

## Summary Report

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### Question Q232

#### The relevance of traditional knowledge to intellectual property law

##### Introduction

Broadly, traditional knowledge (*TK*) may be said to comprise the knowledge systems of indigenous or local communities which may encompass intellectual capital, cultural identity, spiritual beliefs and customary legal systems. TK also has a strong practical component as it has often developed over many generations, in response to changing circumstances and hence, may include traditional agricultural, ecological, environmental or medicinal knowledge.

Strictly speaking, TK encompasses only knowledge and ideas. In a broader sense, it extends to expression of such knowledge and ideas, such expression being referred to as traditional cultural expressions (*TCEs*) or 'expressions of folklore', which may include music, art, designs, names, signs and symbols, performances, architectural forms, handicrafts, tools, musical instruments and narratives.

Commercial exploitation of TK, outside the original domain of the TK holders, raises questions of legal protection against its misuse, the role of prior informed consent and the need for equitable benefit-sharing. In this context, the role of intellectual property (*IP*) systems in relation to protecting TK and issues relating to preserving, protecting and equitable use of TK have been receiving increasing attention in international policy discussions.

Significant efforts to achieve harmonisation in relation to genetic resources and associated TK have been underway for some time. The WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore (*IGC*) has dealt with a range of issues concerning the interplay between IP, TK, TCEs and genetic resources, including disclosure requirements in patent applications that relate to genetic resources and associated TK.

Recognising the potentially broad scope of this Working Question, the groups were asked to observe the following.

- (a) The focus of this question is on TK other than TK associated with generic resources. The groups were asked to treat TCEs as encompassed within TK. As will be seen below, the integrated and overlapping nature of these concepts may be reflected in national laws.

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- (b) While recognising that TK protection involves important policy issues beyond the domain of IP (e.g., the environment, health, trade and development, food and agriculture, indigenous rights, broader human rights considerations) the focus should be on the relevance of TK to IP.
  - (c) The law of unfair competition and other non-IP options may all have a role in a comprehensive system of protection of TK, but the focus should be on core elements of IP law, i.e., patents, trade marks (and other distinctive signs), geographical indications, copyright, designs and confidential information/trade secrets (**Core IP Laws**).

A total of 37 reports were received by the Reporter General. Reports were received from the national groups of Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Chile, China, Denmark, Ecuador, Egypt, Estonia, Finland, France, Germany, Hungary, Indonesia, Italy, Japan, Malaysia, Mexico, Netherlands, New Zealand, Paraguay, Peru, Philippines, Portugal, Russia, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, Ukraine, United Kingdom (**UK**) and the United States (**US**).

A summary of the responses follows below in parts I) and II). Reports received after 1 September 2012 are listed above but their content is not included in the summary.

In part III), an attempt has been made to draw some conclusions and provide guidance to the Working Committee.

## **I) Analysis of current legislation and case law**

### *1. Is TK defined in your national law?*

The majority of groups (approximately 80%) reported that TK is not defined in their national law.

Even in countries where TK is defined (eg Brazil, Paraguay, Peru, Portugal, Spain and Thailand), the definition has in some cases been qualified or limited in some way. For example, in Brazil, the definition is confined to TK associated with Brazilian genetic patrimony. In Portugal, TK is defined by reference to certain plant species other than varieties that are protected by (or the subject of an application for) IP rights.

### *2. If yes to question 1, what is the source of the definition?*

By reason of the responses to question 1, this question was not applicable to the majority of the groups.

Of those countries whose national law includes a definition of TK, the source of the definition is legislation or a corresponding regulation.

### *3. If yes to question 1, how is TK defined?*

By reason of the responses to question 1, this question was not applicable to the majority of the groups.

TK is defined in some national laws as provided below. As noted in the introduction, these definitions may variously involve overlap with or encompass genetic resources, TCEs or both.

|             |   |
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| Brazil      | [TK associated with Brazilian genetic patrimony]: information, individual or collective, of an indigenous or local community, with real or potential value, associated with genetic patrimony.  |
| Paraguay    | [Expressions of folklore]: production of artistic elements that are characteristic of the nation's traditional and cultural patrimony, formed by the aggregate of literary or artistic works, created by unknown authors or authors who do not identify themselves, which are transmitted from generation to generation and respond to the expectations of the traditional and cultural identity of the nation and of its ethnic community.   |
| Peru        | [Collective knowledge]: an accumulated knowledge transmitted over many generations and developed by the indigenous people and communities with respect to the properties, uses and characteristics of their biological diversity.   |
| Philippines | <p>[A definition of TK may be derived from the articulation of 'Community Intellectual Rights']: the rights of indigenous cultural communities/indigenous peoples to own, control, develop and protect:</p> <p>(a) the past, present and future manifestations of their cultures, such as but not limited to, archaeological and historical sites, artefacts, designs, ceremonies, technologies, visual and performing arts and literature as well as religious and spiritual properties;</p> <p>(b) science and technology including, but not limited to, human and other genetic resources, seeds, medicine, health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of fauna and flora, oral traditions, designs, scientific discoveries; and</p> <p>(c) language, script, histories, oral traditions and teaching and learning systems.</p> |
| Portugal    | All intangible elements associated with the commercial or industrial utilisation of local varieties and other autochthonous material developed in a non-systematic manner by local populations, either collectively or individually, which form part of the cultural and spiritual traditions of those people, including knowledge of methods, processes, products and designations with applications in agriculture, food and industrial activities in general, including traditional crafts, commerce and services, informally associated with the use and preservation of local varieties and other spontaneously occurring autochthonous material.  |

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| Spain    | Knowledge, innovations and practices of local populations linked to natural heritage and biodiversity, developed from the experience and adapted to the culture and local environment.   |
| Thailand | <ul style="list-style-type: none"> <li>• ['Thai traditional knowledge']: knowledge, skills, methods or technologies which are transmitted from the past to present, including technology or any means that employ a biological system, living things or a derivative thereof, improved to benefit products and services.</li> <li>• ['Thai traditional medicinal intelligence']: basic knowledge and capability with regard to traditional Thai medicine.</li> </ul> |

The Chinese group noted that the Intangible Cultural Heritage Law contains a definition of 'intangible cultural heritage', being various traditional cultural expressions which are transmitted by people of all nationalities from generation to generation and are regarded as parts of cultural heritage, and material objects and places related to TCEs.

In addition, under the Constitution of Argentina, the CBD (which contains a definition of TK – see introduction) has hierarchy over national law.

4. *If TK is not defined in your national law, is there any 'working definition' described in any draft law or regulation, policy document or other discussion material?*

Leaving aside those groups whose national law contains or incorporates a definition of TK, the responses of the remaining groups (29 in total) can be broadly divided into the following categories:

- Category 1 - no 'working definition'.
- Category 2 - 'working definitions' used in policy or other discussion material.
- Category 3 – adoption or reference to international instruments.
- Category 4 - draft national law which will encompass a definition of TK.

Fifteen of the 29 groups were in Category 1. The remaining 14 groups are approximately evenly divided between Categories 2 to 4.

Category 2

By way of some examples:

- (a) In Australia, various definitions have been proposed in public documents, some of which were created in the context of suggestions for contractual relationships for the use and protection of TK. For example:
  - [TK refers to] all the elements that make up indigenous peoples' cultural heritage, including sacred sites, genetic materials, cultural objects, and languages, songs, ceremonies, photographs, sound recordings, films and written reports (including archival and historical documents) as well as indigenous knowledge systems.
- (b) In Ecuador, in a paper prepared by the Secretariat for Indigenous Peoples, Social, Movement and Citizens' participation, TK is described as constituting system of

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'ancestral wisdom', being knowledge that has been built up over time on the basis of daily practice that has been validated and recognised by the relevant ethnic group. TK is defined there as:

... knowledge not only relating to biodiversity but also to cultural practices generally including songs, rituals, dances, handicrafts, textiles, seed classification, ...

