de mercado de los recursos y conocimientos asociados;
- g) Facilitar el intercambio de información sobre políticas de acceso y de negociación de contratos;
- h) Facilitar la capacitación de los Estados miembros en materia de acceso y negociación de contratos;
- i) Elaborar su propio reglamento interno;
- j) Obtener el financiamiento de sus actividades por medio de las fuentes regionales o multilaterales apropiadas;
- k) Evaluar y dar seguimiento a los procedimientos de acceso; y
- l) Cualquier otra apropiada para el cumplimiento de sus fines.

Artículo 40. Notificación: Cada Estado miembro notificará a los otros Estados miembros en forma inmediata de todas las solicitudes y contratos de acceso, así como de la suspensión y terminación de los contratos.

Artículo 41. Disposiciones Complementarias: Cada Estado miembro deberá establecer disposiciones complementarias a este Protocolo que contemplen aspectos tales como financiamiento nacional para las actividades aquí indicadas, la medida en que se afectarán derechos adquiridos, los sistemas de registro de instituciones, planes de capacitación nacionales y cualquier otra disposición necesaria para implementar este Protocolo.

CAPÍTULO V

DISPOSICIONES FINALES

Artículo 42. Ratificación: El presente Protocolo será sometido a la ratificación de los Estados signatarios de conformidad con sus disposiciones internas.

Artículo 43. Depósito: Los instrumentos de ratificación o de adhesión y de denuncia del presente Protocolo serán depositados y registrados en la Secretaría General del Sistema de la Integración Centroamericana, la que comunicará de los mismos a los demás Estados miembros.

Artículo 44. Modificaciones: Los Estados miembros podrán proponer enmiendas, ajustes y modificaciones al presente Protocolo.

Artículo 45. Reservas: No se admitirá reservas al presente Protocolo.

Artículo 46. Denuncia: El presente Protocolo podrá ser denunciado cuando así lo decida cualquier Estado miembro. La denuncia surtirá efectos para el Estado denunciante 180 días después de depositada y el Protocolo continuará en vigor para los demás Estados en tanto permanezcan adheridos a él por lo menos tres de ellos.

Artículo 47. Vigencia: El presente Protocolo entrará en vigor en la fecha en que haya sido depositado el cuarto instrumento de ratificación. Para cada Estado que ratifique o se adhiera al Protocolo después de haber sido depositado el cuarto instrumento de ratificación, entrará en vigencia en la fecha de depósito de su respectivo instrumento de ratificación.

EN FE DE LO CUAL, se firma el presente Protocolo en....

REGLAMENTO PARA LA PROTECCIÓN DE LAS OBTENCIONES VEGETALES

Con base en las atribuciones de la Ley de Semillas #6289, en los artículos 1,8 (incisos c y d), 15 (inciso c) y 20.

REGISTRO DE VARIEDADES PROTEGIDAS

OBJETO Y ÁMBITO DE APLICACIÓN

ARTÍCULO 1. Finalidad

La presente reglamentación tiene como finalidad el reconocimiento y protección de los derechos del obtentor de una variedad vegetal nueva, amparado por un título de protección vegetal y de sus causahabientes, en los términos en que tal derecho se define en los siguientes artículos.

ARTÍCULO 2. Ámbito de aplicación

El ámbito de aplicación es el de todas las especies vegetales de utilidad para el hombre. Las plantas en su condición silvestre no son objeto de derechos de propiedad intelectual.

ARTÍCULO 3. Definiciones

Se entenderá por “notificación, una comunicación de la “Oficina” a un solicitante en un procedimiento ante la Oficina;

Se entenderá por “obtentor”, la persona que haya creado o desarrollado y puesto a punto una nueva variedad.

Se entenderá por “solicitante”, la persona que presente una solicitud de concesión de un derecho de obtentor;

Se entenderá por “titular” el Titular de un derecho de obtentor;

Se entenderá por “Variedad”, un conjunto de plantas de un solo taxón botánico del rango más bajo conocido que, con independencia de sí responde o no plenamente a las condiciones para la concesión de un derecho de obtentor, pueda:

- a) Definirse por la expresión de los caracteres resultantes de un cierto genotipo o de una cierta combinación de genotipos.
- b) Distinguirse de cualquier otro conjunto de plantas por la expresión de uno de dichos caracteres por lo menos, y
- c) Considerarse como una unidad, habida cuenta de su aptitud a propagarse sin alteración

Se entenderá por “variedad” protegida”, una variedad que sea objeto de un derecho de obtentor, identificada por la denominación según lo establecido en el artículo 6.1.e), definida según el artículo 37.2.c) y por la muestra de que trata el artículo 49.2.a).

ARTÍCULO 4. Nacionalidad, domicilio y sede.

1. Serán beneficiarios de los derechos previstos por el presente reglamento:
 - a) Los nacionales de Costa Rica y todas las personas que tengan su domicilio o establecimiento en el país;
 - b) Los nacionales de otros países, en los que se cuente con un sistema de protección eficaz, y que brinde reciprocidad a los nacionales de Costa Rica.
2. La Oficina determinará, a los fines del párrafo 1.b) supra, la eficacia del sistema de protección concedido por el otro país.

ARTÍCULO 5. Representación Legal.

Toda persona de que no tenga domicilio ni establecimiento en Costa Rica, solo podrá ser parte en un procedimiento iniciado de conformidad con el presente reglamento y hacer valer los derechos dimanantes de la misma, a condición de tener un mandatario que tenga su domicilio u oficina en Costa Rica. El mandatario tendrá un poder de representación ante la Oficina, así como en los procedimientos administrativos y judiciales relacionados con la protección a las obtenciones vegetales.

*TÍTULO II
DERECHO MATERIAL*

*CAPÍTULO I
CONDICIONES PARA LA CONCESIÓN DEL DERECHO DE OBTENTOR*

ARTÍCULO 6. Condiciones de la Protección

1. Se concederá el derecho de obtentor cuando la variedad sea:
 - a) Nueva;
 - b) Distinta;
 - c) Homogénea;
 - d) Estable, y
 - e) Haya recibido una denominación establecida de conformidad con las disposiciones del artículo 44.

2. La concesión del derecho de obtentor no podrá depender de condiciones suplementarias o diferentes, a reserva de que el solicitante haya satisfecho las formalidades previstas por la presente ley y que haya pagado las tasas adeudadas.

ARTÍCULO 7. Novedad

1. La variedad es nueva si, en la fecha de presentación de la solicitud o, llegado el caso, en la fecha de prioridad, el material de reproducción o de multiplicación, o un producto de la cosecha de la variedad no ha sido vendido o entregado a terceros de otra manera por el obtentor o por su derechohabiente o causahabiente, o con el consentimiento del obtentor o de su derechohabiente o cuasahabiente, con fines de explotación de la variedad:
 - a) En el territorio de Costa Rica, más de un año antes de esa fecha, y
 - b) En un territorio distinto al de Costa Rica más de cuatro años o en el caso de árboles y otras especies perennes más de seis años antes de esta fecha.

2. La condición de novedad no se pierde por una venta o una entrega a terceros:
 - a) Que sea la consecuencia de un abuso cometido en detrimento del obtentor o de su derechohabiente o causahabiente;
 - b) Que se inscriba en el marco de un acuerdo de transferencia del derecho sobre la variedad;
 - c) Que se inscriba en el marco de un acuerdo en virtud del cual una tercera persona haya incrementado, por cuenta del obtentor o de su derechohabiente, las existencias

de material de reproducción o de multiplicación de la variedad en cuestión, a condición de que las existencias multiplicadas vuelvan a estar bajo el control del obtentor o de su derechohabiente o causahabiente, y a condición de que dichas existencias no sean utilizadas para producir otra variedad;

- d) Que se inscriba en el marco de un acuerdo en virtud del cual una tercera persona haya efectuado ensayos de acampo o en laboratorio, o ensayos de investigación a pequeña escala para evaluar la variedad;
- e) Que se inscriba en el marco del cumplimiento de una obligación jurídica o reglamentaria, por lo que atañe a la seguridad biológica o a la inscripción de las variedades en un registro oficial de variedades admitidas para comercialización, o
- f) Que tenga por objeto un producto de la cosecha que constituye un producto secundario o excedente obtenido en el marco de la creación de la variedad o de las actividades mencionadas en los apartados c) a e) del presente artículo, a condición de que ese producto sea vendido o entregado de manera anónima, sin identificación de la variedad, a los fines de consumo.

ARTÍCULO 8. Distinción

1. La variedad es distinta si se distingue claramente de cualquier otra variedad cuya existencia, en la fecha de presentación de la solicitud o, llegado el caso, en la fecha de prioridad, sea notoriamente conocida.
2. La presentación, en cualquier país, de una solicitud de derecho de obtentor o de inscripción en un registro de variedades admitidas para la comercialización se considerará que hace a la variedad objeto de solicitud notoriamente conocida a partir de la fecha de la solicitud, si ésta conduce a la concesión del derecho de obtentor o a la inscripción en el registro, según el caso.
3. La notoriedad de la existencia de otra variedad podrá establecerse por diversas referencias, tales como: explotación comercial de la variedad ya en curso, inscripción de la variedad en un registro de variedades mantenido por una asociación profesional reconocida, o presencia de la variedad en una colección de referencia.

ARTÍCULO 9. Homogeneidad

La variedad es homogénea si es suficientemente uniforme en sus caracteres pertinentes, a reserva de la variación previsible habida cuenta de las particularidades de su reproducción sexuada o de su multiplicación vegetativa.

ARTÍCULO 10. Estabilidad

La variedad es estable si sus caracteres pertinentes se mantienen inalterados después de re producciones o multiplicaciones sucesivas o, en caso de un ciclo particular de reproducciones o de multiplicaciones, al final de cada ciclo.

CAPÍTULO II

PERSONAS CON DERECHO A LA PROTECCIÓN

ARTÍCULO 11. Principios

1. Tendrá derecho a solicitar un derecho de obtentor, el obtentor o su derechohabiente o causahabiente.
2. En el caso de que varias personas hayan creado o desarrollado y puesto a punto en común una variedad, el derecho a la protección les corresponderá en común, salvo estipulación en contrario entre los coobtentores.
3. Cuando la obtención varietal sea realizada como producto de un contrato no laboral, cuyo objeto sea la obtención de nuevas variedades vegetales, el derecho de obtentor corresponderá al mandatario, salvo especificación diferente en el contrato.
4. Cuando un trabajador, cuyo contrato o relación tenga como objeto la creación o desarrollo de nuevas variedades vegetales, el derecho de obtentor corresponderá al empleador, salvo pacto contrario.
5. Cuando un trabajador cuyo contrato o relación laboral, no tenga como objeto la obtención de nuevas variedades vegetales, las que llegare a desarrollar serán de su propiedad. Si la obtención de la nueva variedad la realizó dentro de la jornada de trabajo y/o con la utilización de medios o recursos del empleador, al menos una tercera parte de las utilidades corresponderán a este último, salvo pacto diferente.
6. Todo contrato de trabajo que se establezca entre personas naturales o jurídicas, públicas o privadas dedicadas a la investigación y desarrollo de nuevas variedades vegetales, deberá especificar claramente la condición de obtentor y la eventual distribución porcentual de las regalías que se generen como producto de la explotación comercial de la variedad protegida.

ARTÍCULO 12. Presunción de Titularidad

1. Salvo prueba en contrario, el solicitante será considerado como titular del derecho a la protección.
2. No obstante lo anterior, cuando la solicitud sea presentada por un derechohabiente o causahabiente deberá ir acompañada por una prueba suficiente de la titularidad.

ARTÍCULO 13. Cesión judicial de la solicitud del derecho de obtentor o del derecho de obtentor

1. Cuando una persona que no tenga derecho a la protección haya presentado una solicitud de derecho de obtentor, el derechohabiente podrá entablar una demanda de cesión de la solicitud, o de haberse concedido ya, del derecho de obtentor.
2. La demanda de cesión prescribe a los diez años, a partir de la fecha de publicación de la concesión del derecho de obtentor. La demanda contra un demandado que actuó de mala fe no está sometida a ningún plazo.
3.
 - a) Si prospera la demanda, caducarán los derechos concedidos a terceros sobre la base de la solicitud o, en su caso, del derecho de obtentor artículo 18.2).

b) No obstante, los titulares de un derecho de explotación adquirido de buena fe que hayan tomado medidas efectivas para disfrutar de ese derecho antes de la fecha de notificación de la demanda o, en su defecto, de la decisión definitiva, podrán realizar o seguir realizando los actos de explotación resultantes de las medidas que hayan tomado a reserva de pagar una remuneración justa al derechohabiente.

CAPÍTULO III DERECHOS DEL TITULAR

ARTÍCULO 14. Alcance del derecho de obtentor

1. A reserva de lo dispuesto en los artículos 15 y 16 se requerirá la autorización del titular para los actos siguientes realizados respecto de material de reproducción o de multiplicación de la variedad protegida:

- a) La producción o la reproducción (incremento);
- b) La preparación o acondicionamiento a los fines de la reproducción o de la multiplicación;
- c) La oferta en venta;
- d) La venta o cualquier otra forma de comercialización;
- e) La exportación;
- f) La importación; o
- g) La posesión para cualquiera de los fines antes citados de a) a f).

2. A reserva de lo dispuesto en los artículos 15) y 16), para los productos de la cosecha, incluidas plantas enteras, partes de plantas o productos fabricados directamente de productos de la cosecha no se requerirá la autorización del titular de la variedad protegida, siempre y cuando, éste haya podido ejercer razonablemente su derecho en relación con el material de reproducción y multiplicación de la variedad protegida.

3. El titular podrá supeditar la autorización que conceden los párrafos 1 y 2, a condiciones y limitaciones.

4.

a) Las disposiciones de los párrafos 1 a 3 antes citados se aplicarán a:

I. Las variedades derivadas esencialmente de la variedad protegida, cuando ésta no sea a su vez una variedad esencialmente derivada;

II. Las variedades que no se distingan claramente de la variedad protegida de conformidad con lo dispuesto en el artículo 8, y

III. A las variedades cuya producción necesite el empleo repetido de la variedad protegida.

b) A los fines de lo dispuesto en el apartado a.i) antes mencionado, se considerará que una variedad es esencialmente derivada de otra variedad (“la variedad inicial”) si:

I. Se deriva principalmente de la variedad inicial o, de una variedad que a su vez se deriva principalmente de la variedad inicial, conservando al mismo tiempo las expresiones de

los caracteres esenciales que resulten del genotipo o de la combinación de genotipos de la variedad inicial;

II. Se distingue claramente de la variedad inicial, y

III. Salvo por lo que respecta a las diferentes resultantes de la derivación, es conforme a la variedad inicial en la expresión de los caracteres esenciales que resulten del genotipo o de la combinación de genotipos de la variedad inicial.

c) Las variedades esencialmente derivadas podrán obtenerse, entre otras formas, por selección de un mutante natural o inducido, o de un variante somaclonal, selección de un individuo variante entre las plantas de la variedad inicial, retrocruzamientos o transformaciones por ingeniería genética.

ARTÍCULO 15. Excepciones al derecho de obtentor

1. El derecho de obtentor no se extenderá:
 - a) A los actos realizados en un marco privado con fines no comerciales;
 - b) A los actos realizados a título experimental, y
 - c) A los actos ejecutados para fines de la creación de nuevas variedades así como, a menos que las disposiciones del artículo 14.4 sean aplicables, a los actos mencionados en el artículo 14.1 y 14.2 realizados con tales variedades.
2. Se podrán restringir los derechos de obtentor respecto de las especies, géneros y variedades vegetales dentro de límites razonables y a reserva de la salvaguardia de los intereses legítimos de los obtentores, con el fin de permitir a los pequeños agricultores utilizar a fines de producción para uso en su propia explotación, el producto de la cosecha que haya obtenido por el cultivo de una explotación, el producto de la cosecha que haya obtenido por el cultivo de una variedad protegida o de una variedad cubierta por el artículo 14.4.a.i) o por el artículo 14.4.a.ii) y que pertenezca a uno de esos géneros o especies vegetales. Las calidades de pequeño agricultor, así como las especies en las cuales aplicaría esta restricción serán definidas vía decreto ejecutivo.

ARTÍCULO 16. Agotamiento del derecho de obtentor

1. El derecho de obtentor no se extenderá a los actos relativos al material de la variedad protegida o material derivado de la misma, o de una variedad cubierta por el artículo 14.4 que haya sido vendido o comercializado de otra manera en el territorio de Costa Rica por el titular o con su consentimiento, a menos que esos actos:
 - a) Impliquen una nueva reproducción o multiplicación de la variedad en cuestión, o
 - b) Impliquen una exportación de material de la variedad, que permita reproducirla, a un país que no proteja las variedades del género o de la especie vegetal a que pertenezca la variedad, salvo si el material exportado está destinado al consumo.
2. A los fines de lo dispuesto en el párrafo 1), se entenderá por “material”, en relación con una variedad:

- a) El material de reproducción o de multiplicación vegetativa, en cualquier forma;
- b) El producto de la cosecha, incluidas las plantas enteras y las partes de plantas, y
- c) Todo producto fabricado directamente de partes del producto de la cosecha.

ARTÍCULO 17. Reglamentación económica

El derecho de obtentor es independiente de las medidas adoptadas por el Estado para reglamentar la producción, el control y la comercialización del material de las variedades, incluyendo la importación o exportación de éste.

ARTÍCULO 18. Duración del derecho de obtentor. Protección provisional

1. El derecho de obtentor tendrá una vigencia de veinticinco años para árboles y vides y veinte años para el resto de los cultivos. La vigencia, en todos los casos, se extenderá desde la fecha de concesión hasta el 31 de diciembre del año de expiración.
2. El solicitante gozará de todos los derechos previstos por la presente ley a partir de la fecha de presentación de la solicitud.
3. Todo solicitante está en la obligación de consignar en todos sus trámites con terceros que en el uso de sus derechos goza de una protección provisional.

CAPÍTULO IV

EL DERECHO DE OBTENTOR COMO OBJETO DE PROPIEDAD

ARTÍCULO 19. Transferencia de propiedad

1. Los derechos del obtentor podrán ser objeto de una transferencia o uno o varios derechohabientes o causahabientes. La transferencia por cesión requiere la forma escrita.
2. Un acto por el que se transmita o modifique el derecho a solicitar la concesión de un derecho de obtentor, no afectará a los derechos adquiridos por terceros antes de la fecha de dicho acto.
3. Un acto por el que se transmita o modifique los derechos relacionados con una solicitud o con un derecho de obtentor, incluyendo la cesión judicial, sólo será oponible a terceros a partir del momento en que se hayan sido inscritos en el Registro de Solicitudes o en el Registro de Derechos, según sea el caso.
4. No obstante, antes de su inscripción, un acto será oponible a los terceros que hayan adquirido los derechos después de la fecha de ese acto, pero que conocían la existencia de ese acto al adquirir tales derechos.

CAPÍTULO V

LICENCIAS DE EXPLOTACIÓN

ARTÍCULO 20. Licencias contractuales

1. El titular podrá conceder a terceros, a título exclusivo o no, una licencia que cubra todos o parte de los derechos previstos en el Capítulo III del presente título.

2. El contrato de licencia adoptará la forma escrita.
 - a) La licencia exclusiva o las licencias no exclusivas se inscribirán en el Registro de Solicitudes o en el Registro de Derechos, según el caso, y se publicarán en el Diario Oficial.
 - b) Las licencias sólo serán oponibles a las que de buena fe, haya adquirido derechos sobre el derecho de obtentor y si ha sido inscrita en la fecha de adquisición.

ARTÍCULO 21. Licencias obligatorias

1. Mediante presentación de una solicitud ante la Oficina, toda persona podrá solicitar la concesión de una licencia obligatoria correspondiente al derecho de obtentor. La Oficina sólo concederá la licencia obligatoria por razones calificadas de interés público.
2. Además, sólo se concederá la licencia obligatoria si se cumplen las siguientes condiciones:
 - a) El solicitante deberá probar que tiene capacidad suficiente para realizar la explotación y deberá probar que ha intentado obtener la autorización del titular de los derechos en términos y condiciones comerciales razonables y esos intentos no han surtido efectos en un plazo prudencial;
 - b) Que hayan transcurrido (tres) años entre la fecha de la concesión del derecho de obtentor y la fecha de solicitud de concesión de la licencia obligatoria; y
 - c) Que la persona que solicita la concesión de la licencia obligatoria haya abonado la tasa prevista en el Reglamento para la concesión de dicha licencia obligatoria.
3. La licencia obligatoria confiere a su beneficiario el derecho no exclusivo de realizar todos, o algunos, de los actos cubiertos por el artículo 14 por razones de utilidad pública.
4. Al conceder una licencia obligatoria, la Oficina fija las condiciones bajo las cuales la otorga, limita al alcance y duración a los fines autorizados y establece una remuneración equitativa que el beneficiario de la licencia obligatoria habrá de abonar al titular. El beneficiario de la licencia obligatoria habrá de abonar una caución como garantía del pago de la remuneración al titular y deberá cancelar la tasa correspondiente a la Oficina.
5. La Oficina podrá exigir al titular que ponga a disposición del beneficiario de la licencia obligatoria la cantidad de material de reproducción o de multiplicación que sea necesaria para una utilización razonable de la licencia obligatoria, siempre y cuando se realice el pago de una remuneración adecuada.
6. La Oficina fijará la duración de la licencia obligatoria. La licencia obligatoria no tendrá, salvo en circunstancias extraordinarias, una duración inferior a (dos) años ni superior a (cuatro). La licencia podrá prorrogarse si la Oficina considera, sobre concesión de la licencia, pasada la primera fecha de expiración.
7. La Oficina retirará la licencia obligatoria si su beneficiario viola las condiciones en las que fue concedida.

CAPÍTULO VI
EXTINCIÓN DEL DERECHO DE OBTENTOR

ARTÍCULO 22. Expiración prematura

1. El derecho de obtentor expirará antes del plazo previsto por el artículo 18.1:
 - a) Cuando el titular renuncie al mismo mediante una declaración por escrito dirigida a la Oficina, o
 - b) Cuando no se haya abonado una tasa anual al vencimiento del plazo, según lo que establece el artículo 31.
2. En el primer caso, la fecha de expiración es la fecha que figura en la declaración escrita de renuncia o, en su defecto, la fecha de recepción de la declaración. En el segundo caso, se trata de la fecha de vencimiento de la tasa.

ARTÍCULO 23. Nulidad del derecho de obtentor

1. La Oficina declarará nulo el derecho de obtentor si se comprueba:
 - a) Que la variedad no era nueva o distinta en la fecha de presentación de la solicitud o, llegado el caso, en la fecha de prioridad;
 - b) Que cuando la concesión del derecho de obtentor se base esencialmente en las informaciones y documentos proporcionados por el solicitante, la variedad no era homogénea o estable en la mencionada fecha, o
 - c) Que el derecho de obtentor fue concedido a una persona que no tenía derecho al mismo y que el derechohabiente no entabló o renunció a entablar una demanda de conformidad con el artículo 13.
2. El derecho de obtentor declarado nulo se considerará como no concedido.
3. Toda persona que justifique un interés podrá presentar a la Oficina una solicitud de declaración de nulidad.

ARTÍCULO 24. Cancelación del derecho de obtentor

1. La Oficina cancelará el derecho de obtentor si se comprueba que el titular no ha cumplido su obligación en virtud del artículo 47.1) y que la variedad ya no es homogénea o estable.
2. La Oficina cancelará el derecho si:

- a) El titular no responde a la solicitud de la Oficina en el sentido del artículo 47.2) con miras a un control del mantenimiento de la variedad, o
 - b) La Oficina prevé cancelar la denominación de la variedad y el titular no propone en el plazo concedido otra denominación que convenga según el artículo 45.
3. Sólo podrá declararse la cancelación tras el requerimiento hecho al titular de cumplir la obligación que se le impone en un plazo razonable previamente notificado.
 4. La cancelación tendrá vigencia desde su inscripción en el Registro de Derechos, dicha cancelación deberá ser publicada mediante edicto en el Diario Oficial La Gaceta.

ARTÍCULO 25. Publicación de la extinción del derecho de obtentor

La expiración prematura, la nulidad y la cancelación del derecho de obtentor, en el sentido de los artículos 22, 23 y 24, así como su motivo, se inscribirán en el Registro de Derechos. Estas expiraciones se publicarán en el Diario Oficial.

*TÍTULO III
ORGANIZACIÓN Y PROCEDIMIENTO*

*CAPÍTULO I
ORGANIZACIÓN, COMPETENCIAS Y NORMAS GENERALES*

ARTÍCULO 26. Oficina para la protección de las obtenciones vegetales

Todas las funciones establecidas en el presente reglamento para la protección de los derechos de las obtenciones vegetales serán desempeñadas por la Oficina Nacional de Semillas, según lo disponen los artículos 1, 8, 15 y 20 de la Ley de Semillas #6289.

ARTÍCULO 27. Derecho a ser escuchado por la oficina

1. Toda decisión considerada por la Oficina que perjudique los intereses de una parte en un procedimiento ante ella, será comunicada a dicha parte, acompañada de los motivos que la fundamentan.
2. Dicha parte tendrá la posibilidad de formular observaciones, oralmente o por escrito, durante los 30 días siguientes a la fecha de recepción de la comunicación.

ARTÍCULO 28. Recurso

1. Las resoluciones que tome la Oficina tendrán recurso de revocatoria y además serán apelables ante la Junta Directiva dentro del plazo de cinco días hábiles.
2. Las decisiones de la Junta Directiva serán impugnables en la vía contencioso-Administrativa de acuerdo con las disposiciones de la Ley Reguladora de la Jurisdicción Contencioso-Administrativa.

ARTÍCULO 29. Registros. Conservación de expedientes

1. La Oficina mantendrá un Registro de solicitudes y un Registro de Derechos. Los registros serán públicos.

2. Toda persona que tenga un interés formal podrá:
 - a) Consultar los documentos relativos a la solicitud;
 - b) Consultar los documentos relativos a un derecho de obtentor ya concedido, y
 - c) Visitar los ensayos en cultivo y examinar los demás ensayos necesarios realizados en virtud del artículo 37 o del artículo 48.
3. En el caso de variedades cuya producción requiera el empleo repetido de otras variedades (componentes), el solicitante al presentar la solicitud podrá pedir que los documentos y los ensayos relativos a los componentes se eximan de las medidas de publicidad.
4. La Oficina conservará los elementos de los expedientes, los originales o las reproducciones, durante un plazo de cinco años a partir de la fecha de retiro o de rechazo de la solicitud, o si es del caso, de la fecha de extinción del derecho de obtentor.

ARTÍCULO 30. Publicación oficial

1. La Oficina publicará regularmente en el Diario Oficial, las siguientes rúbricas:
 - a) Solicitudes de concesión de derechos de obtentor;
 - b) Solicitudes de denominaciones de variedades;
 - c) Registro de nuevas denominaciones de variedades protegidas;
 - d) Retiro de solicitudes de concesión de derechos de obtentor;
 - e) Rechazo de solicitudes de concesión de derechos de obtentor;
 - f) Concesión de derechos de obtentor;
 - g) Modificaciones relativas a las personas (solicitantes, titulares y mandatarios);
 - h) Extinción de los derechos de obtentor;
 - i) Transferencias de propiedad;
 - j) Licencias contractuales y licencias obligatorias; y
 - k) Anuncios Oficiales.

ARTÍCULO 31. Costo de los servicios

1. Los actos administrativos de la Oficina para la aplicación de este reglamento, dan lugar a la generación de gastos para la prestación de los servicios que la misma brinda. Los costos respectivos serán para los siguientes servicios:

a) Por la tramitación de solicitud del título de obtención vegetal que incluye el servicio por la concesión del mismo.

Costo: 0.74 de un salario de base.

b) Por la realización de examen técnico de la variedad por cada período vegetativo.

Costo: 2.11 salarios de base.

Cuando se trate de una variedad híbrida de cualquier especie y sea necesario efectuar el estudio de los componentes genealógicos el valor de la tasa aumentará al doble.

c) Por la publicación de edictos en el Diario Oficial.

Costo: el valor correspondiente que fije la Imprenta Nacional.

d) Por el mantenimiento anual de los derechos de obtentor.

Costo: 0.32 de un salario base.

e) Restitución del Derecho.

Costo: 0.11 de un salario base.

f) Cambio de denominación, transferencia de propiedad, licencias de explotación.

Costo: 0.26 de un salario base.

g) Por reabilitación de título ya anulado.

Costo: 0.26 de un salario base.

h) Licencias obligatorias.

Costo: 4.21 salarios base.

i) Cuando la Oficina haya convenido que la realización de examen técnico se realice por algún organismo nacional o extranjero técnicamente cualificado, el costo a pagar por la realización del examen técnico de las variedades establecidas en el artículo 37.1.b) será en estos casos el importe que deba abonar la Oficina de organismo o personas que realice el examen, incluyendo el monto del costo real de los gastos realizados por la Oficina para todos los trámites administrativos necesarios.

2. Quedarán obligados al pago de estos costos, las personas naturales o jurídicas, que soliciten y reciban de la Oficina Nacional de semillas cualquiera de los servicios definidos en este reglamento.

3. En fondo generado con el cobro de los servicios prestados y de los recursos financieros establecidos en el artículo 21 de la Ley de Semillas, será depositado en una cuenta especial de la Oficina Nacional de Semillas, abierta en cualquiera de los Bancos del sistema bancario nacional y su administración estará bajo control de la Contraloría General de la República.

4. El fondo señalado en el apartado 3) supra, será administrado por la Oficina Nacional de Semillas a través de su Junta Directiva, la cual aprobará los presupuestos de acuerdo con los programas anuales elaborados por el área ejecutiva.

5. Este fondo se usará exclusivamente para cumplir los fines de esta ley y de la Ley de Semillas, bajo la responsabilidad de los que legalmente lo administren.

ARTÍCULO 32. Restitución del derecho

1. Al solicitante, al titular o a cualquier otra parte en un procedimiento ante la Oficina que no haya podido respetar un plazo con respecto a la Oficina, a petición suya, le serán restituidos sus derechos si el impedimento tuvo como consecuencia directa la pérdida de un derecho, o de un medio de recurso, previsto por el presente reglamento.
2. La petición habrá de presentarse en un plazo de dos meses a partir del momento en que cese el impedimento y, en cualquier caso, en un plazo de un año a partir del vencimiento del plazo no respetado. Dicha petición será razonada e irá acompañada de la tasa de restitución del derecho.
3. La Junta Directiva de la Oficina Nacional de Semillas decidirá sobre la petición.
4. Cuando la petición sea acogida favorablemente, el peticionario dispondrá de un plazo igual al plazo no respetado, a partir de la fecha de recepción de la notificación de la decisión para cumplir el acto en cuestión.
5. Cuando se le hayan restituido sus derechos al peticionario, éste no podrá invocar sus derechos contra terceros que de buena fe hayan procedido a la explotación o tomado medidas para ello, entre la fecha de la pérdida de los derechos y la fecha de la publicación de la restitución de los derechos.

*CAPÍTULO II
SOICITUD*

ARTÍCULO 33. Formas y contenido de la solicitud

1. Cualquier persona que desee obtener la protección de una variedad vegetal deberá presentar una solicitud a la Oficina y pagar el costo correspondiente.
2. Bajo pena de nulidad, la solicitud incluirá como mínimo, los siguientes elementos de información:
 - a) El nombre, dirección y nacionalidad del solicitante y, llegado el caso, de su mandatario con su número de cédula jurídica; así como el poder que le haya sido concedido en caso de que no fuera el obtentor.
 - b) El nombre, cédula y la dirección del obtentor, de no ser el solicitante;
 - c) La identificación del taxón botánico (nombre latino y nombre común);
 - d) La denominación propuesta para la variedad, o una designación provisional;
 - e) Si se reivindica la prioridad de una solicitud anterior, se deberá indicar el país que acogió la mencionada solicitud, el cual deberá tener un sistema de protección eficaz y de reciprocidad para los nacionales de Costa Rica, así como la fecha de presentación;
 - d) Origen geográfico de la variedad;

- e) Una descripción técnica de la variedad, incluyendo fotos que faciliten su distinción.
- f) De tratarse de una variedad solicitada previamente en el extranjero, deberá indicar:
 - Países en los cuales se ha solicitado la protección;
 - Tipo de protección que se ha solicitado;
 - Número de solicitud correspondientes;
 - Fecha de presentación;
 - Situación de la solicitud;
 - Denominación o referencia del obtentor o inventor;
 - Fecha de registro
 - El comprobante del pago del costo de la solicitud.
 - Muestra de semilla de la variedad a proteger.

ARTÍCULO 34. Prioridad

1. El solicitante podrá beneficiarse de la prioridad de una solicitud anterior presentada legalmente para la misma variedad por él mismo o por su predecesor en el título ante la autoridad de un país que tenga un sistema de protección eficaz y de reciprocidad para los nacionales de Costa Rica.

- a) Si la solicitud presentada ante la Oficina ha sido precedida de varias solicitudes, la prioridad sólo podrá basarse en la solicitud más antigua.
- b) Se habrá de reivindicar la prioridad, de forma expresa, en la solicitud presentada ante la Oficina. Sólo podrá reivindicarse durante un plazo de 12 meses contados a partir de la fecha de presentación de la primera solicitud. El día de la presentación no estará comprendido en ese plazo.

2.

- a) Para beneficiarse del derecho de prioridad, el solicitante deberá suministrar a la Oficina, en un plazo de tres meses contados a partir de la fecha de presentación, de conformidad con el ARTÍCULO 35.4), una copia de la primera solicitud, certificada por la autoridad del país que contando con un sistema de protección eficaz, brinde reciprocidad a los nacionales de Costa Rica.
- b) La Oficina podrá solicitar que se presente, en un plazo de tres meses, contados a partir de la fecha de recepción de la comunicación, una traducción de la primera solicitud, para el caso de que ésta no esté en idioma castellano.

3.

- a) La prioridad tendrá por efecto que la solicitud sea considerada como presentada en la fecha de presentación de la primera solicitud con respecto a las condiciones de la protección vinculadas a la variedad.
- b) Además, el solicitante estará facultado para solicitar un aplazamiento, de un máximo de dos años contados a partir de la fecha de vencimiento del plazo de prioridad (tres años contados a partir de la fecha de presentación de la primera solicitud), del examen de la variedad. No obstante, si se rechazara o se retirara la primera solicitud, la Oficina podrá iniciar el examen de la variedad antes de la fecha indicada por el solicitante; en ese

caso, concederá al solicitante un plazo conveniente para suministrar las informaciones, los documentos o el material necesarios para el examen.

CAPÍTULO III TRAMITACIÓN DE LA SOLICITUD

ARTÍCULO 35. Examen de forma de la solicitud

1. La Oficina examinará la solicitud en cuanto a la forma, de acuerdo con la información especificada en el artículo 33.2)
2. Si la solicitud es claramente inadmisibles debido al taxón botánico al que pertenece la variedad, los documentos que constituyan la solicitud serán devueltos al solicitante y la tasa de solicitud le será reembolsada.
3. Si la solicitud está incompleta o no es conforme, la Oficina pedirá al solicitante que la corrija en un plazo de 30 días contados a partir de la fecha de recepción de la notificación. Toda solicitud que no haya sido corregida en el plazo concedido será considerada como inexistente.
4. Se asignará una fecha de presentación a una solicitud completa y conforme, que será inscrita en el Registro de solicitudes. Se considerará fecha de presentación la fecha en que la Oficina haya recibido los elementos de información mencionados en el artículo 33.2).

ARTÍCULO 36. Examen de fondo de la solicitud

1. La Oficina examinará la solicitud en cuanto a su fondo a fin de comprobar, sobre la base de las informaciones suministradas en la solicitud, que la variedad es nueva y que el solicitante está habilitado según el artículo 11.
2. Si el examen revela un obstáculo para concesión del derecho de obtentor, la solicitud será rechazada. Esta decisión puede ser objeto de recurso en virtud del artículo 28.

ARTÍCULO 37. Examen técnico de la variedad

1. La variedad será objeto de un examen técnico cuya finalidad será:
 - a) Comprobar que la variedad pertenece al taxón botánico anunciado,
 - b) Determinar que la variedad es distinta, homogénea y estable, y
 - c) Cuando se haya comprobado que la variedad cumple las mencionadas condiciones, establecer la descripción oficial de la variedad.
2. La Oficina determinará las modalidades prácticas del examen técnico, el cual se realizará bajo la supervisión de la Oficina, pudiendo delegar en otras instancias técnicamente calificadas y acreditadas ante la Oficina.

El examen se basará en ensayos en cultivo y en los demás ensayos necesarios efectuados:

- i) Por la Oficina o por una tercera instancia en virtud de un contrato o acuerdos de cooperación en materia de examen técnico.
- ii) Por el solicitante bajo supervisión de la Oficina.

3. La Oficina definirá los criterios y procedimientos para la realización de los exámenes técnicos.

4. La descripción oficial mencionada en el párrafo 1.c) podrá ser completada o modificada más adelante en función de la evolución de los conocimientos agrobotánicos, sin que por ello se modifique el objeto de la protección.

ARTÍCULO 38. Información, documentos y material necesarios para el examen

1. El solicitante deberá suministrar todas las informaciones, documentos o material necesarios a la Oficina para los efectos del examen técnico.
2. Salvo motivo de fuerza mayor alegado por el solicitante, la falta de tal suministro será sancionada mediante el rechazo de la solicitud.

ARTÍCULO 39. Publicación de la solicitud. Impugnaciones relativas a la concesión del derecho de obtentor.

1. La solicitud será objeto de un anuncio en el Diario Oficial que contenga, por lo menos, los elementos mencionados en los literales a) al e) del artículo 33.2.
2. Una vez publicada la solicitud, toda persona podrá presentar a la Oficina, en el plazo de dos meses, impugnaciones relativas a la concesión del derecho de obtentor.
3. Esas impugnaciones se harán por escrito y estarán motivadas. Se adjuntarán los documentos que sirvan de prueba.
4. Las impugnaciones permiten, exclusivamente, hacer valer que la variedad no es nueva, distinta, homogénea o estable o que el solicitante no tiene derecho a la protección según el artículo 11.

ARTÍCULO 40. Examen de las impugnaciones

1. Las impugnaciones se comunicarán inmediatamente al solicitante, quien dispondrá de un plazo no mayor de tres meses para expresarse sobre las impugnaciones y precisar si tiene la intención de mantener su solicitud, modificarla o retirarla. El plazo podrá ser prorrogado sobre la base de una petición justificada del solicitante.
2. Si el solicitante no responde en el plazo fijado, se considerará que la solicitud ha sido retirada. Si responde manteniendo la solicitud, con o sin modificaciones, su respuesta será comunicada al autor de la impugnación, quien dispondrá de un plazo de 30 días para expresarse sobre la respuesta y precisar si tiene intención de mantener su impugnación o de retirarla.
3.
 - a) Las impugnaciones mantenidas serán examinadas:

I. Independientemente del procedimiento normal de examen de la solicitud cuando invoquen la falta de novedad de la variedad o la falta de título del solicitante, o

II. En el marco del examen técnico de la variedad, cuando invoquen la falta de distinción, homogeneidad o estabilidad.

b) La Oficina podrá decidir modificar las modalidades del examen técnico de la variedad para lograr un mejor sustento frente a la impugnación.

4. Se podrá exigir al autor que presente información y documentos complementarios en apoyo de su impugnación, así como el material vegetal necesario al examen técnico. El artículo 38 será aplicable de oficio.

ARTÍCULO 41. Concesión del derecho de obtentor. Rechazo de la solicitud

1. La Oficina concederá el derecho de obtentor cuando, como resultado del examen técnico de la variedad, compruebe que la variedad cumple con las condiciones previstas en el artículo 6 y que el solicitante ha satisfecho las demás exigencias del presente reglamento.