### Category 3

Again, by way of example:

- (a) The Bulgarian group reported that the definition formulated in Option 2 of Article 1 (Subject Matter of Protection) in WIPO/GRTKF/IC/19/5 is used as a working definition.
- (b) Ecuador and Estonia reported references to the CBD.
- (c) The German group noted that experts regularly use one of the two draft definitions in the 'Draft Articles on the Protection of Traditional Knowledge of the WIPO', ie:  
Traditional knowledge means knowledge resulting from intellectual activity in a traditional context including the know-how, skills, innovations, practices and learning that form part of the traditional knowledge systems of an indigenous people or local community.

[or]

- (a) Traditional knowledge is dynamic and evolving. It is the result of the intellectual activities in diverse traditional contexts, including knowledge, skills, innovations, practices and teachings in a collective framework of indigenous peoples and local communities;
- (b) Traditional knowledge is part of a collective, ancestral, territorial, spiritual, cultural, intellectual and material heritage;
- (c) Traditional knowledge is transmitted from generation to generation in diverse forms and is inalienable, indivisible and imprescriptible;
- (d) Traditional knowledge is intrinsically linked to biodiversity and sustains cultural, social and human diversity embodied in traditional lifestyles.

### Category 4

Indonesia, Mexico, South Africa and Turkey all have draft laws in progress.

Indonesia's Bill defines TK as:

... intellectual creation in knowledge and technology which includes traditional heritage characteristics that are produced, developed and preserved by the custodian.

Mexico's draft law (awaiting approval by the Senate) defines TK as:

All the set of practices and collective knowledge of indigenous peoples, cultural heritage handed down from generation to generation about their biodiversity, health, symbols, emblems, graphic designs, crafts, clothing, dances, songs and musical instruments and other artistic expressions of their own, as well as medicinal plants and therapeutic treatments of traditional use.

In South Africa's Protection of Traditional Knowledge Bill (**South African TK Bill**) (awaiting the signature of the President), TK encompasses a traditional work, a traditional design and a traditional mark. These terms are defined by reference to, but expand upon, existing IP definitions or concepts. For example, a 'traditional work' is, in effect, a copyright work

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but one which has evolved in, or originated from, a traditional community, and in respect of which no individual maker is known. A 'traditional design' encompasses a similar qualification to the concept of a design. A 'traditional mark' encompasses certification, collective and other trade marks which evolved in or originated from a traditional community. A traditional community is a natural, indigenous and homogenous group with common language and customs existing within South Africa within an organised structure and generally recognised as having a separate and individual character.

The Turkish draft Patent Law defines TK as:

... knowledge that comes out from an intellectual activity not related to a technical field and transferred from generation to generation.

The New Zealand group reports that its Patents Bill (which has been in train for some time) is likely to contain definitions relating to M ori TK, and indigenous plants and animals.

5. *Does your national law provide for any protection (whether positive or defensive) for TK?*

Positive protection confers on TK holders, rights over the TK, such as rights to authorise, refuse and determine conditions for access to TK. Defensive protection prevents third parties from obtaining or exercising illegitimate rights over TK.

All groups, save for Denmark and Ukraine, reported that they have national laws that provide for the protection of TK, whether directly or indirectly<sup>1</sup>. This may be through existing or adapted laws or regulations relating to IP or related rights, laws other than Core IP Laws or sui generis measures for TK protection, as described further below.

Three groups reported a level of constitutional protection for TK: Argentina through its adoption of the Convention on Biological Diversity (**CBD**),<sup>2</sup> which, pursuant to its Constitution, ranks above domestic law; Bulgaria by its Constitution which guarantees protection of IP rights (so therefore TK qualifying for IP protection); Ecuador whose Constitution permits ancestral and indigenous peoples to establish territorial districts for the preservation of their culture.

In most cases, regardless of how TK is protected, protection is both positive and defensive.

There are no express references to TK in the national laws of Australia, Belgium, Bulgaria, Canada, China, Ecuador, Estonia, Finland, France, Germany, Hungary, Italy, Japan, Mexico, Netherlands, New Zealand, Paraguay, Philippines, Russia, South Africa (but note the South African TK Bill), Sweden, Turkey, the UK or the US.

Brazil (although limited to genetic patrimony), Chile, Indonesia, Peru, Portugal, Spain and Thailand report that their national laws expressly refer to TK.

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<sup>1</sup> That is, TK is either expressly protected or, by operation of (for example) Core IP Laws, TK that fulfils the criteria for protection under such law is protected. Query whether, if particular TK meet all the requirements for (eg) the grant of a patent in Denmark or the Ukraine, it would be protected as such. If so, Denmark and the Ukraine are in the same position as a number of other groups in that, there is no express or direct protection for TK, but if TK qualifies for protection under a Core IP Law it is protected, but not because it is TK per se.

<sup>2</sup> The CBD entered into force on 29 December 1993 and was the first international agreement to make explicit reference to the protection of TK.

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6. *If yes to question 5, is the protection found in:*

*a) existing IP laws or regulations;*

*b) adaptation of IP laws or regulations through sui generis measures for TK protection; or*

*c) wholly sui generis laws or regulations relating to TK protection?*

A number of the groups reported more than one source of protection for TK in their national law.

Approximately 85% of the groups reported that protection for TK (whether positive or defensive), and whether protected directly or indirectly, is found in their existing Core IP Laws. Many of those groups reported that any TK protection under those laws must meet the relevant criteria for protection under those laws.

Many groups also reported other laws which specifically or indirectly extend coverage to TK. For example, Peru's General Environmental Law includes protection for TK, which recognises and protects ownership rights, establishes mechanisms for informed consent and measures to prevent/punish biopiracy.

Less than 10% of the groups (Belgium, Ecuador and Peru) reported that TK is protected through adaptation of IP laws or regulations as contemplated by part b) of this question. In Belgium, this was achieved through the introduction of a disclosure of origin requirements introduced into the Patent Act in light of Belgium's obligations under the CBD. Ecuador does so through its Constitution, as noted above. Peru protects TK both through a combination of adaptations to IP law and wholly sui generis laws as detailed below in question 7.

Approximately one-third of the groups reported that they had wholly sui generis laws or regulations relating to TK protection. These groups are identified by '\*' in the table under question 7 below.

Some groups reported the following means of recording various manifestations of TK, which may include genetic resources or TCEs.

|              |   |
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| China        | State level and local catalogues recording protected intangible cultural heritage                                   |
| Portugal     | Register of Plant Genetic Resources   |
| South Africa | Register of Traditional Knowledge [to be established when the Protection of Traditional Knowledge Bill becomes law] |
| Spain        | Spanish Inventory on Natural Heritage and Biodiversity  |
| Thailand     | Database established under the Act on Protection and Promotion of Traditional Thai Medicinal Intelligence           |
| US           | Native American Tribal Insignia Database  |

7. If yes, to any part of question 6, please provide details of the law(s) or regulation(s), including where such detail exists:

- a) criteria for eligibility for protection;
- b) beneficiaries of protection;
- c) scope of protection;
- d) sanctions, remedies and exercise of rights;
- e) administration of rights;
- f) exceptions to and limitations on rights;
- g) term of protection;
- h) formalities to which protection is subject;
- i) transitional measures;
- j) consistency with other laws;
- k) national treatment and foreign interests;
- l) trans-boundary cooperation.

Where groups reported that TK is , protected pursuant to one or more Core IP Laws (provided the criteria for eligibility is met), they often helpfully described how a particular Core IP Law could provide protection for TK: 14 examples each for copyright and trade marks, 16 examples each for patents and geographical indications, 8 examples for designs and 10 examples for confidential information/trade secrets.

In each case, the Core IP Law cited as extending protection to TK does not specifically reference TK.

In Chile, TK is protected by Chilean Core IP Law which specifically permits protection of biological and genetic patrimony and national TK, subject to the condition that any grant of rights is in accordance with the relevant Core IP Law.