2. La Oficina rechazará la solicitud si comprueba lo contrario.

3. La concesión del derecho de obtentor o el rechazo de la solicitud se inscribirán en el Registro de Solicitudes y se publicarán en el Diario Oficial.

4. El derecho de obtentor se inscribirá también en el Registro de Derechos. La descripción de la variedad podrá incluirse en el Registro por referencia a los expedientes de la Oficina.

CAPÍTULO IV DENOMINACIÓN DE LA VARIEDAD

ARTÍCULO 42. Objeto de la denominación y signos susceptibles de constituir una denominación

1. La denominación está destinada a ser la designación genérica de la variedad.

2. Podrán constituir denominaciones todas las palabras, combinaciones de palabras, combinaciones de palabras y de cifras, y combinaciones de letras y de cifras que tengan o no un sentido preexistente, a condición de que tales signos sirvan para identificar la variedad.

3. El nombre propuesto para la variedad deberá ser diferente de cualquier denominación que designe una variedad preexistente de la misma especie botánica o de una especie semejante.

4. El nombre de una variedad no puede registrarse como marca comercial.

5.

- a) Mientras se explote una variedad protegida estará prohibido utilizar, en el territorio de Costa Rica, una denominación idéntica o parecida para otra variedad de la misma especie o de una especie, hasta el punto de crear riesgo de confusión. Esta prohibición subsistirá después de que haya dejado de explotarse la variedad cuando la denominación haya adquirido una significación particular en relación con la variedad.
 - b) La prohibición antes mencionada se aplicará también a las denominaciones registradas en otros países que cuenten con un sistema de protección eficaz y de reciprocidad con los nacionales de Costa Rica.
6. Aquel que ofrezca a la venta, venda o comercialice en cualquier otra forma material de reproducción o de multiplicación de una variedad protegida deberá utilizar la denominación de esa variedad. Esta obligación se aplicará también a las variedades mencionadas en el artículo 14.4.a.ii).
 7. La obligación de utilizar una denominación no se terminará con la cancelación o caducidad del derecho de obtentor.
 8. Se reservarán los derechos anteriores de terceros.
 9. Cuando una variedad se ofrezca a la venta o se comercialice de otra forma, se permitirá la utilización de una marca de fábrica o de comercio, un nombre comercial o una indicación similar en la relación con la denominación de la variedad registrada, a reserva de que la denominación pueda reconocerse fácilmente.

ARTÍCULO 43. Motivos de rechazo

1.
 - a) Se denegará el registro como denominación de variedades a las designaciones que:
 - i) No estén conformes con las disposiciones del artículo 42;
 - ii) No convengan para la identificación de la variedad, particularmente por falta de carácter distintivo o por falta de adecuación lingüística;
 - iii) Sean contrarias al orden público y las buenas costumbres;
 - iv) Se compongan exclusivamente de signos o de indicaciones que puedan servir, en el sector de las variedades y de las semillas, a designar la especie, la calidad, el destino, el valor, la procedencia geográfica o la época de producción;
 - v) Sean susceptibles de inducir a error o confusión sobre las características, el valor o la procedencia geográfica de la variedad, o sobre los vínculos que unen la variedad a ciertas personas, particularmente el obtentor y el solicitante, o
 - vi) Sean idénticas o parecidas, hasta el punto de crear un riesgo de confusión y/o asociación a una denominación que designe, en el territorio de Costa Rica o en otro país que brinde protección eficaz y reciprocidad a los nacionales de nuestro país, una variedad preexistente de la misma especie o de una especie parecida, a menos que la variedad preexistente haya dejado de ser explotada y que su denominación no haya adquirido una significación particular.

- b) La Oficina determinará las especies que se asemejan en el sentido de lo estipulado en el apartado a.vi) supra.
- 2)
- a) Se denegará asimismo el registro a título de denominación de variedades, a las designaciones que comporten un elemento que obstaculice o sea susceptible de obstaculizar la libre utilización de la denominación en relación con la variedad, en particular un elemento cuyo registro a título de marca para productos vinculados a la variedad sería rechazado en aplicación del derecho de marcas.
 - b) Se denegará el registro a dichas designaciones, mediante oposición del titular de los derechos sobre el elemento en cuestión, que deberá ser presentada por escrito ante la Oficina.

ARTÍCULO 44. Procedimiento de registro

- 1.
- a) La denominación propuesta para la variedad cuya protección se solicite, será presentada al mismo tiempo que la solicitud, junto con muestra apropiada la misma, la cual se constituirá en muestra oficial.
 - b) Con sujeción al pago de una tasa especial y a la indicación de una designación provisional en la solicitud, el solicitante podrá diferir el procedimiento de registro de la denominación. En ese caso, el solicitante deberá presentar la propuesta de denominación en un plazo de 30 días a partir de la fecha de recepción de la invitación que le haya dirigido la Oficina. Si la propuesta no se presenta en el plazo fijado, la solicitud será rechazada.
2. La propuesta de denominación se publicará en el Diario Oficial, salvo si la Oficina comprueba que existe un motivo de rechazo en virtud del artículo 43.1.a).
3. Cualquier persona interesada podrá presentar, dentro los tres meses siguientes a la publicación, una objeción al registro de la denominación, basada en cualquiera de los motivos de rechazo previstos en el artículo 43.
4. Las objeciones y observaciones se comunicarán al solicitante, quien dispondrá de 30 días para responder a las mismas.
- 5.
- a) El solicitante, sobre la base de las objeciones y observaciones, podrá presentar una nueva propuesta.
 - b) Cuando la propuesta de denominación no esté conforme con las disposiciones del artículo 43, la Oficina invitará al solicitante a presentar una nueva propuesta de denominación en un plazo de 30 días a partir de la fecha de recepción de la notificación. Si la propuesta no se presenta en el plazo fijado, la solicitud será rechazada.
- 6.
- a) La nueva propuesta estará sujeta al procedimiento de examen y de publicación prevista en el presente artículo.

- b) Cuando la nueva propuesta no esté conforme con las disposiciones del ARTÍCULO 43, la Oficina podrá conminar la solicitante para que proponga una denominación conforme. Si el solicitante no obedece, la solicitud será rechazada.
7. Cuando se hayan recibido objeciones u observaciones, las decisiones de la Oficina deberán ser razonadas serán notificadas a las partes. El rechazo de una propuesta de denominación deberá también ser razonado.
 8. La denominación se registrará al mismo tiempo que se conceda el derecho de obtentor.

ARTÍCULO 45. Cancelación de una denominación y registro de una nueva denominación

1. La Oficina cancelará la denominación registrada:
 - a) Si comprueba que la denominación fue registrada pese a la existencia de un motivo de rechazo conforme al artículo 43.1.a);
 - b) Si el titular lo solicita, invocando la existencia de un interés legítimo, o
 - c) Si un tercero presenta una decisión judicial que prohíba la utilización de la denominación en relación con la variedad.
2. La Oficina informará al titular acerca de la cancelación propuesta, y le invitará a presentar una propuesta de una nueva denominación en un plazo de 30 días a partir de la fecha de recepción de la notificación. Si la variedad y no está protegida, la propuesta podrá ser formulada por la Oficina.
3. La propuesta de nueva denominación estará sujeta al procedimiento de examen y de publicación prevista en el artículo 44. La nueva denominación se registrará y publicará en cuanto esté aprobada y la antigua denominación será cancelada al mismo tiempo.

*CAPÍTULO V
MANTENIMIENTO EN VIGOR DEL DERECHO DE OBTENTOR*

ARTÍCULO 46. Tasa anual

1. El titular deberá pagar el costo del servicio para el mantenimiento anual de los derechos del obtentor en vigencia.
2. La tasa deberá pagarse al comienzo de cada año civil, durante todo el periodo de protección. La fecha límite de cancelación será el 31 de enero.

ARTÍCULO 47. Mantenimiento de la variedad

1. El titular deberá conservar y mantener la variedad protegida o, cuando proceda, sus componentes hereditarios, mientras esté vigente el derecho de obtentor.
2. A petición de la Oficina, el titular deberá presentar a ésta y a cualquier autoridad por ella designada, en el plazo fijado, la información, los documentos o el material que se consideren necesarios para el control del mantenimiento de la variedad.

ARTÍCULO 48. Control del mantenimiento de la variedad

1. La Oficina se encargará de controlar que la variedad y, cuando proceda, sus componentes hereditarios, se mantengan durante todo el período de protección
2. Cuando se sospeche que la variedad no está siendo mantenida y que esa sospecha no se disipe mediante la información y los documentos presentados por el titular de conformidad con el artículo 47.2), la Oficina ordenará un control del mantenimiento de la variedad y fijará sus modalidades. El control incluirá ensayos en cultivo u otros ensayos en los que el material suministrado por el titular se comparará a la descripción oficial o a la muestra oficial de la variedad.
3. Cuando el control sugiera que el titular no ha mantenido la variedad, el titular deberá ser escuchado, antes que se tome una decisión de cancelación del derecho de obtentor en virtud del artículo 24.1).

ARTÍCULO 49. Suministro de muestras

1. El titular deberá suministrar muestra apropiada de la variedad a ser protegida, al momento de presentar la solicitud de protección varietal.
2. A petición de la Oficina, el titular deberá suministrar a ésta o a cualquier autoridad por ella designada, en el plazo fijado, muestras apropiadas de la variedad protegida o, cuando proceda, de sus componentes hereditarios a los efectos de:
 - a) Constituir o renovar la muestra oficial de la variedad, o
 - b) Efectuar el examen comparativo de las variedades con fines de protección.
3. A petición de la Oficina, el titular mantendrá o preservará la muestra oficial.

*TÍTULO IV
DISPOSICIONES TRANSITORIAS Y FINALES*

ARTÍCULO 50. Cooperación en materia de examen

La Oficina estará facultada para concertar acuerdos administrativos de cooperación en materia de examen técnico de las variedades, y de control del mantenimiento de las variedades con las autoridades de aquellos países con los que se tengan convenios de colaboración.

ARTÍCULO 51. VIGENCIA.

Rige a partir de su publicación.

ECUADOR

Response to Question 1: No cases exist by way of example.

Response to Question 2: No specific law exists. Nevertheless, Article 377 of the Intellectual Property Law provides that “a *sui generis* system of collective rights for ethnic groups and local communities shall be established. Their protection, and enhancement and application mechanisms shall be subject to a special law which shall be enacted for the purpose.”

Response to Question 3: The Intellectual Property Law came into force on May 19, 1998. A draft law is not available. A number of debates have been conducted and the CODEMPE agreement exists for the preparation of a preliminary draft law which establishes the *sui generis* system of protection for collective individual rights.

Response to Question 4: There is no legislation on this subject.

Response to Question 5: No.

Response to Questions 6 to 8: No law or regulation exists.

Response to Question 9: No law or regulation exists. A principle of Andean legislation as regards *sui generis* protection of plant varieties is the exclusion of protection for botanical genuses and species, provided that their cultivation, possession or use are not prohibited for reasons of human, animal or plant health (Article 2, Decision 345 of the Commission of the Cartagena Agreement, Common Regime for the Protection of the Rights of Plant Breeders).

Response to Questions 10 to 11: No law or regulation exists.

Response to Question 13: No law or regulation exists.

Response to Question 14: There is no legislation on this subject.

Response to Questions 15, 16, 18, 20, 21, 22 and 23: No.

Response to Question 25: There is no legislation on this subject. A starting point has been established for the preparation of the draft law on collective intellectual rights with the study of the standards of customary protection for the traditional knowledge of indigenous communities.

Response to Question 26: No

EGYPT

Response to Question 1: There is no property standard in my country [which has] have been used to protect traditional culture.

Response to Question 2: There is no specific law till now. IP law is still under discussion by legislators.

Response to Question 3: IP law is still under discussion by legislators.

Response to Question 4: From illicit and exploitation and other prejudicial action.

ETHIOPIA

Response to Question 1: None.

Response to Questions 1 and 2: None.

Response to Question 3 to 27: Not applicable

FRANCE

Response to Question 1: In France there is no specific intellectual property enactment that provides for the protection of traditional knowledge. However, classical intellectual property rights can serve indirectly to provide such protection.

Trademarks: The trademark is an intellectual property title that can lend some protection to traditional knowledge: by using a trademark to protect a sign for products manufactured according to traditional methods, one capitalizes on the accumulated know-how; in the case of know-how belonging to a particular corporate group, the most suitable instrument is the collective mark, which can be used by all members of the group. Collective marks are protected in France by both national and Community law.

At the national level, Articles L.715-1 and following of the Intellectual Property Code govern collective marks and collective certification marks, which may be used by any person who abides by regulations for use laid down by the owner of the registration. The ordinary collective mark is a trademark like the others which allows a group of producers to publicize their existence to consumers and to promote their goods and services by means of collective advertising. As for the collective certification mark, it attests that the product or service possesses certain characteristics or qualities; it may only be filed by a legal entity possessing a degree of independence. The owner therefore does not use the mark itself, but provides rather for its promotion and for its legal defense against infringers. The collective mark always has to meet the distinctiveness condition, meaning that it has to relate to an arbitrary, non-descriptive sign.

Articles 64 to 72 of Council Regulation (EC) No 40/94 of December 20, 1993 on the Community trade mark are concerned with Community collective marks. Those marks have to be filed by associations of manufacturers, producers, traders or service providers. They allow the goods or services of the members of the association to be distinguished, and they are accompanied by regulations for their use which among other things lay down the conditions of membership of the association.

For instance, in France the semi-figurative collective mark “Laguiole Origine Garantie” has been filed by the “Association du couteau la Laguiole” for the protection of cutlery articles made in Laguiole, a commune in the Aveyron department.

Geographical indications: The protection of geographical indications also serves to afford indirect protection to local and traditional knowledge: the reputation of a geographical name used in relation to particular goods is generally connected with the particular know-how of the manufacturers in the place named. Protection of the name against use to designate goods not originating in the place named thus contributes to the protection of the know-how. The appellation of origin gives stronger protection to goods whose characteristics are connected with human factors (know-how) but also with natural factors. The protection of indications of source and appellations of origin can thus be a factor of protection of the cultural heritage. By exploiting and protecting geographical names, one helps to enhance local traditions and know-how.

French law protects in particular controlled appellations of origin (AOC): under Article L.115-1 of the Consumer Code, an appellation of origin is constituted by “the name of a country, region or locality serving to designate a product originating therein the quality or

characteristics of which are due to the geographical environment, including both natural and human factors.” Human factors are to be taken to mean traditional local production methods. AOCs are governed by decrees that regulate in detail the conditions for the manufacture of the products qualifying for them with respect to the production area and the techniques used. France is party to the Lisbon Agreement of October 31, 1958, and as such protects both French AOs and the appellations of origin of the other States party to the Agreement.

French law also protects indications of source. Articles L.217-6 to L.217-9 of the Consumer Code allow criminal sanctions for fraud to be imposed in cases of deception committed by the use of false indications of source on goods that do not possess an AO.

For instance, Decree No. 92-340 of April 1, 1992, regulates the appellation of origin “Monoï de Tahiti.”

Response to Question 2: As stated in the response to Question 1, there is no special legislation in France that provides for the protection of traditional knowledge.

Response to Question 27: Intellectual property is designed to protect creation or innovation as a means of promoting new achievements. It is therefore ill suited by nature to the protection of traditional knowledge, which does not possess innovative character per se. Apart from that intellectual property is concerned with protecting specific ways of doing things, and as such requires some form of physical materialization: it cannot apply to mere “knowledge.” The protection of traditional knowledge as such therefore passes through a *sui generis* system that requires the keeping of registers, in which the knowledge is recorded. On the other hand, in so far as an item of traditional knowledge is developed in an innovative way and can be made manifest by description, or where it is codified and associated with a geographical origin as a means of characterizing a product, it qualifies for the protection available under ordinary legislation. For that reason, one of WIPO’s priorities should be to facilitate developing country access to the existing forms of intellectual property and to the related information systems.

THE GAMBIA

Response to Question 1: None.

Response to Question 2: There is no *sui generis* law on intellectual property protection of traditional law.

Response to Question 26: None.

Response to Question 27: The focus of existing intellectual property laws is largely the protection of individual creations, even though collective efforts are also protected. The historical origins, Communal overlapping and character of the rights in traditional knowledge make them elusive to protection by existing intellectual property laws. Here we seen are interplay of laws of agency and intellectual property i.e. the questions of ownership of rights the extend of recognition of these rights and who has the capacity or responsibility to act in terms of registration, protection, collection and distribution of fees etc. While existing laws provide an insight into the protection of traditional knowledge they are not adequate and thus the need for a *sui generis* law. The applicability of the concepts of ‘Droit De suite’ and ‘Domain Public Payout’ should be given increased focus in the protection and commercialization of traditional knowledge. Restrictions, as in tradition IPR protection by way of term of use should not be applied in the case of traditional knowledge. Given the communal character of, and attachment to these rights, protection should be perpetual. However, where this is not considered feasible, the concepts or ‘Droite de Suite’ and/or ‘Domain Public Payout’ or variants of them should be used to enhance the bond of attachment of communities to these rights. This may serve as an incentive to IPR protection.

GUATEMALA

Response to Question 1: At this time the Registry of Intellectual Property doesn't have proper information on such matters, due to the fact that the Government Agency in charge, is the Ministry of Culture.

Response to Question 2: Guatemalan's Cultural Heritage Protection National Law (No. 26-97) and its further reforms (Decrees No.39-98 and 81-98).

Response to Question 3: Guatemalan's Cultural Heritage Protection National Law, was decreed back in 1997.

Response to Question 4: To provide protection, rescue, research and conservancy on all things that belong to the cultural heritage or the nation.

Response to Question 5: No. Some of the creating standards were considered deficient as far as cultural heritage was concerned. That was one of the prime motives to decree the law mentioned before.

Response to Question 6: Intangible cultural heritage, made up of traditions and medical manners and customs.

Response to Question 7: Intangible cultural heritage, made up of institutions, traditions, customs, such as, oral tradition, musical, medical, culinary, religious, (dance and theatre), and customs.

Response to Question 8 : Basically depends upon the decision made by a specific community who claims to have the right that some items should be protected under the law, because they have belonged to the community since ancient times.

Response to Question 10: Cultural goods could be either state or private property, and they can not be sold. Also, they are under state protection.

Response to Question 11: - There is no right for remuneration.

Response to Question 12: No.

1. Any natural person or legal entity who owns a cultural good should register it in the "Cultural Goods Registry" which is an office of the Cultural Ministry Affairs.
2. The mentioned office could ask that the particular good should be exhibit as living proof.
3. The mentioned office could reject the registration.

Response to Question 13: The Registry could be denied the inscription, or even revoke one ready granted, accordingly to the circumstances.

Response to Question 14: No.

Response to Question 15: The law doesn't provide any retroactive protection.

Response to Question 16: Any natural person or legal entity are entitled to acquire the said protection.

Response to Question 18:

- a. Natural person: should take care for the well being and conservancy of the cultural good legal entity.
- b. Legal entity: should take care for the well being and conservancy of the cultural good.

Response to Question 19: None

Response to Question 20: Civil liabilities and legal according to the penal code.

Response to Question 21: The Attorney General's office is entitled to execute any legal actions against predators, jointly with the Ministry of Cultural Affairs.

Response to Question 22: Right holders cannot do such things because those rights can be executed only for the person or legal entity themselves.

Response to Question 23: The Ministry of Cultural Affairs throughout the anthropology and history institute are responsible for the right's administration granted under the law.

Response to Question 24: Yes.

1. Industrial Property Law (Decree 57-2000)
2. Copyright and Related Rights Law (Decree 33-98)

Response to Question 25: Yes. The main purpose of the law, is to provide a protectable common ground for all protectable common ground for all the subjects involved, such as individuals and communities.

Response to Question 26: The law contains certain provisions and to enforce those rights under protection leading to criminal prosecution and civil liabilities as well.