The following groups reported the following particular protection for TK in their national laws, extending beyond Core IP Laws. \*\* denotes a country with wholly sui generis laws or regulations. Again, the interplay with genetic resources and TCEs can be seen.

| Country   | Source of law/details of protection   |
|-----------|---|
| Australia | <p><i>Native Title Act 1993</i></p> <ul style="list-style-type: none"> <li>• Protects rights of indigenous people in relation to land or waters where rights and interests are possessed under traditional law and customs.</li> </ul>              |
| Brazil*   | <p><i>Provisional Measure 2.186 (23 August 2012)</i></p> <ul style="list-style-type: none"> <li>• Recognition of the rights of indigenous local communities to decide on the use of their TK associated with Brazilian genetic patrimony</li> </ul> |



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|           | <ul style="list-style-type: none"> <li>• Origin of TK must be indicated in all publications, uses and exploitations</li> <li>• Prevents unauthorised use of TK</li> <li>• TK holders receive benefits for any third party economic exploitation of their TK</li> <li>• Sanctions for non compliance include warnings, fines, seizure of samples, restraints</li> <li>• Access to TK may only be through the express authorisation of the TK holder and a government appointed management council</li> <li>• Term of protection is unlimited</li> </ul> |
| Bulgaria* | <p><i>Law of Handicrafts</i></p> <ul style="list-style-type: none"> <li>• Regulates and protects craftsman interests and customers of handicraft services</li> </ul>   |
|           | <p><i>Law for Cultural Heritage</i></p> <ul style="list-style-type: none"> <li>• Protects the 'cultural inheritance' which may include historical and archaeological objects, natural values, industrial heritage, fine arts and applied art, handicrafts, document heritage, oral and traditional language, customs, rituals, celebrations, beliefs, music, songs, folk medicine, culinary and wine traditions</li> </ul>   |
| China*    | <p><i>Intangible Cultural Heritage Law</i></p> <ul style="list-style-type: none"> <li>• Protects traditional culture of historical, literary, artistic or scientific value</li> <li>• Provides sanctions for violation</li> <li>• Establishes state level and local catalogues recording protected intangible cultural heritage</li> <li>• May be overridden by the Law on Protection of Cultural Relics, Core IP Laws or any other law relating to traditional medicines, arts and handicrafts</li> </ul>   |
| Japan*    | <p><i>Cultural Properties Protection Act</i></p> <ul style="list-style-type: none"> <li>• Protection afforded to TK that falls within the definition of 'cultural properties' which includes artistic works and other tangible cultural artefacts that are historically or artistically valuable to Japan; certain dramatic and musical works, folk ways/customs, folk performing arts, folk techniques; any subject matter designated by the Minister of Education &amp; Culture as such</li> <li>• Indefinite protection</li> </ul>                  |

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| Mexico*      | <p><i>General Law of Ecological Balance &amp; Environmental Protection</i></p> <ul style="list-style-type: none"> <li>• Traditional use of resources which have been continuously exploited without causing significant changes in the ecosystem may continue</li> </ul>  |
|              | <p><i>General Law of Sustainable Forest Development</i></p> <ul style="list-style-type: none"> <li>• Aims to conserve biodiversity, preventing combat theft and illegal extraction, encourage disclosure and recognition of customs, traditions and cultural practices specific to indigenous peoples and communities living in forest areas</li> <li>• Patents relating to forest genetic resources may be cancelled if they do not recognise the rights of indigenous communities</li> <li>• Requires agreement between the owner of the knowledge and the recipient evidencing express consent from the relevant community</li> </ul>  |
|              | <p><i>General Law of Wildlife</i></p> <ul style="list-style-type: none"> <li>• Protects specimens, parts or derivatives of wildlife for traditional ceremonies and rituals may be limited or denied where use would jeopardise the conservation of wild populations or species</li> </ul>   |
|              | <p><i>General Law of Sustainable Fisheries &amp; Agriculture</i></p> <ul style="list-style-type: none"> <li>• Vests control of fishery resources in producers</li> <li>• Supported by TK management systems</li> </ul>  |
| Netherlands* | <p><i>Dutch Neighbouring Rights Act</i></p> <ul style="list-style-type: none"> <li>• Protects expressions of folklore</li> </ul>  |
| Paraguay     | <ul style="list-style-type: none"> <li>• The author of a work derived from when an expression of folklore (or anyone who makes it public) must indicate the origin of the folkloric expression and any title of the work</li> <li>• Indefinite protection</li> </ul>  |
| Peru*        | <p><i>Decision 486 on the Common Intellectual Property Regime</i></p> <ul style="list-style-type: none"> <li>• IP protection must accord with safeguarding and respecting Peru's biological and genetic heritage, together with the TK of Peru's indigenous, African American or local communities</li> <li>• Patent applications must contain a copy of the contract for access where the product/process the subject of the application is obtained or developed from genetic resources, or a copy of the document that certifies or authorises the use of TK where the product/process is obtained or developed on the basis of that TK</li> <li>• A patent application may be declared null or void where the applicant fails to submit the relevant documentation</li> </ul> |

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|              | <ul style="list-style-type: none"> <li>• Other sanctions for non compliance also apply, including fines, compensation, fair and equitable sharing of benefits, technology transfer or authorisation of use</li> </ul>  |
|              | <p><i>General Environment Law</i></p> <ul style="list-style-type: none"> <li>• Recognition of ownership rights of knowledge, innovation and traditional practices of peasant, native and local communities with regard to biological diversity</li> <li>• Use by third parties must be with informed consent</li> <li>• Mechanisms for equitable distribution of benefits resulting from use</li> </ul>  |
| Philippines* | <p><i>Law 27811 Protection Regime for the Collective Knowledge of Indigenous People</i></p> <ul style="list-style-type: none"> <li>• Provides for registration of collective knowledge</li> <li>• Protects against revelation, acquisition, non-consensual unfair use and unauthorised disclosure</li> <li>• Remedies include compensation; possible criminal action</li> <li>• Non compliance with a licence provision for use of collective knowledge may provide grounds for denial of a patent application where the collective knowledge is not in the public domain</li> </ul> |
|              | <p><i>Traditional &amp; Alternative Medicine Act</i></p> <ul style="list-style-type: none"> <li>• Identification and documentation of indigenous knowledge systems relevant to the utilisation of biological and genetic resources that are applied in traditional and alternative health care practices</li> </ul>  |
| Portugal*    | <p><i>Indigenous Peoples' Rights Act</i></p> <ul style="list-style-type: none"> <li>• Recognises rights to full ownership, control and protection by indigenous cultural communities and people of their cultural and intellectual property rights including human and genetic resources, seeds, traditional medicines and health practices, medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs and visual and performing arts</li> </ul>                      |
| South Africa | <p><i>Decree-Law 118/2002</i></p> <ul style="list-style-type: none"> <li>• Protects all TK which is described and registered in the Register of Plant Genetic Resources</li> <li>• Description must be such as to allow third parties to reproduce or utilise the registered TK</li> <li>• Registration of TK confers on the owner the right to a share in the</li> </ul>  |