Response to Question 27: Both law's, intellectual property and national heritage protection laws, integrate each other to provide protection. When one fails its coverage, the other gives what is needed.

HUNGARY

Response to Question 1:

Trademarks

Under Article 5(1)(a) of Act No. XI on the Protection of Trademarks and Geographical Indications (hereinafter referred to as "the Trademarks Act") a sign may not be granted protection if it would infringe earlier personal rights of others. This provision might be asserted as a route to protect TK holders, in as much as there is the possibility for their obtaining legal personality (e.g. in the form of an association as provided for in Article 61 of the Civil Code), on the basis of which it is viable to claim protection under the general clause contained in Article 86(3) of the Civil Code providing for the protection of intellectual property not covered by *lex specialis*.

More importantly, Part IV of the Trademarks Act contains detailed legislation on collective marks (Articles 96-100) and certification marks (Article 101). TK holders may seek protection both as members of a social organization, public body or association holding a collective mark and by having a certification mark registered the authorized use of which will be subject to compliance with the prescribed quality or other requirements.

Geographical indications

Article 103 of the Trademarks Act provides for protection of geographical names of a region or locality designating a product the specific quality, reputation or other characteristics of which are essentially due to that geographical origin. In the case of appellations of origin, protectability is expressly linked to the inherent natural and human factors of the geographical environment, therefore this title of protection may be particularly appropriate in respect of TK holders.

Patents

Article 8(1) of the 1995 Patents Act enables that an association of TK holders be the rightsholder of a patent application as successor in title of the members of such association.

Copyright and related rights

The Hungarian Copyright Act (Law No. LXXVI of 1999) excludes expressions of folklore from protection under copyright law. Under Article 1, para.(7) of the Act: "The expressions of folklore may not enjoy copyright protection. However, this may not prejudice copyright protection due to the author of a folk-art-inspired work of individual and original nature." This provision reflects the practice that has developed on the basis of the former legislation. The majority of legal systems, thus also Hungarian law, excludes works of folk art and folk poetry because their author(s) is (are) unknown, they are lost in the mists of time, and the works survive and are effective as the collective cultural wealth of peoples and ethnic groups. Hungarian legal literature also takes the view that an expression of folklore can never be a work of authorship, since its main characteristic is not the reflection of the unique personality of an author, but the unchanged representation of the features of cultural public domain. As a consequence, copyright protection is not applicable to folklore.

Unfair competition

Article 4 of Law No. LVII of 1996 on the prohibition of unfair competition and restrictive business practices contains detailed provisions on the protection of trade secrets.

Response to Question 2: There is no *sui generis* legislation providing for the protection of traditional knowledge.

INDONESIA

Response to Question 1: At the moment, the following intellectual property standards are available in Indonesia to protect traditional knowledge as long as it fulfills related requirements: copyrights, trademarks (including geographical indication), and trade secret.

Response to Question 27: In general the Indonesian intellectual property laws do not provide specific legal protection on traditional knowledge. It is difficult to use those existing intellectual property laws for traditional knowledge protection because the “novelty” criteria (regarding patent) for traditional knowledge protection is certainly improper, likewise the “originality” criteria if we use copyright law for traditional knowledge protection.

However, the Indonesian intellectual property law on trade secret accommodates trade secret protection that covers protection for know-how, information, Indonesian traditional herbs as medicine (jamu), etc.

JAPAN

Response to Question 1: In order to obtain patent rights under Japanese Patent Law, it is necessary to meet the requirements of patentability such as novelty and inventive step. The invention, which is almost same as traditional knowledge, might not meet those requirements if the traditional knowledge has already been available to the public. Consequently, no exclusive rights are granted to the invention.

Therefore, traditional knowledge can be protected under the existing IP standards like patent law by preventing any exclusive rights on the traditional knowledge from being obtained by others.

Response to Question 2: There is no specific (*sui generis*) law providing for IP protection of traditional knowledge in Japan.

Response to Question 26: No.

Response to Question 27: As replied in the answer 1, traditional knowledge can be protected under the existing IP standards like patent law by preventing any exclusive rights on the traditional knowledge from being obtained by others.

From the viewpoint that it is adequate for traditional knowledge to be protected in such a way, there seem no serious limitations in the application of patent law as far as the traditional knowledge has already been available to the public.

However, the following limitations can be pointed out if we are in a position that traditional knowledge holders should always be granted proper exclusive rights like patent rights, although we are not actually in that position.

Firstly, it is difficult to identify who holds the rights of traditional knowledge. It is necessary to identify the individual inventors/applicants of traditional knowledge in order to grant patent rights while traditional knowledge is generally belonged to the community which is vaguely and broadly spread.

Secondly, traditional knowledge must meet the requirements of patentability like novelty and inventive step. As described in the answer 1, traditional knowledge can not meet those requirements if the traditional knowledge has already been available to the public.

Nevertheless, the above limitations could be cleared if the traditional knowledge is belonged to apparently identified entities and meets the requirements of patentability.

Therefore, those limitations are not originated from TK itself, but from the existing IP system.

KAZAKHSTAN

Response to Question 1: Till now in the Republic of Kazakhstan there are no special Regulations or special Laws providing protection for traditional knowledge. However, the valid legislation on the intellectual property protection, namely, the Patent Law of the Republic of Kazakhstan of July 16, 1999 and the Law “On the Trademarks, Service Marks and Appellations of Origin of the Goods” of July 26, 1999, don’t exclude the possibility to protect inventions, industrial designs, trademarks. All they being based on traditional knowledge of Kazakh people.

Thus, for example, the patent protection is provided for “the method of producing kumis (mare’s milk),” “Kazakhstan,” Patent of the RK, No. 33; for “the method of producing shubat (female camel’s milk),” “Turkestan,” Patent of the RK, No. 6237, as for inventions. There is provided to grant patent protection for “the method “Kushkon” of manufacturing relief picture of leather,” Patent of the RK, No, 4619. All these are attributed to traditional knowledge.

The outward appearance of national outer clothes, head dresses (saykele), carpets (tuskiiz), decorations of saddles, national dwellings (yurta) and their structural elements; women’s decorations in form of bracelets (blezik), national children’s cots-crib-cradles and table wares (piala, torcyk) are protected as industrial designs.

The designations containing elements of Kazakh ornament are registered and protected as trademarks.

Response to Question 2: In the Republic of Kazakhstan there is no till now elaborated special law on intellectual property protection for traditional knowledge.

Response to Questions 3 to 25: No available.

Response to Question 26: There are no available any special measures to assist the traditional knowledge holders in Kazakhstan to acquire, exercise, manage and enforce rights in traditional knowledge. Nevertheless, it will be suitable to point that there is a valid Law of the Republic of Kazakhstan No. 1488-XII of July 2, 1992 “On the protection and use of historic and cultural heritage.” It being aimed at providing Government protection for subjects of historic and cultural heritage, architectural and cultural old relics and monuments and for other subjects as traditions of human communities. There are: historic, cultural, religious and genre arts.

Response to Question 27: There aren’t any perceived limitations in the application of intellectual property Laws and procedures to the protection of traditional knowledge.

KOREA, REPUBLIC OF

Response to Question 1:

Trademarks

A trademark registration may not be obtained where the mark consists solely of a sign indicating in a common way the origin of the goods; nor where the mark consists solely of a sign indicating a conspicuous geographical name, an abbreviation thereof or a map as in article 6 (1) of Trademark Law. Even in the case of a trademark which falls under the article, where as a result of the use of such trademark prior to the application for registration, consumers are able to conspicuously recognize whose goods it indicates in connection with a person's business, the trademark may be registered together with the designated goods for which the trademark has been used. There is also provision for a "collective mark", which means a mark intended to be used with respect to the goods and services of members of a legal entity founded by and composed of persons who are in the same line of business and who are closely associated therein and who are controlled by the legal entity.

Geographical Indications

According to the 'Agricultural Products Quality Management Law' and the 'Fisheries Products Quality Management Law,' for agricultural and fisheries products and their processed products, if one applies for the registration of a geographical indication, the National Agriculture Products Quality Management Service and the Geographical Registration Council examine the application to see if it meets registration requirements, particularly that the reputation of the subject matter should originate from the geographic features of the region and that the matter should be produced and manufactured in the region.

Patents

Traditional knowledge in the public domain is considered as prior art. According to the Patent law, if an applied invention derived from traditional knowledge does not meet the requirements of novelty and/or inventive step, the registration of the application is rejected.

Copyright and related rights

Copyright-related rights may indirectly protect traditional knowledge through the protection of the rights of performers under the Korean Copyright Law. This includes performances of something other than works, through such artistic means as acting, playing music, singing, reciting, or screening. In some cases sound recordings of such performances are afforded indirect protection through the neighboring rights of phonogram producers.

Unfair competition

TK is protected as a trade secret if not publicly known, has independent economic value, and has been maintained and managed as a secret through considerable effort as in article 1 (2) of the Unfair Competition Prevention and Trade Secret Protection Law. Article 2 (1) of the Law defines the act of making a mark on goods, advertisements, trade documents communicated to the public or in communications, or selling, distributing, importing or exporting goods marked with such a mark which would mislead the public in to believing that the place of production, manufacture, or processing is different from the actual place of production, manufacture or processing as an act of unfair competition.

Response to Question 26: Traditional Knowledge designated by the Law of Protection of Cultural Property as the property of "national or local culture" is to be protected from destruction, and to be maintained for purposes of good preservation, not in regards to

intellectual property rights. Therefore, there are no special measures to assist traditional knowledge holders to handle their intellectual property matters.

Response to Question 27: In Korea, it is often difficult to identify an owner of traditional knowledge because traditional knowledge is handed down from generation to generation and is already well known to the public.

KYRGYZSTAN

Response to Question 1: Legislation of the Kyrgyz Republic in the field of intellectual property does not contain regulations aimed at the protection of traditional knowledge.

Response to Question 2: At present in the Kyrgyz Republic there is no specific law for the protection of traditional knowledge. For this reason we are not in a position to provide any information on the subsequent questions of survey.

LATVIA

Response to Question 1: Existing intellectual property laws have not yet been used to protect traditional knowledge.

Response to Question 2: There is no specific law providing for intellectual property protection of traditional knowledge in Latvia.

Response to Question 27: Since we do not have in Latvia such groups of people which could be designated as "indigenous people" or like and which use in their everyday life traditional knowledge we have not faced with problems of abusive use of these knowledge and therefor we have not felt necessity to develop some form of protection of such knowledge.

Traditional knowledge has been explored and collected since about the 18th century and this work in a form of scientific exploration is still going on. Traditional knowledge of Latvian people and earlier of Baltic tribes is well documented, described, analyzed, maintained in several museums and other collections, and published in books a lot. Traditional knowledge is taught in schools. Many people are engaged in different hobby collectives dealing with maintenance of these knowledge. So these knowledge are considered in Latvia as being in public domain.

Works derived from or based on traditional knowledge can be protected as intellectual property according to IP standards if they meet requirements for protection provided for in these laws. The only wish would be to get some financial assistance in order to be able to convert into computerized form collections of traditional knowledge (particularly in fields of medicinal plants, medical and agricultural methods and devices) and make them searchable which now are kept in our museums in traditional form and therefor are unlikely to be used in examination of patent, trade mark and design applications.

MALAYSIA

Response to Questions 1 and 2: None

Response to Questions 3 to 25: Not applicable.

Response to Question 26: None

Response to Question 27: At present, there is no specific law for the protection of traditional knowledge in Malaysia. Therefore, we are unable to provide general information or comments on perceived limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge.

NEW ZEALAND

Response to Question 1:

Trade marks

There are currently no specific provisions contained in New Zealand's intellectual property laws specifically directed to the protection of traditional knowledge. Aspects of traditional knowledge are, however, protected to an extent by intellectual property laws generally. For example, traditional literary or artistic works may qualify for protection as copyright works under the Copyright Act 1994. Certain works might also be registrable as registered designs under the Designs Act 1953.

A new Trade Marks Bill, currently being considered by Parliament, will if enacted allow the Commissioner of Trade Marks to refuse to register a trade mark where its use or registration would be likely to offend a significant section of the community, including Maori¹. This provision would provide additional protection to some expressions of traditional knowledge by preventing the inappropriate registration of marks based on Maori text or imagery.

The Trade Marks Bill also provides that persons who are culturally aggrieved have standing to seek a declaration that a registered trade mark is invalid because it is likely to offend a significant section of the community, including Maori.

To assist the Commissioner's consideration of whether a mark might be considered offensive to Maori, the Bill provides for the establishment of an advisory committee. The role of the advisory committee would be to advise whether the use or registration of a mark derivative of Maori text or imagery would be or is likely to be offensive to Maori.

While the above amendments have yet to be brought into effect (dependent on the Parliamentary process), the Intellectual Property Office has existing processes for the examination of trade marks containing Maori text and imagery. Where it has been determined that a trade mark is of significance to a particular iwi (tribe), hapu (sub-tribe) or other Maori group, it is usually considered appropriate to require an applicant to seek consent from the relevant Maori authority (section 19 of the Trade Marks Act requires consents to registration in certain cases).

For example, where a trade mark consists of or includes Maori words that are an iwi or hapu name, the name of a site of significance to a particular Maori group, or part of a traditional Maori proverbial saying, applicants will be advised that registration of the trade mark "would appear" to be deceptive under Section 16 of the Trade Marks Act², as consumers may assume there is a connection between the applicant and its goods or services and the iwi or hapu concerned. Applicants are further advised in such cases that objection to registration may be overcome if consent of the relevant Maori authority is obtained. Any consent given is included as a condition of registration. Similar objections may be raised concerning devices with particular cultural or spiritual significance to Maori.

¹ This response makes reference to the term "Maori". For the purpose of this document "Maori" is used to refer to the indigenous people of New Zealand.

² Section 16(1) of the Trade Marks Act 1953 provides "It shall not be lawful to register as a trade mark or part of a trade mark any scandalous matter or any matter the use of which would be likely to deceive or cause confusion or would be contrary to law or morality or would otherwise be disentitled to protection in a Court of Justice".

Patents

New Zealand is also considering how aspects of the Patents Act 1953 might (where appropriate) be modified to address Maori concerns and interests. A comprehensive review of the Act is taking place, which will include consideration of exceptions to patentability. Public consultation will be undertaken this year which will among other things, seek to ascertain views on the issues of interest to Maori, such as how patent examiners might be made aware of traditional knowledge which constitutes prior art.

Also the patents area, the Government has agreed in principle to one of the recommendations of the Royal Commission on Genetic Modification³ that a "Maori Consultative Committee" be established⁴. The precise role and functions of the Committee are, however, yet to be determined and are expected to be the subject of consultation as part of the review of the Patents Act more generally. Also in response to a recommendation of the Royal Commission on Genetic Modification, the Government has agreed that the Patents Act be amended by adding a specific exclusion to the patentability of human beings and the biological processes for its generation. This can in part be seen as a response to concerns raised by Maori about the patentability of human beings.

As with trade marks, the Intellectual Property Office has developed guidelines for patent examiners concerning patent applications of significance to Maori. The guidelines target inventions relating to, using or derived from indigenous flora and fauna, Maori individuals or groups, indigenous micro-organisms (including viruses, bacteria, fungi, algae where any line of research resulted from any traditional or local knowledge), and indigenous material derived from an inorganic source where research resulted from any traditional or local knowledge.

If an application falls into one of the above criteria an examiner is required to assess whether it is appropriate to raise an objection to registration under section 17 of the Patents Act (which allows the Commissioner of Patents to refuse an application where the use of the invention in question would be contrary to morality). In making this assessment, examiners are directed to consider the extent to which the application may have special cultural or spiritual significance for Maori, and whether or not the application is likely to be considered culturally offensive. Where an application may reasonably be considered to fall under section 17, applicants are to be advised accordingly and given the opportunity to obtain the consent of the competent Maori authority.

Plant Varieties

A review of the Plant Variety Rights Act 1987 is currently being considered. The purpose of the review is to determine whether the 1987 Act provides adequate protection for new plant varieties. The Government's obligations under the Treaty of Waitangi, and Maori concerns regarding the exploitation of indigenous flora will be taken into account.

³ The Royal Commission on Genetic Modification was established to look into and report on the issues surrounding genetic modification in New Zealand. The Commission's warrant asked that, among other things, it investigate and hear views on the intellectual property issues involved, now and in the future, in relation to the use in New Zealand of genetic modification, genetically modified organisms and products.

⁴ The Royal Commission on Genetic Modification recommended that the "Maori Consultative Committee" develop procedures for assessing patent applications, and facilitate consultation with the Maori community where appropriate.

Measures such as those contained in the Trade Marks Bill are not able or intended to address the concerns of Maori about the use and protection of their "cultural and intellectual property". They do, however, seek to provide some practical measures that will contribute to this objective.

We are not aware of case law or practical examples in the industrial property or copyright areas which demonstrate the ability of the existing New Zealand intellectual property regime to protect traditional knowledge (see, however, reference to "Maori Made Mark" in response to question 26). While a search of the Intellectual Property Office's database reveals a number of patents (either granted or under examination) involving traditional uses of indigenous flora and fauna, these records do not contain information relating to the ethnicity of the applicant. Similarly, with trade marks, while all applications involving Maori text and imagery are flagged as type "Maori" there is no record of the ethnicity of the applicant⁵.

Response to Question 2: New Zealand has not introduced any specific (*sui generis*) law providing for intellectual property protection of traditional knowledge. New Zealand considers, however, that the consideration of *sui generis* models for the protection of traditional knowledge is both necessary and important. New Zealand is currently undertaking scoping work on both legislative and non-legislative mechanisms for domestic protection of traditional knowledge. It is expected that discussion with Maori on these issues will take place this year. New Zealand considers that further and ongoing discussion with Maori is fundamental to the development of domestic models. Such a discussion must also precede any New Zealand input into an international scheme of *sui generis* protection for traditional knowledge.

As no *sui generis* measures currently exist, New Zealand has not answered questions 3-25.

Response to Questions 3 to 25: Not Applicable.

Response to Question 26: New Zealand does not provide assistance to traditional knowledge holders to acquire, exercise, manage and enforce rights in traditional knowledge in the form of targeted education or training, financial assistance, reduced filing or maintenance fees, or enforcement.

In the trade marks area, the Government, through the Maori Arts Board of the Arts Council of New Zealand ("Creative New Zealand"), has funded the development of the "Maori Made Mark". The Maori Made Mark is a mark of authenticity and quality, which will indicate to consumers that the creator of works is of Maori descent and produces work of a particular quality. Creative New Zealand is the current owner of the trade mark. It is anticipated that once the mark is well established it will be transferred to an autonomous Maori entity.

The Maori Made Mark was developed in response to concerns raised by Maori regarding the protection of cultural and intellectual property rights, the misuse and abuse of Maori concepts, styles and imagery and the lack of commercial benefits accruing back to Maori. The Mark is considered by many as an interim means of providing limited protection

⁵ The Intellectual Property Office of New Zealand receives on average, about 2200 trade mark applications per month. Of these, on average, around 12 contain Maori text and imagery. There are approximately 900 registered trade marks and 170 pending applications which contain Maori text and imagery.

to Maori cultural property, by decreasing the market for copy-cat works produced by non-Maori.

Response to Question 27: New Zealand considers that the generally perceived constraints of intellectual property laws relating to novel contribution, duration, identification of an owner, and the lack of a protective imperative are reasons that existing intellectual property laws do not provide the level of protection for traditional knowledge that Maori, and other indigenous peoples, seek (as that is not their purpose).

The following is a practical example of current intellectual property rights not providing the protections which Maori seek. A Maori business sought patent and plant variety right protection for an indigenous plant (and a process for the extraction of its oil) with traditional healing properties. Patent protection was not available for the process used to extract oil from the plant as the method was common knowledge. A plant variety right was not available as the plant concerned grew naturally. The applicant brought this matter to the attention of the Waitangi Tribunal⁶. He noted that the only possible legal protection available would be to develop a plant variety with similar medicinal qualities. This option was not, however, acceptable to the applicant on the grounds that it would require genetic modification which the applicant considered to be unethical and culturally offensive. The possibility identifying (and later patenting) the active molecules in the oil extracted from the plant was found to be prohibitively expensive. The applicant suggested that the ideal solution is for the Government to develop legislation to prohibit ownership (by third parties) of the indigenous plant concerned and the associated traditional medicinal knowledge.