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|-----------|---|
|           | <p>benefits derived from its use</p> <ul style="list-style-type: none"> <li>• Holders of TK which has not been used in industrial activities or which is not publicly known outside the community in which it originated may object to its use</li> <li>• Fines for contravention</li> </ul>  |
| Spain*    | <p><i>South African TK Bill (not yet law)</i></p> <ul style="list-style-type: none"> <li>• Ensures recognition and compensation for use of TK</li> <li>• Protects traditional works, traditional designs and traditional marks (other than a mark registered under the Trade Marks Act) (see answer to Question 4) against exploitation</li> <li>• Establishes a Register of Traditional Knowledge</li> <li>• The owner of the rights will be an individual who holds the rights for the traditional community in a representative capacity</li> <li>• Remedies for non-compliance include damages or a standard licence fee</li> <li>• Term of rights are limited where published or indefinite where unpublished</li> </ul> <p><i>Organic Law 42/2007/Law for the Sustainable Development of Rule Areas</i></p> <ul style="list-style-type: none"> <li>• Equity benefit sharing derive from the utilisation of TK</li> <li>• Establishes inventories of TK</li> </ul> |
| Thailand* | <p><i>Law 30/2006 of Seed &amp; Nursery Plants &amp; Genetic Resources</i></p> <ul style="list-style-type: none"> <li>• Protection and development of TK relating to genetic resources for food and agriculture</li> </ul>  |
| US*       | <p><i>Act for the Protection and Promotion of Traditional Thai Medicinal Intelligence</i></p> <ul style="list-style-type: none"> <li>• Protection for text/formulae relating to traditional Thai medicinal intelligence</li> <li>• Rights holder controls production of the medicine and research, distribution and improvement or development of the registered text/formulae</li> <li>• Registration may be revoked where the right holder misuses, violates or causes severe damage to the registered traditional Thai medicine</li> <li>• Exceptions to the exclusive rights of the rights holder for acts pertaining to traditional Thai medicine that is for the benefit of study, discovery, test or research specified under a Ministerial</li> </ul>   |

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|  | <p>regulation; preparation of prescription; production of medicine for household use or use by public hospitals or government or state agencies</p> <ul style="list-style-type: none"> <li>• Term of protection is the life of the rights holder plus 50 years</li> </ul>  |
|  | <p><i>Indian Arts &amp; Crafts Act</i></p> <ul style="list-style-type: none"> <li>• Unlawful to offer or display for sale or sell any goods that falsely suggests it is Indian produced, an Indian product or the product of a particular Indian tribe or organisation</li> <li>• Official insignia may be entered in the Native American Tribal Insignia Database which is used as an aid in the examination of applications for trade mark registration</li> <li>• No limit to term of protection</li> </ul> |

8. *Are the protections described in response to questions 6 and 7:*

*a) referable to TK alone; or*

*b) related to or linked to the concepts of protection of:*

*(i) genetic resources; or*

*(ii) TCEs?*

Quarter of the groups did not answer this question. It appears that some did not answer on the basis that in their countries TK is only protected within the criteria of existing Core IP Laws.

The Hungarian group reported that its TK protection is applicable to TK only, TCEs being specifically excluded from protection under its Copyright Act. The UK group reported that the protections found within Core IP Laws and some consumer protection regulation was referable to TK alone, as did the US group.

Of the remaining groups that addressed this question, 15 reported linkage to genetic resources and 13 to TCEs. There is some overlap in those figures, as 8 groups reported that TK protection is linked both to genetic resources and TCEs.

9. *If yes to question 8(b), please provide details of any linkages.*

Few groups answered this question substantively, most having addressed linkages directly or by implication in earlier questions.

As is apparent from the preceding answers, many definitions of TK, or the articulation of the protection afforded to TK, reference genetic resources or encompass TCEs or both.

A common linkage between TK and genetic resources is by reason of disclosure requirements for patent applications. This has already been noted by a number of the groups in responding to previous questions, and was also raised in this context by the South African, Swedish and Turkish groups. In the case of Turkey, this requirement is in its draft patent law.

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10. *Please identify any shortcomings in any protection of TK in your country by reference to the matters in questions 6 to 9 above.*

The responses to this question are necessarily subjective, depending on views as to whether, and if so what, protection for TK is desirable. For example, the UK group does not favour strong TK protection, so while the UK group acknowledges weak protection for TK under UK law, the UK group does not consider that a shortcoming.

A number of the other groups did not consider that there are shortcomings within their present systems, including Bulgaria, Germany, Italy, Japan, Netherlands, Peru, Sweden and Switzerland.

Some groups with particular protection for TK in their national laws reported shortcomings or weaknesses in those laws. For example, Brazil reported that the Provisional Measure detailed above fails to address registration of TK rights, does not fully detail benefit sharing arrangements and further, is inconsistent with TRIPS and Brazilian patent law.

Largely, where shortcomings were identified, it was express or implicit that TK protection should be strengthened. The following themes emerged:

Lack of a definition of TK

This was noted by six groups (China, Indonesia, New Zealand, Spain, Thailand and Turkey). The Indonesian group noted that this lack of definition causes difficulties in defining the scope of protection and the beneficiaries of that protection with the result that many aspects of TK remain beyond the protection of Indonesian law. The Thai group noted that while traditional Thai medicinal intelligence is protected as TK, TK outside that scope is not well defined, with a corresponding lack of definition of relevant benefits and protection.

Lack of a specialised system for protection of TK

This was noted by five groups (Canada, Ecuador, Spain, Thailand and Turkey). The Canadian group considers that there needs to be a principled legal approach which clearly addresses the interests of communities, and the control and management of their TK with regard to third party use and the benefit of Canadian society as a whole.

Difficulties/undesirability in adapting existing laws

This was noted by seven groups (Belgium, Canada, France, Germany, Portugal, South Africa and Turkey). The Belgian group identified the principal problem as follows - the possibility of TK benefitting from positive IP protection under existing Belgian IP laws is 'rather theoretical' due to the eligibility criteria for protection. For example, to attract copyright protection, the work must be fixed in some material form, which TK often is not. For trade mark protection, the notion of 'distinctiveness' is linked to the ability to identify or distinguish on the basis of commercial origin, whereas TK may not generally involve commercial exploitation. Patent protection may be difficult to achieve if the identification of the inventor is not possible and traditional patent notions of novelty and inventiveness are applied. More generally, the public nature of IP rights may not always be compatible with the secrecy that is inherent in some aspects of TK, eg for religious or spiritual reasons.

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Even if not specifically articulated by other groups, similar issues must arise in countries where TK is protected pursuant to existing Core IP Laws. Whether such issues are perceived as shortcomings depends upon the attitude towards protection of TK at a general level. See, for example, the views of the German, UK and US group noted elsewhere in this Summary Report.

A number of groups also noted that the inter-generational nature of TK may not fit with traditional IP notions of clear delineation of ownership rights and timeframes for statutory monopolies.

No or insufficient protection for TK, including with reference to the scope of rights and remedies

This was noted by eight groups (China, Egypt, Indonesia, Mexico, New Zealand, Paraguay, Turkey and the Ukraine). The Chinese group noted that the emphasis is on the administrative process of protecting the subject matter, rather than protection of the beneficiaries. The current Egyptian law requires the disclosure of any TK element in a patent application, but only requires the applicant to submit that it has 'acquired the TK in a legitimate manner'. Such expression is too vague to offer the full range of (defensive) protection. Paraguay and Thailand noted that despite express protection, there are no sanctions for contravention of their respective laws.

Cost

Some groups highlighted the burdensome nature, procedurally, administratively and financially, for obtaining protection (whether such protection is under the relevant Core IP Laws pursuant to which registration is required, or through sui generis regimes).

Other issues/'shortcomings'

In addition to the above, there is a broader issue as to politicisation of TK. This was highlighted in the responses to this question by the Australian and US groups.

The Australian group explained that the protection (and survival) of Australia's indigenous cultures and their interaction with Australia's dominant Western culture is a highly politically-charged topic. Any significant steps to provide additional protection for TK in Australia would likely involve extensive indigenous and public consultation and debate.

The US group questioned the desirability of legislative favouritism of one class of persons. This 'unequal protection' is based solely on classification as an Indian belonging to an Indian tribe or belonging to a recognised Indian arts and crafts organisation.

11. *Please identify any significant case law in connection with protection of TK in your country.*

Approximately 75% of the national groups reported that there was no or no significant case law in connection with protection of TK in their respective countries.

Australia, Canada, China, France, Germany, Hungary and Japan reported on cases relevant to the protection of TK. Australia, Canada, China, France and Indonesia reported on cases specifically referable to TK. For example:

- (a) In Australia, courts have considered the relationship between Australia's native title regime and the ownership of TK. Further, an injunction has been granted in favour of an indigenous community to prevent publication of a book by an anthropologist,

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which contained culturally significant subject matter disclosed to the anthropologist in confidence by some members of the community. The items and sites disclosed were traditionally kept secret from other members of the same indigenous group.