⁶ The Waitangi Tribunal is a specialist tribunal charged with hearing the claims of Maori against the Crown in respect of their rights under the Treaty of Waitangi which imposed rights and obligations on both Maori and the Crown in anticipation of the formal British settlement of New Zealand.

NORWAY

Response to Question 1: We base our answers on an understanding that “traditional knowledge” does not include innovations that individuals make on the basis of traditional knowledge, e.g. when a person uses elements of traditional folksongs to create a new piece of music. We refer to the definition of “traditional knowledge” in paragraph 33 of the document, and also to the purpose of the survey, which we assume is to examine how existing intellectual property rights (IPR) can protect knowledge that is not linked to specific innovations from known individuals.

Traditional knowledge that is not in the public domain, may under certain circumstances be protected under measures on trade secrecy. Section 294 of the Norwegian General Civil Penal code reads as follows:

“Any person shall be liable to fines or imprisonment for a term not exceeding six months who (...)

2. without authorization either himself makes use of a business or operational secret concerning an enterprise in which he is or has in the course of the last two years been employed, or in which he is or has in the course of the last two years been a participant, or discloses such a secret for the purpose of enabling another person to make use of it, or who by misleading or prompting is accessory thereto, or;

3. without authorization makes use of any business or trade secret of an enterprise which he has become acquainted with or gained control over in the capacity of a technical or mercantile consultant to the enterprise or in connection with a commission from it, or without authorization reveals such a secret for the purpose of enabling others to make use of it, or who by misleading or prompting is accessory thereto;

A public prosecution will only be instituted when it is requested by the aggrieved person and is required in the public interest.”

Generally, existing IPR standards in Norway are not applicable to traditional knowledge that is already in the public domain, because this knowledge cannot fulfil the novelty requirement for patents and designs, nor the requirements for copyright protection. For this reason, we are not able to find actual examples where IPR have been used to protect traditional knowledge.

- However, trademarks may indirectly protect traditional knowledge, as explained in the textbox on page 11 in the document WIPO/GRTKF/IC/2/5. Traditional communities in Norway are free to register collective trademarks to establish signs under which goods originating from their community, can be sold. A search in the national trademark register did not, however, reveal any actual examples of this type of collective trademarks.

- Similarly, the measures against deceptive marketing in the Marketing Act may to some extent indirectly protect traditional knowledge, by prohibiting their abuse. This act states that in trading activity, it is prohibited to use incorrect or misleading marketing measures that are capable of affecting the supply and demand for goods or services. In addition, the Trademark Act states that trademarks which are capable of being misleading, cannot be registered. These measures primarily aim at protecting the consumers. Indirectly, however, they can lead to the result that only the original holders of certain traditional knowledge can fully utilize this knowledge for economic purposes. For example, it would be illegal to market a herbal medicine product as an original ‘Sami’ product when it is in fact not. The Marketing Act

does not prohibit imitations of products or services derived from traditional knowledge as long as they are marketed as imitations.

- We do not possess information on actual examples where exploitation of traditional knowledge has resulted in legal sanctions under the provisions of the Marketing Act.

Response to Question 2: In Norway, there is no specific (*sui generis*) law providing for intellectual property protection of traditional knowledge. Consequently, we have no answers to the questions 3-25.

Response to Question 26: As stated above, in our answer to Question 1, trademarks are the only IPR protection currently available to give specific protection to traditional knowledge in Norway. While we do not presently have IPR measures that specifically aim at protecting traditional knowledge, we are actively following the processes in WIPO and elsewhere. Depending on their outcome, we will consider introducing such measures in the future.

Response to Question 27: As already stated, the main reason why traditional knowledge cannot be fully protected by IPR systems in Norway today, is that such knowledge does not fulfill the requirements for patent, design or copyright protection. The question of developing new *sui generis* IPR protection for traditional knowledge, is of interest in a number of areas, e.g. in the area of herbal medicine and agriculture. Norway will actively follow the processes in WIPO and elsewhere.

PAKISTAN

Response to Question 1: The International Union for Conservation (IUCN), Islamabad has recently started studies in Gilgit Area on the documentation of indigenous knowledge and its property protection in the country. The project is at its preliminary stage therefore, is not possible provide the execute information on the subject.

Response to Question 2: As presently there is no law, which cover intellectual property protection of traditional knowledge. Recently Ministry of Food, Agriculture and livestock has proposed “Plant Breeders Ordinance 2001” for the approval to protect intellectual Property Rights for plant varieties. It is further stated that the Government of Pakistan is very cautious on the subject matters considering to establish Intellectual Property Rights Authority to deal with all the related issues of IPR.

Response to Question 3: The establishment of Intellectual Property Rights Authority is at its initial stage. It is expected that the process for legislation may start in the beginning of next year.

Response to Question 4: The main objectives to establish Intellectual Property Rights Authority would be as under :

- (a) Legal protection to farmer’s rights, traditional knowledge, folklore, etc. for titts illicit exploitation.
- (b) In direct protection of IPR by means of neighboring right.
- (c) Protection of copyright etc.
- (d) Establishment of IPR.
- (e) Execution/implementation of IPR in the country.
- (f) Facilitate the exchange of IPR protected material with the other countries on the agreed term and condition.

Response to Question 5: No.

Response to Question 6: It is too early to comment as the Pakistan is in the early stage of formulating regulation on IPR.

Response to Question 7: The main focus would be on the protection of IPR against illicit exploitation and other prejudicial actions.

Response to Question 8: It is expected while determine the subject matter qualifies for project under the law or regulation will be viewed in the context of model provisions and other regulation in different countries.

Response to Question 9: No comments.

Response to Questions 10 and 11: It is too early to say at this time as Intellectual Property Rights Authority is not functioning.

Response to Question 13 to 27: Can only be answered when Intellectual Property Rights Authority will finalize rules and regulations in the country.

Note: A draft copy of “Legislation on Access to Biological Resources and Community Rights” is also enclosed. This document is being processed for the approval by the Government of Pakistan.

PAKISTAN (ANNEX)

Government of Pakistan
Ministry of Food, Agriculture & Livestock
Pakistan Agricultural Research Council

*LEGISLATION ON ACCESS TO BIOLOGICAL
RESOURCES AND COMMUNITY RIGHTS*

- Whereas, it is necessary to protect and encourage cultural diversity, valuing the knowledge, innovations and practices of the local communities with respect to the conservation, management and use of biological resources.
- Whereas, the Government of Pakistan together with the civil society exercises sovereign rights over the biological resources existing in the national territory.
- Whereas, it is the duty of the state and its citizens to regulate the access to biological resources as well as related use of community knowledge and technologies.
- Whereas, the state recognizes the necessity of providing adequate mechanisms which guarantee a just, equitable and effective participation of its citizens in the protection of their collective and individual rights and in making decisions which affect the biological and intellectual resources as well as the activities and benefits derived from their utilization.
- Whereas, there is a need to promote and support the traditional and indigenous technologies that are important in the conservation and sustainable use of biological resources and to complement them by modern technologies.
- Whereas, there is the need to implement the relevant provisions of the Convention on Biological Diversity, in particular Article 15 on access to genetic resources and Article 8(j) on the preservation and maintenance of knowledge, innovations and practices of indigenous and local communities.

Now, therefore, it is hereby legislated as follows:

Article 1: Definition

Access to biological resources and community right means acquisition of state biological resources and its related use/knowledge and technologies either by direct or indirect means for research or commercial use.

Article 2: Objectives

The objectives of this legislation shall be to:

- a) Project and support the rights of local communities over biological resources and their knowledge, innovations and practices with respect to the conservation and use of biological resources.
- b) Ensure the conservation and sustainable use of biological resources and [related] knowledge and technologies in order to maintain and improve their diversity as a means of sustaining the support and health care system of the country.

- c) Provide an appropriate system of access to biological resources and [related] knowledge and technologies based upon mutually agreed terms and subject to the prior informed consent of the State and the concerned local communities.
- d) Promote appropriate mechanisms for a fair and equitable sharing of benefits arising from the use of biological resources and [related] knowledge and technologies as well as ensuring the participation and agreement of concerned communities in making decisions as regards the distribution of benefits which may derive from such uses.
- e) Promote and encourage the building of national scientific and technological capacity relevant to the conservation and sustainable utilization of biological resources;
- f) Provide appropriate institutional mechanisms for the effective implementation and enforcement of community rights and conditions of access to biological resources.

Article 3: Scope

1. This legislation applies to biological resources and [related] knowledge and technologies as well as their derivatives existing in the national jurisdiction of the country both in-situ and ex-situ.
2. This legislation shall not apply to the traditional use and exchange of biological resources as well as [related] knowledge and technologies carried out by the and between local communities based upon their customary practices.

Article 4 :Access to Biological Resources and related Community knowledge and technologies.

1. Research and development on biological resources shall be carried out within the country, unless found impossible to do so. When there are competitive requests for access to biological resources, priority shall be given to the collector who undertakes to conduct the research and development within the country.
2. Access to biological resources shall be based upon mutually agreed terms and subject to the prior informed consent of the State, competent authority. The requirements and conditions set out are as below:
 - a) The Collector shall request the competent national authority for access to biological resources by application in writing that contains information inter- alias.
 - i) The identification of the applicant and the documents which testify to his legal capacity to contract;
 - ii) Detailed and specific information about the resources to which access is sought, including its present and potential uses, its sustainability and the risks which may arise from access;
 - iii) Whether any collection of the biological resources endangers any component of biological diversity;
 - iv) The purpose for which access to the resource is requested including, where appropriate, the type and extent of commercial use expected to be derived from the resources;

- v) Description of the manner and extent of intended involvement of the country in the necessary research and development of the biological resources concerned;
 - vi) The identification or request for the assignment of the national scientific counterpart institution which will participate in the research and be in - charge of monitoring the process;
 - vii) The precise sites where the resources is located as well as the places where the proposed research and development activities will be carried out.
 - viii) An indication of the primary destination of the resources and its probable subsequent destination;
 - ix) An indication of the benefits, whether economic, technical, biotechnological, scientific, environmental, social or otherwise, that may derive to the country and the concerned local communities and proposed mechanisms of arrangements for benefit sharing;
 - x) Description of the knowledge, innovation of practice associated with the resources, if any,
 - xi) Presentation of an environmental impact assessment where it is required;
 - xii) Any other information deemed relevant by the competent authority.
- b. Once the application is complete, the competent national authority shall place it in a public registry for a period of three months which may be consulted by any person.
- c. Upon determination that the application has fulfilled all the necessary requirements of the present legislation and subsequent regulations issued for its effective implementation, the competent national authority shall approve the grant of access to the material requested with or without conditions.
2. The competent national authority shall grant permission after the signing of an agreement with the collector. The agreement shall contain the following minimum requirements:
- a) a limit on the sizes of the samples that the collector may obtain and / or export;
 - b) guarantee of a deposit of duplicates of all specimens collected with a duly designated government Institution;
 - c) a commitment by the collector to inform the competent authority and, where appropriate, the concerned local community of all finding from the research and development on the resource material, if a commercial use is derived from such activity;
 - d) a commitment by the collector not to transfer the acquired resources to any other party without the authorization of the competent national authority;
 - e) provision for the payment of [loyalties] [a fixed sum of money] to the national government or local communities, in case commercial use is derived form the biological resources taken. Where appropriate and applicable, other forms of additional benefits may be negotiated;

- f) submission of a regular status report of research and development on the resources concerned and where [appropriate] [specimen of biological resources are to be collected in large quantities], on the ecological state of the area to the competent national authority; and
 - g) commitment to abide by the relevant rules of the country particularly those regarding sanitary control, bio-safety and the protection of the environment as well as the cultural practices, traditional values and customs of the local communities.
3. No import or export of any biological resources shall be allowed to and from the country unless the competent national authority confirms that a prior informed consent has been obtained from the country of origin.
 4. The competent national authority may unilaterally withdraw its consent and terminate the agreement and / or further use of the biological resources concerned whenever it has become apparent that the collector has violated any of the mutually agreed terms, or the overriding public interest so demands.
 5. The competent national authority shall ensure that a guarantee has been obtained from the State in whose jurisdiction the collector operates regarding the latter's compliance with the mutually agreed terms and conditions of access to the biological resources.
 6. Any claims upon biological resources obtained or used in violation of the provisions of this legislation of mutually agreed terms and conditions shall not be recognized and the certificate of intellectual property or similar certificates and license upon such resources or products and processes resulting from access shall not be considered valid.
 7. The competent national authority may, when it deems it necessary, establish restrictions or prohibitions on those activities which are directly or indirectly related to access to or introduction of biological resources, particularly in case of:
 - a) endangered taxa;
 - b) endemism ;
 - c) adverse effects upon human health or upon the quality of life or the cultural values of the local communities;
 - d) environmental impacts which are undesirable or difficult to control;
 - e) danger of genetic erosion or loss of ecosystems, their resource or their components, because of undue or uncontrolled collection of germplasm;
 - f) non-compliance with rules on bio-safety or food's security; and
 - g) use of resources for purposes contrary to national interest and to relevant international agreements entered into by the country.

Article 5: Community Rights

1. The State shall recognize and protect the rights of the local communities to collective benefit from their knowledge, innovations and practices acquired through generations (past, present and future) and to receive compensation for the conservation of biological resources in accordance with the provisions of this legislation and subsequent regulations.
2. The local communities shall at all times and in perpetuity be the lawful and sole custodians [as well as generators] of the relevant knowledge, innovations and practices.

3. No such knowledge, innovations or practices shall be sold, assigned, transferred or dealt with in any manner without the prior informed consent of the local communities concerned and national competent authority.
4. The State shall ensure that at least 10 percent of benefit obtained from any commercial use of biological resources are paid to the concerned local communities.
5. Subject to the above paragraphs of this Article, the State shall taken regulatory measures to establish and implement a system of collective/community [intellectual][achievements] rights through a process of consultation with and participation of the local communities. Such measures shall include:
 - a) the identification of the types collective [intellectual] [achievements] rights that are recognized in each case;
 - b) the identification and definition of the requirement and procedure necessary for the recognition of the collective [intellectual] [achievement] rights and the title to same;
 - c) definition of a system of collective registration and specific rights and obligations that arise form the entitlement;
 - d) criteria and mechanisms for the standardization of procedure; and
 - e) licenses for the exploitation and commercialization of the protected species, varieties .
6. The State shall identify, in consultation with local communities, technical institutions to assist them to identify and characterize their innovations.
7. The State shall ensure that local communities have the right not to allow the collection of biological resources and access to their traditional technologies, knowledge, innovations and practices, as well as to den and restrictions upon such activities when it is provided that such activities threaten the integrity of their natural or cultural patrimony.

Article 6: Institutional Arrangements

- 1) A national inter-sectoral coordination body at the highest level, composed of relevant representatives form the public sector, scientific and professional organizations, NGOs and representatives of local communities, shall be created as a regulatory body to ensure the proper implementation and enforcement of the provisions of this legislation.
- 2) A technical secretariat (advisory body) which shall equally be inter-sectoral and composed of representatives of the public sector, research institutes and centers, the academic sector, authorities or community organization is and NGOs shall be created to support the work of the national inter-sectoral coordination body.
- 3) The national inter-sector coordination body shall have, inter-alia, the following functions:
 - a) ensure that the minimum conditions for agreements with collectors is strictly observed and complied with;
 - b) ensure that the rights of local communities whereas the collection of or research on biological resources are being conducted are protected, including verifying that the requirement of prior informed consent by the local communities are complied with;

- c) study and recommend policies and laws on the sustainable use of biological resources including new laws or intellectual property rights and community rights over their knowledge innovations and practices [relevant to the conservation and sustainable use of biological resources];
- d) recommend policies and mechanisms for coordination between the entities competent in matters of biodiversity and bio-safety;
- e) establish, together with relevant sectoral agencies, local communities, scientific and non-governmental organizations, list of genetic resources threatened by extinction and deterioration, and the places threatened by serious loss of biological diversity;
- f) issue and update every three years, a report on threats to the national biodiversity and about the potential impacts of its deterioration upon sustainable development;
- g) establish a mechanism to enable the identification and dissemination of information regarding threats to biological and genetic diversity; and
- h) perform such other functions as may be necessary to implement this legislation.

Article 7: Establishment of a National Information System

The State shall establish a National Information System with regard to biological resources which include the following aspects:

- a) the creation of facilities required to maintain and up-to-date system of information about the research and development activities on the biological resources of the country, and
- b) measures towards the repatriation of information on the country's traditional knowledge and technologies [related with biological diversity].

Article 8: Funding

The funds required to undertake activities towards implementing the provisions of this legislation shall be obtained through [budgetary allocation] [the establishment of a national trust funds] for which resources may include:

- a) allocation of state budget;
- b) a portion of the benefits shared by appropriate and concerned sectoral departments;
- c) incomes and fees imposed on access agreements; and
- d) any other source of funds be identified.

Article 9: Appeals

Decisions on approval, disapproval or cancellation of agreements regarding access to biological resources may be appealed through appropriate administrative channels.

Article 10: Sanctions and Penalties

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

- a) written warning;
- b) fines;
- c) confiscation of collected biological and genetic specimens and equipment;
- d) perpetual ban from access to biological resources in the country.

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

PANAMA

Response to Question 1: There have been no such examples.

Response to Question 2: Law No. 20 of June 26, 2000, regulated by Executive Decree No. 12 of March 20, 2001, entitled “Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples, for the Protection and Defense of their Cultural Identity and their Traditional Knowledge, and Other Provisions.”

Response to Question 3: It came into force on June 27, 2000, on being promulgated in Official Gazette No. 24,083.

Response to Question 4: Protection and defense of the collective intellectual property rights and the traditional knowledge of indigenous peoples in relation to their creations, such as inventions, models, drawings and designs, innovations contained in images, figures, symbols, graphics, petroglyphs and other material, in addition to the cultural elements of their history, music, art and traditional artistic expressions that are suitable for commercial use, afforded by means of a special system of registration, promotion and commercialization of their rights, with a view to enhancing the socio-cultural values of indigenous culture and doing social justice to those peoples.

2. The cultural heritage of indigenous peoples may not be the subject of any form of exclusive rights in favor of third parties not authorized under the intellectual property system, such as copyright, industrial design and trademark rights, and the rights in geographical indications and other subject matter, except where the application is made by the indigenous peoples themselves.

Response to Question 5: Yes. Among others: Law No. 35 of May 10, 1996 “Enacting Provisions on Industrial Property”; in its Article 14 it specifies that “The following (...) are not considered inventions for the purposes of this Law: (...) aesthetic creations and artistic or literary works.” Law No. 15 of August 8, 1994, on Copyright and Neighboring Rights, and Enacting Other Provisions, provides in its Article 3 that “The author is the original owner of the moral and economic rights in the work as recognized by this Law. In the absence of proof to the contrary, that person shall be presumed to be the author whose name, signature or identifying mark appears as such on the work.” Panamanian copyright law protects the unpublished works of authors who may be identified; however, the collective rights in the traditional knowledge of the indigenous and local communities of Panama are ancestral. Apart from that, traditional knowledge does not meet the novelty requirement required by the patent system and specified in Law No. 35.

Response to Question 6: Collective rights of indigenous peoples in their creations, traditional knowledge, cultural heritage, innovations and practices.

Response to Question 7: Collective indigenous rights: indigenous cultural and intellectual property rights that relate to art, music, literature, biological, medical and ecological knowledge and other subject matter and manifestations that have no known author or owner or date of origin, being the heritage of an entire indigenous people.

Comment: Work is currently proceeding on a draft law for the protection of the collective rights of local communities, which broadens the definition as follows: they are the

intellectual property rights of indigenous peoples and local communities the subject matter of which is art, music, literature, biological, medical and ecological knowledge, rituals, games, cultural expressions, traditional science and technology, gastronomy, cultural traditions, beliefs and other aspects of the cultural heritage that are not dissociable from the cultural identity of a whole community.

Response to Question 8: Indigenous peoples have developed knowledge that has been handed down and perpetuated throughout generations in Panama. That knowledge embodies an intellectual effort and is a contribution to society. It is well known to all that this scientific and biological knowledge, traditional medicine, art, culture, music, agriculture, traditional know-how and other subject matter of the cultural heritage is currently at risk of improper exploitation by persons and/or companies seeking to commercialize it, and that it is precisely that commercial exploitation based on it that is going to deter the creators of such knowledge and manifestations owing to the non-existence of national provisions with which to prevent it.

All this traditional knowledge constitutes the identity of an indigenous people. Panama is a signatory of the Convention on Biological Diversity, and as a Contracting Party is bound to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local peoples that contribute to traditional lifestyles. That was the motivation for the enactment of special legislation to protect the collective rights of those peoples, and thereby to promote the preservation of biological diversity and the sustainable use of biological resources. Finally, all that knowledge is in everyday use by indigenous peoples and local communities. The provisions on collective and certification marks contained in Law 35 of 1996, which require the inclusion with the application for registration of rules for the use of the traditional knowledge or cultural manifestation, will be applied.

Response to Question 9: Genetic resources.

Response to Question 10: Collective intellectual property rights of indigenous peoples.

Response to Question 11: Exclusive rights, with the proviso that they may be the subject of exclusive third-party rights where the request is filed by the indigenous peoples themselves.

Response to Question 12: Yes.

Response to Question 13: Where the rights have been granted on the basis of false or inaccurate information.

Response to Question 14: No.

(ii) As soon as registration of the collective rights has been granted by the Registry.

Response to Question 15: The Law provides that rights accorded previously under the relevant legislation shall be respected and shall not be affected.

Response to Question 16: The Traditional Indigenous Congress(es) or Authority (Authorities) of the indigenous peoples are entrusted with representing them and complying with the requirements laid down in the Regulations under the Law. The Regulations provide that there can be traditional knowledge of indigenous peoples in the form of creations shared between members of two or more communities, in which case the benefits accrue to both or all of them collectively.

Response to Question 17: Yes.

Response to Question 18: Yes. The Regulations under the Law provide that the collective rights of an indigenous people shall not prevent that people from continuing to exercise the rights within the indigenous community that holds the traditional knowledge, neither shall they affect the right of present and future generations to continue to make use of the collective knowledge and develop it.

Response to Question 19: Law No. 20 of June 26, 2001, provides that traditional indigenous knowledge (*Naöbe-Bugle*) is excluded from it when acquired by non-indigenous communities by operation of customary law but in respect of which those communities cannot claim the collective rights recognized by the said Law.

Response to Question 20: In cases not provided for in either customs legislation or industrial property legislation, infringements of the Law are punished with fines ranging from 1,000 to 5,000 dollars, depending on their seriousness. In the event of a repeat offense, the amount of the fine is doubled. The sanctions provided for in the Law are applied in addition to the seizure and destruction of the materials used to commit the infringement.

Response to Question 21: Appeals against registrations have to be filed in person with the representatives of the General Congresses or Traditional Indigenous Authorities. There is no evidence of appeals having been filed.

Response to Question 22: Under the Law and its Regulations, the owners of rights do have the right to assign their rights by licensing the use of registered collective rights. There is no provision for the grant of compulsory licenses.

Response to Question 23: Law 20 of 2001 sets up the Department of Collective Rights and Expressions of Folklore within the Industrial Property Registry of the Ministry of Commerce and Industries (MICI), through which the collective rights of indigenous peoples and local communities will be granted.

The foregoing was ratified by Resolution No. 3 of July 31, 2001, of the Ministry of Commerce and Industries, which brought about the creation of the Department.

Response to Question 24: Yes. Law No. 20 of 2001 provides that the provisions on collective and certification marks contained in Law No. 35 of 1996 shall be applicable in so far as they do not conflict with the rights provided for in Law No. 20 itself. The application for registration should (1) include rules of use, which, in addition to the identifying particulars of the applicant authorities, should specify the grounds on which use of the collective rights may be denied to a member of the indigenous people, and (2) include a favorable report by the competent administrative body on the rules of use.

Response to Question 25: Yes. No protocol.

As for what is to be protected, yes, because it does have to determine the subject matter for which protection is sought.

Response to Question 26: Law No. 20 itself helps the holders of traditional knowledge, as it provides that the services of an attorney are not required for dealings with DIGERPI.

No payment is required.

The Department of Collective Rights and Expressions of Folklore has the following functions among others: (a) promotion of the program for intellectual protection of traditional knowledge and expressions of folklore, and (b) technical support and training in the intellectual protection of traditional knowledge and expressions of folklore for the benefit of peoples possessing traditional knowledge and expressions of folklore.

Response to Question 27: Every indigenous people is governed by the Traditional Congresses or Authorities.

In the case of the Kuna people there are three districts created by law which are governed by Congresses:

Kuna Yala district
Madungandí district
Wargandí district

There is also a Kuna people known as Ta Kar Kun Yala, which lives in provincial lands.

It is important to point out that much of their traditional knowledge consists of shared creations, and it has been suggested that peoples of Kuna origin, on applying for registration, should file a resolution jointly with one of the Congresses representing them. That would be for just one of their creations that required urgent registration. In spite of all of them being available, they have failed to meet. There are a number of reasons for this, namely the fact that the areas are far from each other, that there is a lack of resources, that they all have other priorities and that they do not see clearly what advantages there could be for them. The Law applies only to the registration of the collective rights of indigenous peoples.

The submission of the Law Protecting the Collective Rights of Local Communities to the Legislative Assembly is awaited.

PAPUA NEW GUINEA

Response to Question 1: There is no legislation for the administration and protection of Traditional Knowledge. The present IP regime makes no express provision to protect Traditional Knowledge.

Response to Question 2: Although there is serious consideration for such at this stage, there is no *sui generis* law for the protection of Traditional Knowledge in place.

Response to Question 3: There is no *sui generis* law drafted up to now.

Response to Question 26: At this point in time – None.

PERU

Response to Question 2: There is no specific law providing for intellectual property protection of traditional knowledge but there is a draft that has been prepared with the participation of different institutions and individuals. This draft has been published in the Official Journal on August 31, 2000. An initial draft was published in the Official Journal on October 21, 1999. Important comments were received from different organizations and individuals such as professors, congressmen, indigenous peoples' representatives, NGOs, after the publication of the initial draft. The new draft has been prepared after careful consideration of the comments received to the initial draft.

The possibility of establishing *sui generis* protection for indigenous knowledge was first mentioned in the current Law on industrial property (article 63).

Response to Question 3: The draft is not yet in the process of legislative adoption.

Response to Question 4: The objectives stated in the draft are the following:

- a) to promote the respect, protection, preservation, broader application and development of the collective knowledge of the indigenous peoples;
- b) to promote a fair and equitable distribution of the benefits arising out of the utilization of this collective knowledge;
- c) to promote the utilization of this knowledge for the benefit of mankind.

Response to Question 5: Yes. Intellectual property protection was created in response to needs that are totally different than those of indigenous peoples. Its objectives are different as well. Last but not least, requirements for intellectual property protection are hardly applicable to traditional knowledge.

Response to Question 6: The term used is "collective knowledge of the indigenous peoples."

Response to Question 7: The "collective knowledge of the indigenous peoples" is the knowledge that has been developed by the indigenous peoples about properties, uses and characteristics of the biological diversity.

Response to Question 9: It is provided that the traditional exchange of collective knowledge between indigenous peoples should not be affected by these regulations.

Response to Question 10: Those who pretend to have access to the collective knowledge of the indigenous peoples with purposes of scientific, commercial, and industrial application will have to request of one or more indigenous communities who possess the collective knowledge in matter their prior informed consent. To have access to the knowledge with purposes of commercial and industrial application, a license must be signed. In these cases, an adequate retribution must be provided and an equitable distribution of the benefits must be guaranteed.

Response to Question 11: The rights granted are not exclusive. They are shared by the indigenous communities that possess a certain knowledge, which may make use of them with a certain independence (see answer to question 18).

The rights granted go beyond a remuneration.

Response to Question 12: Yes. If an indigenous community wishes to register its collective knowledge (which is not mandatory) or a licensing contract (which is not mandatory either), or if it wishes to bring action for infringement of its rights, must it comply with certain formalities. See articles 16, 17, 25, 26, 27, 45, 46 of the Draft.

Response to Question 13 to 15: No.

Response to Questions 16: Any indigenous community that possesses collective knowledge.

Response to Questions 17: Yes. One or more indigenous communities may give the prior informed consent (see answer to question 10).

Response to Questions 18: Yes. The indigenous community whose prior informed consent has been sought must inform that it is beginning a negotiation to the biggest number of indigenous communities that possess the collective knowledge at issue, and take into account their interests and concerns.

Response to Questions 19: Use for scientific purposes is allowed just with the prior informed consent of one or more indigenous communities. In this case, no license is required.

Response to Questions 20: Any indigenous community that possesses the collective knowledge may proceed against those who reveal, acquire or use such collective knowledge without the consent of at least one indigenous community that possesses the collective knowledge at issue. As a part of the procedure, cautionary measures may be ordered such as: the ceasing of the activities which are the matter of the action, the confiscation of the products developed using the traditional knowledge at issue, among others.

Response to Questions 21: Fines may be imposed as a penalty.

Response to Questions 22: Any indigenous community may conclude a licensing contract. There are no provisions on compulsory licenses.

Response to Questions 23: The competent authority established by the draft is the Patent Office, and the Intellectual Property Chamber of the Tribunal for Defense of Competition and Intellectual Property of INDECOPI (Peru's National Institute for Defense of Competition and Protection of Intellectual Property).

Response to Questions 24: Yes. The *sui generis* protection is independent from the one established in the legislation on intellectual property.

It is provided that if an application of a utility patent or a plant variety breeder's certificate, related to products or processes obtained or developed from a collective knowledge, is filed, the applicant must present a copy of the contract of license, as a previous requirement for the concession of the respective right, unless it is a collective knowledge which is of public domain. The breach of this obligation will cause the denial or, be it the case, nullity of the utility patent or the plant variety breeder's certificate in question.

Response to Questions 25: Yes. It is provided that indigenous peoples may use their customary laws and traditional ways of resolution of conflicts to solve their disagreements. It is also provided that indigenous peoples may choose their representatives using their traditional systems of adoption of decisions. Members of the Administrative Committee of the

Fund for the Development of the indigenous peoples are encouraged to use the mechanisms that are traditionally used by the indigenous peoples for sharing and distributing collectively generated benefits.

Response to Questions 26: It is provided that to facilitate the registration of the collective knowledge of the indigenous peoples (which is not mandatory), the competent authority may send representatives to the indigenous peoples places of origin in order to gather the necessary information.

PHILIPPINES

Response to Question 1: None.

Response to Question 2:

1. Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)

AN ACT TO RECOGNIZE, PROTECT AND PROMOTE THE RIGHTS OF INDIGENOUS CULTURAL COMMUNITIES/INDIGENOUS PEOPLES, CREATING A NATIONAL COMMISSION ON INDIGENOUS PEOPLES, ESTABLISHING IMPLEMENTING MECHANISMS, APPROPRIATING FUNDS THEREFOR, AND FOR OTHER PURPOSES

2. NCIP Administrative Order No. 01-98

RULES AND REGULATIONS IMPLEMENTING REPUBLIC ACT NO. 8371, OTHERWISE KNOWN AS "THE INDIGENOUS PEOPLES RIGHTS ACT OF 1997"

3. Senate Bill No. 101

Draft Only: AN ACT PROVIDING FOR THE ESTABLISHMENT OF A SYSTEM OF COMMUNITY INTELLECTUAL RIGHTS PROTECTION

Response to Question 3:

1. Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997) took effect on November 23, 1997.
2. NCIP Administrative Order No. 01-98 (Rules and Regulations Implementing Republic Act No. 8371) took effect on June 30, 1998.
3. Senate Bill No. 101 – The draft bill is in the initial stage only, thus the scope, complexion and contents of the bill may change in the future.

Response to Question 4:

1. Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)
 - 1.1 To recognize, respect and protect the rights of indigenous cultural communities and indigenous peoples;⁷
 - 1.2 To guarantee respect for their cultural integrity and to ensure that members of the indigenous cultural communities and indigenous peoples benefit on equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.⁸
2. NCIP Administrative Order No. 01-98 (Rules and Regulations Implementing Republic Act No. 8371).
 - 2.1 To prescribe the procedures and guidelines for the implementation of Republic Act No. 8371 to facilitate compliance therewith and compliance thereof.⁹

⁷ Rep. Act No. 8371, Sec.2 (c).

⁸ Rep. Act No. 8371, Sec.2 (e).

⁹ NCIP Administrative Order No. 01-98 (1998), Rule 1, Sec. 2.

- 2.2 To recognize and promote all individual and collective rights of indigenous cultural communities and indigenous peoples within the framework of national unity and development.¹⁰

Response to Question 5: It is the policy of the State to foster the preservation, enrichment, and dynamic evolution of a Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression.¹¹

The State shall also recognize, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.¹²

Response to Question 6: Cultural Integrity.¹³

Response to Question 7: Cultural integrity shall refer to the holistic and integrated adherence of a particular indigenous cultural communities/indigenous peoples community to their customs, religious beliefs, traditions, indigenous knowledge systems and practices, and their rights to assert their character and identity as peoples.¹⁴

Response to Question 8: The rights of indigenous peoples to cultural integrity shall include community intellectual property rights.¹⁵

The protection of community intellectual property shall include science and technology including but not limited to, human and other genetic resources, seeds, medicines, health practices, vital medicinal plants, animals, minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of flora and fauna, and scientific discoveries.¹⁶

Indigenous knowledge systems and practices (IKSP) are systems, institutions, mechanisms, technologies comprising a unique body of knowledge evolved through time embodying patterns and relationships between and among peoples and between peoples, their lands and resource environment, including such spheres of relationships which may include social, political, cultural, economic, religious, and which are the direct outcome of the indigenous peoples responses to certain needs consisting of adaptive mechanisms which have allowed indigenous peoples to survive and thrive within their given socio-cultural and biophysical conditions.¹⁷

Response to Question 9: None.

Response to Question 10 and 11: Indigenous peoples/indigenous communities (IP's/IC's) are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and

¹⁰ NCIP Administrative Order No. 01-98 (1998), Rule 1, Sec. 3.

¹¹ Constitution (1987), Art. XIV, Sec. 14.

¹² Constitution (1987), Art. XIV, Sec. 17.

¹³ Rep. Act No. 8371, Chapter VI, Sec. 29 & NCIP Administrative Order No. 01-98, Rule I, Sec. 4(c).

¹⁴ NCIP Administrative Order No. 01-98, Rule VI, Sec. 2.

¹⁵ NCIP Administrative Order No. 01-98, Rule VI, Sec. 3(e).

¹⁶ NCIP Administrative Order No. 01-98, Rule VI, Sec. 10(b).

¹⁷ NCIP Administrative Order No. 01-98, Rule VI, Sec. 14.

protect their sciences, technologies and cultural manifestations, including indigenous knowledge systems and practices.¹⁸

The IP's/IC's shall, within their communities, determine for themselves policies, development programs, projects and plans to meet their identified priority needs and concerns. The IP's/IC's shall have the right to accept or reject a certain development intervention in their particular communities.¹⁹

Policies, programs, projects, plans and activities subject to Free and Prior Informed Consent shall include but not limited to the research in indigenous knowledge, systems and practices related to agriculture, forestry, watershed and resource management systems and technologies, medical and scientific concerns.²⁰

The IP's/IC's shall have the right to regulate the entry of researchers into their ancestral domains/lands or territories. A written agreement shall be entered into with the IP's/IC's concerned. All data provided by the indigenous peoples shall be acknowledged in whatever writings, publications, or journals authored or produced as a result of such research. The indigenous peoples will be definitively named as sources in all such papers and shall be provided copies of the outputs.

shall be entitled to royalty from the income derived from any of the researches conducted and resulting publications.²¹

Response to Question 12: Yes.

Response to Question 13: No.

Response to Question 14 and 15: No.

Response to Question 16: The indigenous peoples and indigenous cultural communities

Response to Question 17: Yes. The indigenous cultural community concerned shall have the right to accept or reject a certain development intervention in their particular community.²²

Response to Question 18: Yes. The required Free and Prior Informed Consent shall depend upon the impact of the proposed policy, program and plans. When the policy, program or project affects a whole range of territories covering two or more ancestral domains, the consent of all affected indigenous cultural communities and indigenous peoples shall be secured.²³

The consensus building process of each particular indigenous cultural community shall be adhered to in securing their Free and Prior Informed Consent.²⁴

Response to Question 19: None.

¹⁸ Rep. Act No. 8371, Sec. 34.

¹⁹ NCIP Administrative Order No. 01-98, Rule IV, Sec. 3.

²⁰ NCIP Administrative Order No. 01-98, Rule IV, Sec. 7.

²¹ NCIP Administrative Order No. 01-98, Rule VI, Sec. 15.

²² NCIP Administrative Order No. 01-98, Rule IV, Sec. 3.

²³ NCIP Administrative Order No. 01-98, Rule IV, Sec. 4.

²⁴ NCIP Administrative Order No. 01-98, Rule IV, Sec. 5.

Response to Question 20: Appropriate legal actions may be instituted in the National Commission for Indigenous Peoples (NCIP) for any violation of the Indigenous Peoples Rights Act and the Rules and Regulations thereunder.

Response to Question 21: The NCIP shall have jurisdiction over all claims and disputes involving the rights of indigenous peoples and indigenous cultural communities provided, however, that no such dispute should be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws. The NCIP shall issue a writ of execution requiring the sheriff or proper officer to execute the final decisions.²⁵

The NCIP shall also have the power to hold any person in contempt, directly or indirectly, and impose appropriate penalties therefore.²⁶

The NCIP shall also enjoin any or all acts involving or arising from any case pending before it which, if not restrained forthwith, may cause grave or irreparable damage to any of the parties to the case or seriously affect social or economic activity.²⁷

Any person who commits violation of any of the provisions of Republic Act No. 8371 and its Implementing Rules and Regulations shall be punished in accordance with customary laws of the indigenous peoples and indigenous cultural communities concerned without prejudice to the right of the indigenous peoples and indigenous cultural communities concerned to avail of the protection of existing laws, which provide penalties of imprisonment ranging from nine (9) months to twelve (12) years and/or a fine of not less than ONE HUNDRED THOUSAND PESOS (P100,000.00) nor more than FIVE HUNDRED THOUSAND PESOS (P500,000.00).²⁸

Response to Question 22: No.

Response to Question 23: Yes. The NCIP is the primary government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-being of the indigenous peoples and indigenous cultural communities and the recognition of their ancestral domains as well as rights thereto.²⁹

Response to Question 24: No.

Response to Question 25: Yes. When disputes involve indigenous cultural communities and indigenous peoples, customary laws and practices shall be used to resolve the dispute.³⁰

Response to Question 26: The Office of Empowerment and Human Rights of the NCIP shall ensure that indigenous socio-political, cultural and economic rights are respected and recognized. It shall ensure that capacity building mechanisms are instituted and ICCs/IPs are afforded every opportunity, if they so choose, to participate in all levels of decision-making.

²⁵ Rep. Act No. 8371, Sec. 66.

²⁶ Rep. Act No. 8371, Sec. 69 (b).

²⁷ Rep. Act No. 8371, Sec. 69 (c).

²⁸ Rep. Act No. 8371, Sec. 72.

²⁹ Republic Act No. 8371, Sec. 38.

³⁰ Rep. Act No. 8371, Sec. 65.