- (b) The Canadian group provided an example whereby the Trademarks Act was used to prevent the unauthorised reproduction of ancient rock-painting images of great religious significance to Snuneymuxw First Nation.
- (c) The Chinese group reported on a case in which a utility model for a variation of a traditional musical instrument was subsequently invalidated on the basis that the method for making such instruments was known to traditional craftsmen.
- (d) The French group reported that TK has been upheld as prior art on two recent occasions.
- (e) The Indonesian group reported the withdrawal of a number of Japanese patents covering floral herbs from Indonesia and a prosecution for the use of traditional motifs in jewellery.

Germany and Japan reported on case law from which principles applicable to the protection of TK might be extrapolated.

The German group reported a case where the German Federal Patent Court refused to allow an international registration for the mark, 'KOMBUCHA' for beer in Germany. 'Kombucha' is an ancient tea fungus. While the issue turned on the fact that the German purity law for beer prohibits the adding of such an ingredient, the result may be characterised as an indirect protection for Kombucha.

The Japanese group described a case in which land in a sacred area to the Ainu people was expropriated for a dam project. The dam affected the seasonal river passage of salmon. The court recognised that salmon an important source of food and livelihood for the Ainu people, and they also had a unique food culture including fishing and cooking methods, and rituals at meals. However, the Ainu people were ultimately unsuccessful in their attempt to reverse the expropriation decision due to wider 'public interest' concerns.

## **II) Proposals for harmonisation**

### *12. Is a harmonised definition of TK desirable?*

One quarter of the groups were not in favour of a harmonised definition of TK. Approximately 10% were undecided. The remaining groups (i.e., approximately two thirds) were in favour of a harmonised definition.

#### Against a harmonised definition

Australia, Bulgaria, Finland, Germany, Hungary, Paraguay, Turkey, the UK and the US did not consider a harmonised definition of TK desirable.

The primary reason stated was the difficulty of effectively formulating a harmonised definition in light of the wide variation of the needs amongst indigenous cultures around the world, and the fact that the substance of TK varies from one geographical region to another, and from one community to another.



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The German group noted that what is sought to be achieved with initiatives for the protection of TK also vary widely. The Turkish group was concerned that a definition may be limiting and insufficiently flexible to change with changing needs. The latter concern at least might be addressed by the US group's suggestion that rather than delineating a precise harmonised definition, an inclusive listing might be more useful.

The UK group was not only concerned that any definition would be vague and overly broad, but was more fundamentally concerned as to whether there is a clear and reasoned policy objective that supports a general 'TK right'. The UK group's concern is that a positive right may undermine the integrity of the existing IP system which is traditionally reluctant to protect mere information. It is possible that this could be addressed by a sui generis 'TK right'.

While the UK group would be in favour of specific measures to tackle present deficiencies in relation to protecting TK defensively, it would not favour a broad definition of TK. In that context, the UK group considers that specific mechanisms for TK protection are more appropriately dealt with at a national level so that measures can be appropriate to the circumstances of the particular country's cultural groups.

#### Undecided

Belgium, New Zealand and Russia expressed no opinion as to whether a harmonised definition of TK is desirable.

The Japanese group expressed concerns as to the proper delineation between the protection of TK and the protection of IP. While a harmonised definition of TK might be desirable as a means to reach consensus about what should be protected as TK and what should be protected (for example) as a patent, the Japanese group noted similar concerns to those expressed by the German and Turkish groups.

#### In favour of a harmonised definition

The following groups favour a harmonised definition, albeit in some cases with qualifications: Argentina, Brazil, Canada, Chile, China, Denmark, Ecuador, Egypt, Estonia, France, Indonesia, Italy, Mexico, Netherlands, Peru, Philippines, Portugal, South Africa, Spain, Sweden, Switzerland, Thailand and Ukraine.

The Canadian group considers that ultimately, a harmonised definition is desirable, but it may be better to focus on efforts to harmonise administrative regimes for TK as a first step, given the different stages of legal development of the concept of TK, the variety of national and community interests that would have to be reconciled and the differences between sources of TK.

A number of the other groups favoured a harmonised definition which can take into account cultural differences with sufficient flexibility. This would permit countries to encompass the nature of the TK originating from their respective countries, indigenous peoples or cultural communities.

13. *If yes to question 12, please propose a definition of TK, or the concepts that should be included in any proposed harmonised definition of TK.*

In addition to those groups which answered no to question 12 or who had no opinion in relation to whether a harmonised definition of TK is desirable (11 groups in total), a further 3 groups (Brazil, Denmark and Sweden) did not propose a definition of TK or the concepts that should be included in any proposed harmonised definition of TK. The Danish group was concerned that an implication of remuneration arises in relation to all subject matter encompassed by any definition and so would defer defining TK until the rights which would flow from recognition of TK are clearly articulated.

Of the 22 groups (approximately 60%) who provided a substantive response:

- 5 groups (Canada, Italy, Mexico, Netherlands and Philippines) proposed a WIPO derived definition;
- 3 groups (Indonesia, Peru and Thailand) proposed a definition derived from their existing national law or draft national law;
- 7 groups proposed their own definition;
- 5 groups proposed concepts (rather than a definition) to be included in any harmonised definition of TK.

WIPO derived definition

| Country | Definition   |
|---------|--|
| Canada  | The Canadian group proposed a variation of Option 3 of draft Article 1 (WIPO/GRTKF/IC/19/INF/8), but amended as follows:<br><br>'[TK] refers to the know how (such as the skills, innovations, practices, oral teachings and learning), as defined by the national law of a Member State, resulting from the activity in a community context for sustaining communal living.'  |
| Italy   | WIPO/GRTKF/IC/19/INF/8:<br><br>'[C]ontent or substance of knowledge resulting from intellectual activity in a traditional context, [including] the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, all contained in codified knowledge systems passed between generations.' |
| Mexico  | WIPO/GRTKF/IC/19/INF/8: [See under Italy above]<br><br>or<br><br>WIPO/GRTKF/IC/21/4, Article 1.1:<br><br>1.1 Traditional knowledge is knowledge that is dynamic and evolving, resulting from intellectual activities which is passed on from generation to generation and includes but is not limited to   |

|             |  |
|-------------|--|
|             | know-how, skills, innovations, practices, processes and learning and teaching, that subsist in codified, oral or other forms of knowledge systems. Traditional knowledge also includes knowledge that is associated with biodiversity, traditional lifestyles and natural resources. |
| Netherlands | WIPO/GRTKF/IC/19/INF/8: [See under Italy above]  |
| Philippines | WIPO/GRTKF/IC/19/INF/8: [See under Italy above]  |

Existing or draft national law

|           |   |
|-----------|---|
| Indonesia | Definition in the draft Indonesian Bill:<br><br>'[TK]... is ... an intellectual creation which relates to knowledge and technology, cosmology, aesthetic values, the principles of art, social order, taxonomy, linguistic order and meaning of words, created by creation, skill, invention and innovation based on the traditions inherited from a particular traditional society...' |
| Peru      | Definition in Article 2(b) of Law 27811:<br><br>'Collective knowledge – an accumulated knowledge transmitted over many generations and developed by the indigenous people and communities with respect to the properties, uses and characteristics of their biological diversity.'  |
| Thailand  | Thailand is presently considering a draft promotion protection of TK Act, with reference to which the definition of TK refers to indigenous knowledge creating or belonging to, each indigenous area which has been protected, restored, transmitted, developed, disseminated or used in daily life with values being one of the recognised by indigenous people.                       |

Own proposed definition

|           |  |
|-----------|--|
| Argentina | 'All knowledge, innovations, practices, creations and customs, inclusive but without limitation to technical, scientific, artistic nature or of industrial application, traditionally linked to or based on indigenous local communities and resultant from an intellectual collective activity over the natural resources and the environment and its live elements, and that are transmitted among its members'. |
| Chile     | 'All that arises from communitarian human activities (agronomy, commerce, medicine, religion, craftwork, dressing customs, social or communitarian signs, animal health assistance, etc.), which have been or are being developed over many generations by local communities.'   |

|             |   |
|-------------|---|
| China       | 'Knowledge which is held by an individual, a family, a community or a state in a certain area and which is preserved and transmitted mainly in traditional manners generation by generation, mainly including traditional medicine, traditional arts and crafts, etc'   |
| Egypt       | 'A unique knowledge system tested and developed by indigenous or local communities over time and through practice of many generations embodying the traditional lifestyle of these communities and their cultural heritage, including human and genetic resources, seeds, plants, medicines and traditional agriculture.'   |
| Spain       | 'The creations and inventions of indigenous people that, from an untraceable past, have orally, graphically and in a mimicked way transmitted them from generation after generation' such expressions and knowledge having been developed and maintained despite modern development.  |
| Switzerland | 'Knowledge, innovation and customs of indigenous and local communities in developing an industrialised countries, which have been created, improved and adapted to changing requirements and environmental conditions by these communities over generations, and handed down to subsequent generations, often in oral form.'  |
| US          | By way of example, a definition encompassing the following: <ul style="list-style-type: none"> <li>• a body of spiritual, cultural or intellectual knowledge, including the expression, depending on the context and the audience, of such knowledge and ideas;</li> <li>• generated collectively by a given cultural community or traditional society;</li> <li>• preserved and transmitted within the cultural community or traditional society;</li> <li>• including, but not limited to the know-how, skills, innovations, practices, and learning of the cultural community or traditional society.</li> </ul> |

Concepts for inclusion in any proposed harmonised definition

| Country | Concepts  |
|---------|---|
| Ecuador | <ul style="list-style-type: none"> <li>• TK should be recognised as a result of ancient wisdom.</li> <li>• TK includes innovations arising from needs that have evolved with time and on the basis of experience.</li> <li>• TK includes traditions and customs transmitted from one</li> </ul> |

|          |  |
|----------|--|
|          | <p>generation to another.</p> <ul style="list-style-type: none"> <li>TK includes TCEs, eg art, music, dances, songs, rituals, folklore, textiles, signs and designs.</li> <li>TK is complemented by discoveries in the field of medicine and food.</li> </ul>  |
| France   | <ul style="list-style-type: none"> <li>Existence of knowledge, ie knowledge, practices, teaching, expressions of folklore.</li> <li>Connected with one or more local populations.</li> <li>Handed down from generation to generation.</li> </ul>   |
| Portugal | <p>The Portuguese group considers that TK consists of information of individuals/collective practice of an indigenous community or local community, with actual or potential value, associated to the genetic heritage, and proposes that the following concepts be included in any proposed harmonised definition:</p> <ul style="list-style-type: none"> <li>Knowledge systems of indigenous or local communities which may encompass intellectual capital, cultural identity, spiritual beliefs and customary legal systems.</li> <li>Includes traditional agricultural, ecological, environmental or medicinal knowledge.</li> </ul> |
| Ukraine  | <ul style="list-style-type: none"> <li>A definition of TK should refer to the nature of TK and the mode of its creation, preservation and transmission.</li> <li>Any definition should be non exhaustive.</li> <li>Any definition should not exclude from protection of TK even if it is widely known to the public other than the members of the respective community/holders of rights in such TK.</li> </ul>  |

14. *Is it desirable to have only one form of protection for TK, either positive or defensive, or both forms? Please state reasons.*

Half of the groups favoured both forms of protection for TK, although for varying reasons and in some cases with qualifications. One quarter of the groups considered that it was desirable to have only defensive protection for TK, ie 75% in total favour at least defensive protection. The remaining 25% did not directly express a view.

Positive and defensive protection

Of the groups who favoured both forms of protection, some (e.g. Belgium, Portugal and the Philippines) did so on the basis that the two forms of protection are complementary. The Belgian group noted that positive measures may also serve to provide defensive protection and vice versa. This approach was echoed by Egypt, Italy and Spain, all of whom favoured a comprehensive protection regime. The rationale is that a coordinated combination of both forms of protection provides means for TK holders to evaluate their own interests and

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decide on the direction of use of their TK, as well as ensuring protection of that TK against third parties.

The South African group favours both forms of protection on the basis that existing IP laws should be used to protect TK, with defensive protection being bolstered by requiring an applicant to disclose a source and geographic origin of biological material used in any invention so as to prevent any third parties from obtaining or exercising illegitimate IP rights over TK.

While the Swedish group favoured both forms of protection, its view was that existing positive and defensive protection already exists and is comprehensive.

#### Defensive protection only

The groups that favoured defensive protection only did so for various reasons, including those relating to the scope of any defensive protection. In some cases, support for defensive protection was predicated upon an assumption that such protection should be within the scope of existing Core IP Laws. For example, the Argentine group commented on the difficulty of any comprehensive system of positive protection within the parameters of existing IP laws. The French, German and Dutch groups acknowledged that if TK satisfies protection within existing Core IP Laws, then it is reasonable for it to be protected, but the underlying assumption seemed to be that any extension of existing Core IP Laws to provide positive protection would be undesirable.

The Japanese and US groups advocated limited defensive protection (only) to the extent that TK can be shown to be prior art.

Other reasons for favouring defensive protection only included that:

- positive protection may be undesirable in view of the communal nature of TK and the fact that the beneficiaries of TK may be difficult to identify;
- difficulties inherent in the philosophical question as to whether culture can be owned;
- the desirability of sharing and disseminating TK;
- the possibility that TK has already been blended into a broader body of prior art or if not, may otherwise be maintained through confidentiality measures.

15. *Should TK be protected by:*

*a) existing IP laws or regulations;*

*b) adaptation of IP laws or regulations through sui generis measures for TK protection; or*

*c) wholly sui generis laws or regulations relating to TK protection? In your answer, please identify which and state reasons.*

One quarter of the responses favoured the position that any protection for TK should be confined to existing Core IP Laws. Slightly less than half the groups favoured wholly sui generis laws or regulations. The remaining groups did not express a particular view or considered that a combination of any or all of existing or adapted Core IP Laws, or wholly sui generis laws might be used.

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Groups that considered TK protection should be confined within existing Core IP Laws, or that such laws are adequate so far as they go, provided reasons including the following:

- TK should be protected as any other knowledge might be protected such that it is capable of attracting IP protection (eg Argentina);
- to the extent that TK may be recognised as part of the prior art, a harmonised approach is already available (eg Germany);
- TK should only be protected in a defensive sense as against existing IP (UK).

The Swedish group considered that any form of protection of TK should be aligned with, and not run counter to, the principles of the existing IP system. How this is achieved is of less importance.

The US group noted that there is no clear consensus in the US as to whether a separate system is needed for the protection of TK, apart from the protection afforded by existing laws, including Core IP Laws. However, there is consensus that TK that can be shown to be prior art should receive defensive protection, so steps should be taken to increase the accessibility of patent offices to information relating to the existence and content of qualifying TK. The US group does not consider that this requires a change to existing IP laws.

Insofar as suggestions were made for adaptation of Core IP Laws through sui generis measures for TK protection, the Egyptian and French groups considered that issues such as mandatory disclosure and prior informed consent could be adopted, thus bolstering defensive protection under existing IP laws.

The Mexican group noted that there is close linkage between IP laws and knowledge, as well as some capacity for recognition of collective rights, so those linkages should be maintained, rather than separated.

Reasons for favouring wholly sui generis laws or regulations relating to TK protection varied, but one theme was that existing Core IP Laws are not well adapted to the protection of TK for reasons:

- IP laws' highly refined requirements;
- IP laws offering insufficient guarantees of protection;
- the variety of different subject matters encompassed within TK;
- TK encompassing broader subject matter than that covered by IP rights;
- basic incompatibility with IP rights in terms of geographical delineation, term of protection and identity of beneficiaries.