It shall likewise ensure that the basic human rights, and such other rights as the NCIP may determine, subject to existing laws, rules and regulations, are protected and promoted.³¹

The Legal Affairs Office of the NCIP shall provide legal assistance in litigation involving community interest. The NCIP also has field offices in provinces of indigenous peoples and indigenous cultural communities.³²

Response to Question 27: The National Commission on Indigenous Peoples (NCIP) is a relatively new office, which is developing and formulating the specific parameters and mechanisms to effectively provide adequate protection to indigenous peoples.

The current IP system recognizes works with identifiable author. We have an experience in which the UNESCO has recognized the Ifugao epic “Hudhud” as a masterpiece of the oral and intangible heritage of humanity. The Hudhud epic is the only Southeast Asian cultural piece selected in the UNESCO list. However, before the epic became an official entry/nomination of the epic, the UNESCO required a certification of a competent authority, which will give permission to the entry or nomination. As our existing laws do not identify competent authority, a political authority (local executive) was instead identified who endorsed the entry.

³¹ Rep. Act No. 8371, Sec. 46 (e)

³² Rep. Act No. 8371, Sec. 46 (g).

PORTUGAL

In his letter of November 22, 2001, to the Secretariat of the World Intellectual Property Organization (WIPO), the Chairman of the Board of Directors of the National Institute of Intellectual Property passed on the following comments made to the Ministry of Economy:

“In view of the fact that ‘Industrial property has the social function of guaranteeing fair competition by conferring (...) private rights (...), as well as to prevent unfair competition’ (Article 1 of the Industrial Property Code (CPI), approved by Decree-Law No. 16/95 of January 24, 1995), the various forms of intellectual property in general, and individual or collective marks, appellations of origin and geographical indications in particular, play an important role in the absence of any specific legislation on the subject, apart from which there is copyright, whose protection in Portugal is the responsibility of a body other than the National Institute of Industrial Property.

“It should therefore be pointed out, in the case of trademarks, that the protection granted has nothing to do with the product itself. It is a form of indirect protection of the subject matter which for the most part seeks to avoid or prevent the registration of marks or ‘distinctive signs’ that relate to the designation of the ‘traditional knowledge’ concerned.

“A more elaborate form of protection may be found in collective marks (CPI Article 172), association marks (CPI Article 173) and certification marks (CPI Article 174), all of which may consist of signs or designations used commercially to designate the geographical origin of the goods or services concerned, particularly where the ‘producers’ of a piece of traditional knowledge in a given locality or region intend to form a group or come to an agreement to certify that knowledge.

“In Portugal for instance it should be pointed out that the Association of Producers of Arraiolos Carpets are the holders of a registered association mark for their product.

“However, traditional knowledge has an even more effective and more direct form of protection available in the institution of appellations of origin and geographical indications.

“Appellation of origin means the name of a region or a specific locality, or in exceptional cases a country, used to designate or identify a product whose quality or characteristics are essentially or exclusively due to the geographical environment, including natural and human factors, and the production, transformation and development of which are carried out in the demarcated geographical area (CPI Article 249(1)). In Portugal, rights of this kind protect the wines of Oporto and Madeira, the cheeses of Serpa or Azeitão, in other words essentially agricultural products which draw on the natural environment (the specific properties of the soil or climate, for instance), and also on the human environment, for their specific character.

“Where the natural factor is not the determining factor but the product has a reputation, specific quality or other characteristics that can be attributed to that geographical origin, or where the production, transformation or development is carried out in the demarcated geographical area, protection has to be provided by way of a geographical indication (CPI Article 249(3)).

“At the same time attention has to be drawn to the fact that Portuguese legislation, like that of all Member States of the European Union owing to the issue of Directive 98/71/EC of the European Parliament and Council which took place on October 13, 1998, is going to consider the possibility of registering handicraft as a design (Article 1 of the Directive). However, for protection to be obtained for craft products and indeed for all industrial products, those products have first to be new and individual in character (Article 3).

“There are a number of products in Portugal that belong to our cultural heritage but which, for want of novelty, cannot be given design protection, in spite of some of them being already considered handicraft.

“A new Industrial Property Code is in the process of being completed within the Assembly of the Portuguese Republic; it introduces a new regime for designs and will lay down new conditions for the protection of handicraft.

“The appellation of origin and geographical indication, once registered, become the common property of those persons who have their residence or headquarters in the locality, region or territory, and give them the right to prohibit third-party use, in the designation or presentation of a product, of any sort of indication or suggestion that indicates or suggests that the product in question originates in a geographical region other than its true place of origin, or to proceed against any act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (CPI Article 251).

QATAR

In a letter sent to the Secretariat of the World Intellectual Property Organization on February 26, 2002, the Director of the Copyright Office, Ministry of Economy and Trade of the State of Qatar submitted the following comments:

The State of Qatar has not yet enacted a law or regulations dealing specifically with the protection of traditional knowledge.

However, please note that the Qatar Copyright Law, No. 25 of 1995, in Article 39, provides for the protection of folklore matters, please find attached copies of the Article for your perusal.

Article 39

The national folklore shall be considered part of the public domain. The State, acting through the Ministry, shall endeavor to protect the national folklore by all legal means and methods, and shall exercise the authors' rights in works of folklore to protect them against mutilation, alteration or commercial exploitation. The import and distribution of copies of works of folklore, or copies of translations of works of national folklore and similar material produced abroad, shall be prohibited unless it has been authorized by the ministry.

ROMANIA

Response to Question 1: Law no. 84/1998 on trademarks and geographical indications defines in Article 3 f the geographical indication as “the name serving to identify a product that originates in a country, region or locality of a State in those cases where a certain quality, reputation or other specific characteristic may be essentially attributed to that geographical origin.” As stated by the Law the persons authorized by OSIM to use a geographic indication for wines or spirits may prohibit the use of such indication by any other person for wines and spirits that do not come from the region suggested by the geographical indication concerned, even where the true origin of the product is expressly mentioned or the geographical indication is used in a translated form or accompanied by terms such as “kind”, “type”, etc.

Response to Question 2: There are no special provisions regarding the protection of Traditional Knowledge through intellectual property.

Response to Question 3: Up to the present we do not have a legal norm or a project.

RUSSIAN FEDERATION

Response to Question 1: Subjects characterized by the general term “traditional knowledge” cover a broad spectrum of concepts and knowledge of popular medicine and recipes, as well as rituals, knowledge of agriculture, ecology and land use. Many of the subjects are protected within the framework of the intellectual property standards existing in the Russian Federation. As examples, patents may be cited which have been granted for inventions based on traditional knowledge in accordance with the Patent Law of the Russian Federation:

RU 2 137 491 C1 “Diabetic mix”

RU 2 034 542 C1 “Immunomodulation device”

RU 2 102 078 C1 “Means for invigorating the human organism”

RU 2 102 078 C1 “Means for acting on acupuncture points for correcting the functional, psychological and emotional condition of an individual”

RU 2 033 798 C1 “Means for apitherapy and apiculture preventive treatment”

Response to Question 2: Such laws and rules do not exist in the Russian Federation.

Response to Question 6: Popular medicine (as one of the aspects of the subject under consideration)

Response to Question 26: Laws of the Russian Federation on:

1. “Guarantees of the Rights of Indigenous Peoples and Minorities of the Russian Federation” of April 30, 1999 (No. 82-F3);
2. “General Principles of Organization of Communities of Indigenous Peoples and Minorities of the North, Siberia and the Far East of the Russian Federation” of July 20, 2000 (No. 104-F3);
3. “National and Cultural Autonomy” of June 17, 1996 (No.74-F3);
4. “The Animal World” of April 24, 1995 (No. 52-F3);
5. “Selection Achievements” of August 6, 1993 (No. 5605-1).

Response to Question 27: The application of existing intellectual property laws to traditional knowledge to traditional knowledge is limited by the following:

- the existence of requirements for compliance with the criteria of “novelty” and “inventive step”;
- a limited period of protection.

Compliance with these requirements contradicts the definition of “traditional knowledge.”

SAMOA

Response to Question 1: Samoa's Copyright Act 1998, The Patent Act 1972 and the Trademarks Act 1972 are the intellectual property laws currently enforced in Samoa. They do not have provisions to protect the traditional knowledge. The Copyright Act 1992 however, contains certain provisions on protection of moral rights and performers rights. These could be used to protect traditional knowledge such as cultural activities on dances, tattooing etc. being fixated on videotapes only to the extent that there is an infringement on the right of the registered author. The traditional knowledge holders may only claim royalties if they happen to be the performers of the traditional knowledge that was demonstrated and fixated on video. They may claim on the right of performers protected under the Copyright Act 1998, but this is a course of action that is rarely pursued.

The Village Fono Act 1990 provides for an institutional structure within the Village communities called "Village Fono" (Village Council", which is a traditional authority of government comprised of traditional chiefs ("matai"). They formulate customary village laws and enforce punishments according to village customs and usage. They also make rules, which govern the development and use of village land (including the rivers, springs and trees thereon) for the economic betterment of the village. The Village Fono Act 1990 indirectly yet effectively protects Samoa's traditional form of governance, customary laws and traditional forms of punishments. The Act primarily gives legal recognition to the Village Fono as the law making body for the village in incidental matters. It enacts laws and penalties/punishments in accordance with the village custom and usage. The implementation of this Act by the Village Fono not only preserves the traditional form of government in Samoa (Village Fono), it also preserves traditional knowledge in customary laws and traditional punishments, thus protecting them from eroding.

Response to Question 2 to 26: Not applicable. Samoa has no *sui generis* legislation concerning intellectual property rights.

Response to Question 27:

Communal/Collective Rights.

The right of the author to recognition of his authorship of the work is ultimately pointed to a single entity or a specific person. Exclusive monopoly is a qualifying factor to meet patenting criteria. The knowledge that is currently possessed by the people of Samoa has been developed and refined throughout history and it is the social manifestation of the work of several generations. They are community based. Any enforcement of the intellectual property protection of traditional knowledge would have to take into account the communal or collective rights of the people to that knowledge.

The resources that possess great economic and social usefulness are located on land since time immemorial occupied by various "aiga" (extended family/families). Their right over the communal customary land also extends to the right to the plants and the animals that go with the land. It also happens that the Samoan people already possess some knowledge on the medicinal and social value of these plants, which could be patented. All these are interwoven into Samoans everyday lives and have also become an integral factor of identity.

The Intellectual Property Rights (IPRs) however refer to a group of laws (patent, copyrights, trademarks etc.), which grant legal protection to whomever create new ideas or knowledge. The requirements for IPRs are consistency, novelty and creativity, thus

removing communal benefit. Any implementation of the IPRs removes traditional practices and lifestyles of the Samoan people accordingly. It offers neither right nor protection to the Samoan people.

SINGAPORE

Response to Question 1: Information not available.

Response to Question 2: None available.

Response to Questions 3 to 26: See response 2.

Response to Question 27: We have identified a few perceived limitations as follows:

1. Subject matter to be protected?
Traditional knowledge is itself, something that is difficult to quantify or define. This being the case, it would be difficult to assign a proprietary right to Traditional Knowledge.
2. Who do we attribute the Right (if any) to?
Traditional knowledge refers to a wide spectrum of knowledge transmitted from one generation to another, from one culture to another. Given that this knowledge is an evolving one and not a stagnant, quantifiable and definable base of knowledge, it will be difficult to attribute the knowledge to any particular group of people or place. To that extent, any IPR protection for traditional knowledge which signifies a degree of monopoly confined to the right holder is difficult in practice and thus cannot achieve the objective of safeguarding the rights of attribution.
3. Period of protection accorded to the Right (if any)?
If traditional knowledge is seen as an IPR right that can be obtained, for how long should this protection last? Further, during the term of protection, who would be responsible for maintaining and enforcing the Right?
4. "Use" of traditional knowledge
Further, by its very nature, traditional knowledge is knowledge in the "public domain", albeit that it may be the public domain of a certain sector of culture, place or people. How then does one determine bad faith use, misappropriation or unfair competition? The objective of IPR protection is also to encourage new intellectual creations or the disclosure of intellectual creations. It is difficult to see how this applies to traditional knowledge since traditional knowledge is knowledge that already exists and known, even if it may be that in certain cases, the knowledge is restricted to a particular sector of people or place.
5. What kind of proprietary Right do we wish to attribute to Traditional Knowledge?
The current IP standards e.g. Copyrights (original works), Patents (novelty), Trade Marks (distinctive) can be seen to protect information either by using-
 - a) inclusionary means e.g. by giving rights people claiming protection over something that is new, original etc. Since traditional knowledge is not new, this means would not be appropriate; or
 - b) exclusionary means e.g. by preventing people from claiming rights to information that is not new, original etc. Preventing people from claiming such rights over traditional knowledge in theory could apply. However, in practice, due to the ambiguity (e.g. ownership, lack of proper documentation) that lies in traditional knowledge, preventing or challenging such claims has proven to be difficult and expensive in practice.

SOLOMON ISLANDS

Response to Question 1: Prior to 1987, Solomon Islands has been relying on the UK Intellectual Property laws. In 1987, Solomon Islands enacted the 1987 Copyright Act. Besides that the Research Act 1982 and the War Relics Acts 1980 were also enacted.

Since coming into force no registration has yet been done under the Copyrights Act for traditional knowledge. According to the Registration Generals Office, they are not yet ready to register anything under the Act. Efforts are however on the way to prepare for registration.

Response to Question 2: Just like most of the other Pacific Island States, Solomon Islands is still waiting for the finalization of the model law discussed and prepared to be adopted by all interested Pacific Island States.

Response to Question 3: About the beginning of 2001, all Trade Ministers of the Pacific Islands met in Western Samoa. The draft law was supposed to be finalized and adopted there. Since our office did not attend due to financial difficulties, we do not know what happened. We can confirm however that there is no such law on the pipe line for purposes of enactment / adoption into our national laws.

Response to Question 4: The Draft Model Law for Pacific Islands States discussed in New Caledonia in February 2001 has the following as objectives. Nothing important was altered then ;

- a) To encourage acceptable uses of Pacific Islanders' Knowledge and Expressions of Culture.
- b) To incorporate customary laws and practices for the protection of Traditional Knowledge and Expressions of Culture.
- c) To protect integrity of Pacific Islanders
- d) To prevent use of Traditional Knowledge and Expressions of Culture that are offensive to Pacific Islanders.
- d) To secure a financial return to Pacific Islanders for the use of traditional Knowledge and Expressions of Culture.

Response to Question 5: Yes. In brief it is felt that the Western laws dealing with Intellectual Property cannot adequately deal with traditional knowledge and Expressions of Culture. It is felt that the Western laws are geared more towards the protection of individual rights than collective rights as which is the case with a lot of the Pacific Islands Traditional Knowledge and Cultural Expressions.

Response to Question 8: Parts III to V of the Draft Law discussed in February 2001 contains the mechanisms to be put in place for purposes of administering and controlling registration and so on of traditional rights and Expressions of Culture. Criteria will be set down by the Board.

Response to Question 9: I think it will depend on each state to decide on which subject matters should be excluded. In the Solomon Islands, the cultures are diverse with different perspective on traditional rights. Hence proper analysis needs to be done before a general position is put into law. Article 30 of the draft legislation of February 2001 however prohibits the use of sacred sites.

Response to Question 10: To be decided by each state and the Administrative body.

Response to Question 11: As the rights to traditional knowledge and expressions of culture are collectively owned it is not possible to grant them to an individual exclusively.

The proposed law therefore intends to retain ownership of rights with its traditional owners but grant to interested persons right to use.

Response to Question 12: No. The details of the draft model law on this issues are yet to be finalized.

Response to Question 16: All customary owners of Traditional knowledge and Expressions of Culture.

Response to Question 17: Yes. The traditional Rights are owned collectively since they can be acquired by groups in [owing group] or outside or individuals with inside or outside.

Response to Question 18: Yes. I suppose its the role of the Administration body to decide.

Response to Question 23: As mentioned earlier the law will be enacted by the States but there will be an Administration body in place.

Response to Question 24: Yes. There is a provision which says that the law is in addition to existing IP laws.

Response to Question 25: Yes. Specifics will be considered when the Solomon Islands considers the draft law under local circumstances.

Response to Question 26: Until the adoption of the Model Law constantly referred Solomon Islands presently has no special measures to assist. As mentioned earlier the present regime is Western oriented hence it is also questionable whether it will work. Solomon Islands Copy Right is also an adjusted version of those abroad

Response to Question 27: While it would be best that we wait until the incorporation of the proposed law as for as Solomon Islands is concerned the Standardization of standards will be a problem due to the fact that our cultural practices and customs differ from place to place.

SWEDEN

Response to Question 1: As far as we know, case-studies regarding the use of intellectual property rights (IPRs) to protect traditional knowledge (TK) have not been made. In the lack of such studies there is further no collected or structured information on the use of IPRs in this field. Although such examples could exist, we are thus not able to provide any actual examples.

Response to Question 2: There is no specific law providing for intellectual property protection of traditional knowledge (TK). This is the case as far as no law could be described as particularly aiming at the protection of private property rights covering the intellectual contribution in traditional knowledge and conferring exclusive rights to control the commercial exploitation of that intellectual contribution and safeguard the integrity of and attributions to works.

However, it should be mentioned that the Swedish Constitution (The Instrument of Government, Chapter 1 Section 20) provides for certain legislation regarding the right of the Sami to reindeer husbandry. Existing legislation in this respect is the Reindeer Husbandry Act (Rennäringslagen [1971:437]), which states the sole right for the Sami to reindeer husbandry within certain geographical areas. The character of the reindeer husbandry right could be described as mainly economic and not specifically focused on intellectual property related issues. Due to this there will be no further answers given to the questions in Part II, but rather some general information on the reindeer husbandry Act in the following. A copy of translated parts of the act will also be submitted.

The Reindeer Husbandry Act came into force 1971 and replaced earlier legislation, which also stated the sole right for the Sami to reindeer husbandry within certain geographical areas.

The main purpose of the act is the sole right of the Sami to reindeer husbandry within certain geographical areas.

According to the act, Section 1, first paragraph, a person who is of Sami descent has the right to use land and water for his own maintenance and that of his reindeer. According to the second paragraph of the same Section the right mentioned belongs to the Sami population and is based on immemorial usage. Further, according to the third paragraph of Section 1 the reindeer husbandry right is exclusive for the members of Sami villages.

The law contains provisions regarding inter alia geographical areas and annual periods of reindeer husbandry, membership of Sami villages, the exercise of reindeer husbandry, exhaustion of the right, financial relations, governing procedures and concession of the right.

The act is currently being analyzed with the purpose of modification and modernization.

Response to Question 26: No.

Response to Question 27: Unfortunately, for the time being, we have no information or comments in this respect.

SWITZERLAND

Response to Question 1: We are unable to provide information on actual examples in which existing intellectual property standards have been or are being used in Switzerland to protect traditional knowledge.

It should be borne in mind, however, that all forms of intellectual property rights available under Swiss law are also available for the protection of traditional knowledge. Therefore, any holder of traditional knowledge wishing to avail himself of intellectual property protection in Switzerland is able to do so, as long as the applicable criteria of protection are met.

Response to Question 2: In Switzerland, there is no specific (*sui generis*) law providing for intellectual property protection of traditional knowledge.

Response to Questions 3 to 25: See reply to question 2 above.

Response to Question 26: In Switzerland, there are no special measures to assist the traditional knowledge holders to acquire, exercise, manage and enforce rights in traditional knowledge.

Response to Question 27: As we have no practical or empirical information available that is based on actual examples, we are unable to provide general information or comments on perceived limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge.

TANZANIA, UNITED REPUBLIC OF

RESPONSE TO QUESTION 1: In an letter dated September 26, 2001, to the Secretariat of the World Intellectual Property Organization (WIPO), the Muhimbili University College of Health Sciences, Institute of Traditional Medicine advised as follows with regards to Question 26 of the Survey:

“While the law and the regulation on protection of IP for IK is not in place, the Institute of Traditional Medicine (ITM) is developing a Memorandum of Understanding (MoU) and Material Transfer Agreement (MTA) to safeguard the IP for IK of the stakeholders, particularly the Traditional Health Practitioners and the Community. The Ministry of Health is also in the process of formulating a legislation on Traditional and Alternative Health Practice which includes the protection of IP for Indigenous Knowledge.”