The Australian group considered that it would be unrealistic to expect any single law to provide protection for an area as broad as TK and envisaged that a suite of sui generis laws would be necessary.

The Belgian group noted as an advantage of a wholly sui generis laws or regulations that this avoids the possibility that attempts to adapt existing IP laws would unacceptably modify the content of those laws.

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The Canadian group considered that a wholly sui generis regime would be appropriate as forming the foundation for the protection of TK, but coupled with necessary amendments to existing IP regimes to address circumstances where rights in TK transition to or overlap with, rights arising under existing IP regimes.

In general, the rationale for preferring wholly sui generis laws or regulations was that such a system could be better adapted to deal with the inherent nature of TK and would be simpler to incorporate, rather than trying to amend the existing laws. It was however noted by the Portuguese group that any sui generis system would require a careful balancing between protection and promotion of knowledge. Likewise, the US group observed that consideration of any sui generis system would raise a number of issues for further consideration, including:

- the extent to which existing IP laws do not already provide adequate protection;
- the need to take into consideration issues relating to unfair competition, human rights, differing concepts of ownership and property, environmental concerns;
- overlap with existing and well developed IP regimes;
- the time and effort required to develop a sui generis system which adequately balance the objectives and interests at stake, and the political will to do so;
- whether separate or more flexible standards for inventorship and public disclosure for inventions derived from TK are appropriate;
- how the group that generated the TK would be acknowledged, compensated and/or not barred from practising or otherwise using the TK from which subsequent inventions are derived;
- how to ensure all members of a TK holding 'class' are rightly identified;
- safeguards against dubious TK claims.

16. *If yes to any part of question 15, is a harmonised approach to protection desirable? In your answer, please state reasons.*

Approximately two thirds of the groups favoured a harmonised approach to TK protection (although in two cases it was unclear whether the groups were advocating sui generis laws per se or sui generis laws as promoting harmonisation).

Five groups (Australia, Belgium, China, Ukraine and the US) expressed opposition to a harmonised approach. While the German and UK groups did not answer this question, based on previous answers, it is to be assumed that they would also be opposed to a harmonised approach, in which case approximately 20% of the groups are so opposed.

The remaining groups did not express a view.

#### In favour of harmonisation

In terms of the reason for favouring a harmonised approach, the responses can be broadly divided into 3 categories:

- efficiency/certainty;
- addressing the needs of a globalised world;



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- effective protection.

The Canadian group considered that a harmonised approach would elevate TK to the same status as other IP, ie valuable intangible economic interests, which would in turn motivate ongoing international efforts to protect and manage TK. Arguably, reaching the same conclusion but for different reasons, Mexico and Paraguay advocate harmonisation as a means for providing a minimum standard of protection. Ecuador, Finland and Portugal noted that a harmonised approach would avoid cross boundary issues and acknowledge the fact that interests in, and the risk of misuse of, TK are not necessarily confined within today's national boundaries. The Swedish and Swiss groups favour harmonisation as a means for better facilitating trade, thereby creating legal certainty for holders of TK and those wishing to exploit it.

Both the Philippines and Spanish groups, although being in favour a harmonised approach, noted the need for flexibility. The Philippines group considered that countries must be given enough prerogative to determine the manner, form and mechanism of protection for TK such as is compatible with the particular nature of TK in their country, and the Spanish group was concerned to avoid a harmonised approach being too specifically delineated so as to exclude relevant subject matter.

#### Against harmonisation

The Australian group considered it would be difficult to achieve harmonisation in practice, considering the wide variation among indigenous cultures around the world, particularly given the difficulty of even agreeing on a definition of TK, and the fact that TK continues to evolve.

The Belgian group quoted from the author Dutfield,<sup>3</sup> who warns against a 'one size fits all' approach, diluting the rich diversity of TK by a system that will not be appropriate for any particular society. This concern was echoed by the US group, which commented:

... there exists such diversity within these TK systems that develop in a set of "harmonised" rules for application to these diverse systems may undermine the very diversity it hopes to protect.

Similarly, the Ukrainian group considered that the specifics of TK favour each country introducing a tailored system of protection for TK, but nonetheless countries should contribute to the development, and make use, of model laws, adapted as appropriate to specific situations.

#### 17. *If yes to question 16, how should that approach be implemented*

*a) at an international level; and*

*b) at a national or regional level?*

Approximately one third of the groups had answered no to question 16 or did not answer this question. Of the remaining 25 groups, 13 considered that a harmonised approach to protection of TK should be implemented at both an international level and at a national or

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<sup>3</sup> G. Dutfield, "Protecting Traditional Knowledge and Folklore. A review of progress in diplomacy and policy formulation", ICTSD-UNCTAD Project on IPRs and Sustainable Development, 2003, [http://ictsd.org/downloads/2008/06/cs\\_dutfield.pdf](http://ictsd.org/downloads/2008/06/cs_dutfield.pdf)

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regional level, and 10 groups considered that approach should be implemented at an international level.

Finland preferred harmonisation at a regional level only. The Finnish group noted that international harmonisation may disregard the particular characteristics and development that TK of a given community. On the other hand, protection of TK on a national level may create artificial boundaries and provide unnecessarily narrow protection. Consequently, harmonisation on a regional level may be desirable in accordance with the reach of the given indigenous community.

Reasons for favouring implementation at both an international level and a national or regional level included:

- an international approach can focus on the recognition of TK rights, national systems can focus on recognising the specific situation of particular local indigenous communities and that international and national learning can be applied where national boundaries are inappropriate and cooperation is required (Argentina);
- a harmonised approach could be implemented in stages, the first step of which would be international harmonisation of an administrative regime, while substantive protections for TK could flow from regimes implemented at a national or regional level (Canada);
- basic policy or approach to TK might be harmonised at an international level, while specific questions of how TK should be protected might be harmonised at a national or regional level (Japan);
- implementation at a national or regional level does not preclude observation of general principles at the international level (such as conventions and treaties) which can serve as the parameters on minimum standards within which TK rights at a national or regional level should be recognised and protected (Ecuador, the Philippines, Turkey, US).

In favouring harmonisation at an international level, the Danish group noted that if countries go solo and TK is not protected uniformly and globally, local economies and communities will suffer because their TK will be available to all, especially with countries such as India and South Africa creating TK databases.

The German group, while of the view that existing legal systems provide adequate defensive protection of TK, considered that cases in which there are no rights of prior use or continued use for TK could be addressed by bilateral or multilateral agreements.

18. *Having regard to WIPO/GRTKF/IC/19/5, please provide any proposals you have as to a harmonised approach concerning:*

- a) criteria for eligibility for protection;*
- b) beneficiaries of protection;*
- c) scope of protection;*
- d) sanctions, remedies and exercise of rights;*

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- e) *administration of rights;*
  - f) *exceptions to and limitations on rights;*
  - g) *term of protection;*
  - h) *formalities to which protection is subject;*
  - i) *transitional measures;*
  - j) *consistency with other laws;*
  - k) *national treatment and foreign interests; and*
  - l) *trans-boundary cooperation.*
  - m) *any specific measures for facilitating protection of TK, eg, systems for recording TK, specific mechanisms for benefit-sharing, or collective or reciprocal systems of administration on behalf of indigenous people or local communities.*

Although the question contemplated proposals 'having regard to' WIPO/GRTKF/IC/19/5, the groups were not limited by reference to that document, the draft articles in which have been updated since the Working Guidelines were released<sup>4</sup>.

The following 15 groups did not provide proposals for a harmonised approach: Australia, Brazil, Bulgaria, Chile, Denmark, Finland, France, Hungary, Mexico, Netherlands, New Zealand, Paraguay, Russia, Turkey and the UK. Some of the groups questioned the utility of using such guidance.

The Swiss group does not see a need for sui generis protection of TK, but nonetheless provided a number of substantive proposals it would favour in the event of a sui generis approach. Similarly, the US group noted that there was no consensus in the US on harmonisation proposals generally, but it offered comments in relation to some of the items at a) to m).