TOGO

Response to Question 1:

1. Law No. 91-12 of June 10, 1991, on the Protection of Copyright, Folklore and Neighboring Rights.

Chapter II: Works of National Folklore: Articles 66-72.

2. Agreement on the Revision of the Bangui Agreement of March 2, 1977, Establishing an African Intellectual Property Organization.

Annex VII: Literary and Artistic Property.

Chapter I:

Articles 67 and 68.

Response to Question 2: No *sui generis* legislative texts on the protection of traditional knowledge.

Response to Questions 3-13: Not applicable.

Response to Question 14: No.

Response to Questions 15 and 16: Not applicable.

Response to Questions 17 and 18: Not applicable.

Response to Questions 19 to 23: Not applicable.

Response to Questions 24 and 25: Not applicable.

Response to Questions 26 and 27: None.

TONGA, KINGDOM OF

In a letter dated October 24, 2001, to the Secretariat of the World Intellectual Property Organization (WIPO), the Deputy Registrar of the Intellectual property & Company Registration Unit, Ministry of Labor, Commerce & Industries in the Kingdom of Tonga advised as follows:

“Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge.

...

The information required by the Survey are not applicable to Tonga, since there is no formal means of protection exist now. Geographical names, Tongan phrases, traditional designs, etc, can however be considered under *the “Industrial Property Act 1994”*, although they are not specifically indicated in it. Various Groups in the society have voiced out the need to protect the traditional knowledge, traditional medicine, plant variety, etc. that are peculiar to Tonga. This is still under due consideration.”

TRINIDAD & TOBAGO, REPUBLIC OF

In a letter dated September 17, 2001, to the Secretariat of the World Intellectual Property Organization (WIPO), the Controller of the Intellectual property Office, at the Ministry of the Attorney General and Legal Affairs, in Port of Spain advised as follows:

“Re: The Second Session Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

I refer to the above subject and enclose for you a completed questionnaire. This was very easy to complete because unfortunately no legislation exists in Trinidad and Tobago to protect Traditional Knowledge and Folklore. When the Copyright Act, 1997 was drafted several provisions were included to protect our traditional knowledge and folklore. The Honorable Minister then took a decision to remove all the said provisions and work with the International Community to create an International Instrument to protect Traditional Knowledge and Folklore. Legislation will then be developed based on the outcome of that said Instrument.

A case study was done by WIPO. (Copy of the said report is attached for ease of reference). A regional seminar is scheduled to take place in February, 2002 in Trinidad and Tobago to continue to encourage these discussions with the hope that Member States will come closer to an agreement on the provisions of an International Instrument to protect Traditional Knowledge and Folklore.”

[The Case Study Referred to has been published in the Final Report of the WIPO Fact-Finding Missions on Intellectual Property and Traditional Knowledge].

TURKEY, REPUBLIC OF

Response to Question 1: There is no special legislation for the protection of traditional knowledge in Turkey. However, there are some national regulations that cover protection of some traditional knowledge elements. The first one is the Decree Law Pertaining to the Protection of Geographical Indications (No. 555, Year 1995) and its Implementing Regulations (Appendix 1 and 2). Some examples of traditional knowledge elements protected in this scope are agricultural products, foodstuffs and handicrafts. Other national regulations that may be related with the protection of traditional knowledge are: Law on the Protection of Cultural and Natural Assets (No: 2863, year 1983); Law for Registration, Control and Certification of Seeds (No: 308, Year 1963) and its Implementing Regulation for Plant Variety Registration (year 1997).

In addition to these, Turkey is a party to the following international treaties and processes: Bern Convention for the Protection of Literary and Artistic Works (since 1995); International Labour Organization (since 1946); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (since 1981); UNESCO Convention for the Protection of the World Cultural and Natural Heritage (since 1983); International Undertaking of Plant Genetic Resources (since 1984); UN Food and Agriculture Organization (since 1948); Convention of Biological Diversity (since 1996); Agenda 21 (since 1997); UN Convention to Combat Desertification (since 1998).

Response to Questions 2 to 27: Not applicable.

TUVALU

Response to Questions 1 and 2: None.

Response to Question 27: IP is a new idea for Tuvaluans. Not many people are aware that certain TK may be protected. It's an area the Government is looking into.

UNITED STATES OF AMERICA

Response to Question 1: The United States does not have intellectual property laws that provide protection specifically for “traditional knowledge”. This does not mean that existing intellectual property laws do not afford protection for traditional knowledge. U.S. laws can provide a means to protect traditional knowledge and also to prevent others from obtaining intellectual property rights based on such knowledge.

First, state trade secret laws may afford protection for traditional knowledge in certain circumstances. For those individuals, organizations and communities that take steps to maintain traditional knowledge confidential, state trade secret laws may apply. In most states, the trade secret law protects a formula, idea, process, compilation of information or other information that: (1) has actual or potential economic value; (2) is generally known or readily ascertainable; and (3) is treated by the party in control of the information in a way that can reasonably be expected to prevent the public from learning about it, absent improper acquisition or theft. When determining whether information qualifies as a trade secret under this definition, courts typically consider the following:

- the extent to which the information is known by others besides those in control of the information
- the extent to which the information is known by those within the owning entity and the measures taken to prevent broader disclosure
- the extent to which measures have been taken to keep the information secret
- the value of the information to the owning entity, and
- how difficult it would be for others to properly acquire or independently duplicate the information.

Although trade secret laws are commonly thought of in the context of business secrets, they may serve as well to protect traditional knowledge if the holders have sought to keep it a secret from others. Courts have repeatedly enforced trade secret laws, and many businesses rely on this protection. We are unaware of Native Americans bringing cases in U.S. courts under state trade secret laws, though clearly some are aware of this protection. At the same time we are unaware of breaches of confidentiality incurred by Native Americans who have sought to keep their traditional knowledge secret and have had outsiders acquire and exploit such information.

Notwithstanding the standards of trade secret law, U.S. patent law requires that an invention be novel and non-obvious in order to be patentable. Thus, if traditional knowledge is considered “prior art” – even if the patent applicant did not rely on it - then no patent may issue; if a patent had been issued, that patent may be revoked. The case of the revocation of a patent claiming wound-healing properties of turmeric following a showing that written accounts of traditional uses of the wound-healing properties of tumeric in India constituted prior art under U.S. law, demonstrates that this protection can work.

Finally, with respect to U.S. Government bioexploration agreements, traditional knowledge identified under the terms of the National Institutes of Health/National Cancer Institute’s Letters of Collection, *inter alia*, keeps the knowledge of medicinal use of organisms (plants, etc.) provided by local populations and traditional healers confidential until both parties agree to publication.

Response to Question 2: There are no *sui generis* laws providing for the intellectual property protection of traditional knowledge in the United States.

Response to Questions 3 to 11: Not applicable.

Response to Question 12: No.

Response to Question 13: Not applicable.

Response to Question 13: No.

Response to Questions 15 to 16: Not applicable.

Response to Questions 17 and 18: No.

Response to Questions 19 to 23: Not applicable.

Response to Questions 247 and 25: No.

Response to Question 26: The U.S. Patent and Trademark Office's (USPTO) Office for Independent Inventors has as its principal mission to ensure USPTO-based support and encouragement of independent inventors and small business concerns through focused, innovative activities and projects some of it focused on independent Native American inventors. As part of the function of the Office for Independent Inventors, there is increased USPTO participation in inventor and entrepreneur conferences and seminar programs, outreach to regional inventor and entrepreneur organization meeting bringing patent and trademark information and issue discussions to the grassroots level and development of state-of-the-art educational tools and delivery modes including distance learning, virtual classrooms and Internet-based systems. While there are no rights in traditional knowledge in the United States, this USPTO Office encourages the development of traditional knowledge into patentable inventions where possible.

Response to Question 27: Overall, the United States is not of the view that special intellectual property protection is needed for traditional knowledge. For those who take steps to keep the traditional knowledge out of the hands of outsiders, trade secrets law can provide protection. If on the other hand, traditional knowledge has become known outside of the indigenous community, then the patent requirement for "novelty" and "non-obviousness" would apply. Countries without established trade secret or similar regimes to protect information that an individual or group seeks to keep confidential may want to create such intellectual property protection either under the trade secret formulation or some similar format. Overall, however, it is important to keep in mind that intellectual property, whether or an existing or *sui generis* nature, serves as an incentives for future creative endeavors; by definition, traditional knowledge needs no incentive for development.

Nevertheless, the United States believes that the most appropriate way to "protect" traditional knowledge from misappropriation by unauthorized researchers is to encourage the collection of traditional knowledge into searchable prior art databases with the consent of the holders of the knowledge, encourage traditional knowledge holders to withhold the sharing of the knowledge with outsiders until they have determined mutually agreed terms (contract)

and, where appropriate, to use various existing IP and non-IP tools, including marketing methods to efficiently exploit their knowledge.

VENEZUELA

Response to Question 1: There are in our countries real-life instances in which use has been made of modern industrial property provisions to protect traditional knowledge. One example is the institution of appellations of origin, which is extensively provided for in our legal order, and which indeed has served to protect a large amount of subject matter that can be assimilated to what traditional knowledge is generally understood to be.

Examples that can be quoted are highly relevant inasmuch as it is not only geographical conditions that have influenced the recognition of the appellations of origin granted to date, but rather human intervention, detected in the conduct of activities that themselves have had a potential effect on exploitation. One such example is Cocuy de Pecaya (a liqueur extracted from the agave): not only does the area in which this type of plant is grown benefit from special conditions, but there is a manner in which the communities located there traditionally extract the product, using processes that have remained unchanged for centuries.

Response to Question 2: There is no specific, *sui generis* law that provides intellectual property protection for traditional knowledge. Nevertheless, there is in our constitutional framework a program principle according to which the intellectual property rights in the knowledge, technology and innovations of indigenous peoples is guaranteed and protected (Constitution of the Republic of Venezuela).

Response to Question 3: At present an Industrial Property Law of Venezuela, which to a large extent complements Decision 486 — the Common Provisions on Industrial Property — is under consideration.

Also under consideration in this connection is the question whether or not model provisions on the protection of traditional knowledge should be included, or whether a special law should be enacted separately. These options are being discussed between the National Executive and the Legislature.

Response to Question 4: The following objectives may be noted in the Constitutional provision referred to above:

to protect and guarantee the intellectual property rights of indigenous peoples;
collective benefits;
prohibition of the patenting of ancestral resources and knowledge.

Response to Question 5: Yes.

Response to Question 6: The expression “collective intellectual property of knowledge” is used.

Response to Questions 7 and 8: See Response to Question 2.

Response to Question 9: No.

Response to Question 10: In this connection it has been stated that the subject matter in question must of necessity benefit from unlimited, retroactive protection.

Response to Question 11: For the purposes of determining either exclusive rights or the right to remuneration, thought has been given to making it subject to disclosure; in other words, if the knowledge has been disclosed, its holder is entitled to remuneration, and in the event of it not having been disclosed, he will enjoy exclusive rights in it as well as the right to remuneration.

Response to Question 12: It has to be automatic.

Response to Question 13: The rights obtained, owing to the retroactivity that they have to enjoy and their unlimited nature, cannot lapse or be revoked.

Response to Question 14: In the course of the discussions that have taken place on the draft, the guiding principle has been not to make the protection subject to any particular time limit.

Response to Question 15: This aspect has not been fully worked out, but there is a strong inclination towards making the protection retroactive.

Response to Question 16: It has been stated that those entitled to enjoy the protection are the indigenous communities.

Response to Question 17: Yes.

Response to Question 18: Yes. See Response to Question 2.

Response to Question 19: No exception has been contemplated in this respect.

Response to Question 20: All the remedies and sanctions provided for in our legal order, as well as action for damages or such other civil remedies as may be appropriate.

Response to Question 21: All the remedies and sanctions provided for in our legal order, as well as action for damages or such other civil remedies as may be appropriate.

Response to Question 22: Thought has certainly been given to the possibility of transferring rights by licensing, but without assigning them in the fullest sense.

Response to Question 23: Yes. The design of a structure for administering the rights granted is indeed under consideration.

Response to Question 24: Yes.

Response to Question 25: No.

VIETNAM

Response to Question 1: In Viet Nam there still are very few legislative efforts to manage and control the use of genetic resources and almost none on the protection of traditional knowledge.

It Is Vietnam patent law usually protects products, methods and usage. Accordingly, for traditional medicine products, methods and usage can be patented too. In addition of the protecting traditional medicine products, methods a usage industrial property law allows traditional knowledge can be protected as know-how, trademarks, trade secrets. However, for herbal medicines difficult to meet all the requirements of the law due to their intrinsic characteristic.

The procedure of the examination for traditional medicinal inventions are followed to the procedure of the patent examination for common inventions. The pharmaceutical product, which can be patented in the field of traditional medicine include traditional medical compositions, herbal preparations, extracts from herbal medicines or compositions, health foods with herbal medicines, etc. The methods that can be patented in the field of traditional medicine include methods for the preparing the pharmaceutical preparations, methods for extracting special substances from natural medicine materials. Vietnamese patent law protects the new indication of a known drug. There are some examples of traditional knowledge protected by existing intellectual property standards in Vietnam : traditional preparation of medicinal plants (trade name Cedemex) used for assistance in stopping drug-addiction is granted under patent No VN 1017 ; traditional balm of medicinal plants are registered as Truong Son balsam trade mark No 30848 ; As appellations of origin : Phu Quoc fish soya sauce with registered number 1 and Shan Tuyet Moc Chau tea with registered number 2.

Biological methods, including gene modification, are considered inventions and protected as such ; all regulations on application procedures, protection requirements, protection form, and duration of protection of these objects are same as for invention of other kind. Some biological objects as may be used in agriculture (plant varieties, animal species) are not considered as objects of invention protection, but can be protected similarly. However, the procedures for granting this type of patents are somewhat different from the procedure for other kind of invention. Protection requirements for plant varieties and animal species are novelty, stability, uniformity and effectiveness. Applications for protection of plant varieties and animal species are to be lodged with the Ministry of Agriculture. Here, they are subjected to examination by the Commission of varieties and species, which is responsible for management of new species used in culturing and cultivating. Applications are examined in procedures similar to that for invention application. The duration of examination is 18 months beginning on the official filing date. To date, more than 30 certificates have been granted for plant varieties and animal species, of which 27 are plant varieties.

Response to Question 2: At present, there is no specific law or draft providing for intellectual property protection of traditional knowledge in Vietnam.

Response to Question 26: At present, the state of Vietnam has not established any special measures to assist beneficiaries to acquire exercise, manage and enforce rights in the traditional knowledge.

Response to Question 27: Generally speaking, traditional knowledge could not be protected adequately by prevailing laws on intellectual property. Below are some examples of perceived limitations :

Traditional knowledge can be protected as patent or business secret, but these knowledge are rarely novel so that the holders seldom enjoy exclusive rights according to patent system.

Traditional knowledge can be protected as business secret but these knowledge are rarely documented and kept confidence.

Traditional knowledge can be protected according to copyright laws, but it is very difficult to determine actual authors, the date of publication or creation.

For the purpose of protecting traditional knowledge, it is necessary to establish *sui generis* law or regulation to protect traditional knowledge.

EUROPEAN COMMUNITY

Response to Question 1: There are currently no intellectual property standards specifically directed at the protection of traditional knowledge within the European Union. Nevertheless, at least in theory, a number of existing intellectual property standards may potentially be used to this end. This use can take the following forms:

Trademarks

It is possible, under certain conditions, to protect products of traditional communities/groups by collective, guarantee or certification trademarks, either at national level (1) or at Community level (2):

(1) Article 15(2) of Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks (OJ No L 40 of 11.2.1989, p. 1) lays down that Member States (of European Union) may provide that signs or indications which may serve, in trade, to designate the geographical origin of the goods may constitute collective, guarantee or certification marks. Such a mark does not entitle the proprietor to prohibit a third party from using in the course of trade such signs or indications, provided he sues them in accordance with honest practices in industrial or commercial matters. In particular, such a mark may not be invoked against a third party who is entitled to use a geographical name.

(2) Article 64(2) of Council Regulation (EC) No 40/94 of 20 December 1992 on the Community trade mark (OJ No L 11 of 14.1.1994, p.1) lays down similar provisions. Signs or indications which may serve, in trade, to designate the geographical origin of the goods may constitute Community collective marks. The applications for a Community trade mark are filed at the Office for Harmonization in the Internal Market, which is located in Alicante (Spain), or at the central Industrial Property Office of a Member.

Geographical indications

Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ No L 208 of 24.7.1992, p. 1) introduces a Community protection of designations of origin and of geographical indications for agricultural products and foodstuffs. Only a group or, subject to certain conditions, a natural person shall be entitled to apply for registration.

The registered names are protected against any unlawful use or usurpation of these names. The registration is only justified when a clear link exists between the very specific characteristics of the product and the geographical area concerned. Also when a reputation is proved.

Patents

The preamble of Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions (OJ No 213 of 30.7.1998, p. 13), and in particular recital 27, lays down that, an invention is based on biological material of plant or animal origin, or if it uses such material, the patent application should, where appropriate, include information on the geographical origin of such material, if known; this is without prejudice to the processing of patent applications or the validity of rights arising from granted patents.

Recital 27 of Directive 98/44/EC has to be regarded as being an encouragement to mention the geographical origin of biological material in the patent application, along the line indicated by Article 16(5) of the Convention on Biological Diversity. However, to provide such information is not an obligation under Community law. Nor does the failure to provide such information has, as such, any legal consequence for the processing of patent applications, or on the validity of rights arising from granted patents.

Copyright and related rights

As already indicated on page 12 of this survey, the purpose of copyright and neighboring rights is to provide protection for traditional knowledge (in view of the criteria and constraints of originality, identity of the author, term of protection, etc). However, protection could, in theory, be sought indirectly for the form in which the traditional knowledge is presented.

If the traditional knowledge was compiled into a database, the *sui generis* protection provided for in Directive 96/9/EC on the legal protection of databases (OJ No L 77 of 23.3.1996, p. 20) would cover the database itself, but not the actual information stocked within it. If the traditional knowledge is found in a performance protection can be provided for under the related rights of performers (found in Directive 92/100/EEC on the Rental and Lending Right, OJ No L 346 of 27.11.1992, p. 61; in Directive 93/98/EEC on the Term of protection, OJ No L 290 of 24.11.1993, p. 9; and in the new Directive 2001/29/EC covering copyright and related rights in the Information Society, OJ No L 167 of 22.6.2001, p. 10).

Response to Question 2: There is no specific law providing for IP protection of traditional knowledge at the EU level. However, under Article 20a(2) and (3) of Council Directive 70/457/EEC of 29 September 1970 on the common catalogue of varieties of agricultural plant species (OJ No L 225 of 12.10.1970, p. 1) and Article 39a(2) and (3) of) of Council Directive 70/458/EEC of 29 September 1970 on the marketing of vegetable seed (OJ No L 225 of 12.10.1970, p. 7), specific conditions shall be established for the growing and marketing of landraces and varieties which are naturally adapted to the local and regional conditions and threatened by genetic erosion. These conditions may include elements, which should indirectly imply some effects similar to intellectual property protection of traditional knowledge.

Furthermore, as a Party to the UN Convention to Combat Desertification and to the Convention on Biological Biodiversity (CBD), the European Community is bound by the obligations resulting from these Conventions, in particular as to the protection of “traditional knowledge and practices.” As regards the Convention to Combat Desertification, there is neither internal legislation transposing the provisions of the Convention nor any action plan at the Community level. Regarding the CBD, action plans were adopted by the EU Council. With regard to traditional knowledge, the Biodiversity Action Plan for Economic and Development Co-operation should be adopted by the EU Council by November 2001. According to Action 11 of this Action Plan, the European Community will support national capacity-building in developing countries to define intellectual property rights in relation to biodiversity, and develop supportive laws for equitable benefit sharing. These must translate into practical agreements and contracts between suppliers and users.

[End of document]