The remaining groups (21 out of 36) had a variety of proposals in relation to some or any of the items listed at a) to m) above.

Before turning to those proposals, it is worth noting that the Canadian group's overarching proposal for an internal administrative regime administered by WIPO, the threshold for access to which would be a Member State's recognition of TK and community rights in TK under its national law. It would have a function similar to that of PCT for patents, but adapted for TK, and may include both positive and defensive protection. The regime would provide registry services for TK and rights holders that would serve as the basis for access to dispute resolution protocols and systems. A Member State would not be precluded from establishing its own registry and dispute resolution mechanisms involving TK that is addressed by parties within its borders.

This proposal may warrant further consideration by the Working Committee as a framework which could accommodate both national systems and circumstances, but provide an overarching dispute resolution mechanism on an opt-in basis.

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<sup>4</sup> The text which represents the conclusion of the IGC's 21<sup>st</sup> session is the most recent draft text. It can be accessed at <http://www.wipo.int/tk/en/igc/>.

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### Criteria for eligibility (Article 1)<sup>5</sup>

The options for criteria for eligibility include protection for TK associated with indigenous people or traditional communities and collectively generated, shared and preserved by that community.

The Canadian and US groups suggested the draft article could be used for reference purposes, while the Italian and Swiss groups expressed a preference for option 1, and the Egyptian and Philippines groups expressed a preference for option 3 of WIPO/GRTKF/IC/19/5. The principle difference between those options is that option 1 is silent as to whether the TK is publicly known, whereas option 3 would limit protection to such TK as is not widely known outside the community. That difference persists in the most recent drafting for Article 1.

Other proposals focused on the TK being unique to a particular region or its indigenous inhabitants which has been developed, protected and transmitted within that group. The proposals generally did not deal with whether such knowledge is in the public domain, other than the proposal from the Argentine group, which noted that TK which has entered the public domain should be excluded from protection under the ordinary principles applicable to Core IP Laws. This observation would apply to any proposal favouring protection of TK within the scope of existing Core IP Laws.

The US group also noted that TK which qualifies as prior art should receive defensive protection based on existing prior art rules. Judging by responses to other questions from other groups, this proposal is non-controversial.

### Beneficiaries of protection (Article 2)

The common thread of the alternatives in Article 2 is that beneficiaries should include indigenous and local communities. The unresolved area is whether families, nations and individuals may also be beneficiaries.

The Egyptian and Italian groups favour alternatives which are inclusive of nations, families or individuals, whereas the Swiss group would favour limiting the protection to indigenous and local communities.

The remaining proposals tended to favour an approach that would see beneficiaries as communities, although the Portuguese group considered that any entity (including individuals) who represented the interest of the region from where the TK originated could be a beneficiary of protection. To the contrary, the US group suggested that an individual with a truly individual intellectual contribution should be encouraged to pursue protection under modern IP laws.

### Scope of protection (Article 3)

The alternatives presented in WIPO/GRTKF/IC/19/5 varied as to whether the scope of protection is defensive or positive or both. The most recent drafting of Article 3 has options for defensive and positive protection, both of which provide for prior informed consent and

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<sup>5</sup> References to articles are to those appearing in WIPO/GRTKF/IC/19/5 but incorporating any updated content, as applicable. Note that there are generally a number of conceptual alternatives provided in each of the draft articles, as well as options for preferred drafting.

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sharing of benefits. The most recent draft also contains a new Article 3 bis dealing more particularly with scope of protection and sanctions.

The Egyptian and Italian groups favour those WIPO options which are rights based, allowing the beneficiaries to exercise control over and exploit their TK. The remaining proposals also focused primarily on positive protection, including rights to control the use of TK by third parties without consent (which may include benefit sharing as a condition of that consent). The Argentine group noted a need for balance between the rights of TK holders and others.

The US group noted that where the TK involves resources depended upon by TK holders, whether for medicinal, cultural or other purposes, protection of those resources should be within the scope of any protection contemplated, as many TK holders are directly dependent on their environment.

#### Sanctions, remedies and exercise of rights (Article 4)

The draft article has a number of options. Option 1 provides a degree of flexibility at the national level. Option 2 is prescriptive in requiring criminal, civil and administrative enforcement procedures. Option 3 introduces the concept that sanctions and remedies should, where appropriate, reflect those that indigenous people and local communities would use.

The Italian group favours option 1, the Peruvian group favours a combination of options 1 and 2 and the Swiss group favours option 3. The Thai group, while not referencing the WIPO framework, also advocated criminal and civil sanctions, but was the only other group to do so. The options are effectively merged in the most recent draft of Article 4, so as to present a variety of additional rather than mutually exclusive concepts.

The present draft article continues to encompass proposals that would see procedures being accessible, fair, equitable, adequate and not burdensome to holders of TK, and provides for alternative dispute resolution mechanisms recognised by international, regional and national law as appropriate. This may be desirable as the historical, economic and social situation of TK holders can make it difficult for them to pursue relief through courts or legislation. Alternative dispute resolution was also advocated by the Canadian and Ecuadorian groups.

The most recent draft also contains a new Article 4 bis which details possible disclosure requirements with varying consequences arising for non-disclosure.

#### Administration of rights (Article 5)

The draft article suggests appointing an appropriate national or regional authority to facilitate the administration of rights, which authority would include indigenous peoples.

The draft article proposes a number of options for the activities of the authority, which include:

- disseminating information and promoting practices about TK and its protection;
- ascertaining whether prior informed consent has been obtained;
- proving advice to TK holders and users on the establishment of mutually agreed terms;

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- applying national legislation regarding prior informed consent and fair and equitable sharing of benefits and/or supervising the same;
  - assisting TK holders in enforcement of their rights;
  - determining whether an act pertaining to TK constitutes infringement or an act of unfair competition.

Implicit in most proposals was that the national or regional authority should be established by the government of the relevant country. A number of groups suggested that the relevant authority could manage a database of TK. This is now an alternative in the most recent draft of Article 5.

The Estonian and South African groups favoured administration by the courts rather than by an authority established for the purposes of administering TK rights.

#### Exceptions to and limitations on rights (Article 6)

Article 6, with varying options, indicates that measures for protection of TK should not be used against the communities in possession of the TK and should not limit the members of those communities to continuing practising their TK.

Whether by reference to the draft article or otherwise, a number of groups supported this proposition. The Italian and Japanese groups considered that any exceptions and limitations should be by reference to existing domestic laws, particularly IP laws. The Indonesian group suggested that there should be an exception to the measures for protection if the TK was used other than by the TK holder for no profit and in the communal interest. The Thai group proposed a similar exception, being for research, study or non-commercial purposes. The Swiss group proposed that protection of TK should not encumber the independent discovery or invention of the same knowledge.

The draft article draws a distinction between TK generally and 'secret and sacred TK', the distinction being that the latter should not be subject to exceptions and limitations. None of the groups addressed this point.

#### Term of protection (Article 7)

The draft article offers two options:

- protection lasting as long as the TK fulfils the criteria for eligibility; or
- duration of protection varying upon the characteristics and value of the TK

The groups who made proposals were approximately equally split between favouring the first option and an indefinite term.

#### Formalities to which protection is subject (Article 8)

The draft (and the subsequent work of WIPO) proposes two alternatives:

- no formality; or
- some formality with the possibility of maintaining registers or other records of TK

Most of the groups who answered expressed a preference for a register or other record of TK, with views (where expressed) varying as to whether registration should be compulsory and a condition for the acquisition of rights.

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### Transitional measures (Article 9)

The draft article provides that the provisions will apply to TK which fulfils the criteria for eligibility when the provisions come into force, with options as to whether:

- rights already acquired by third parties continue in accordance with national law/ international legal obligation; or
- acts in respect of TK which had commenced prior to the provisions are to be brought into conformity.

A number of groups supported the concept of transitional measures per se. The Egyptian, Philippines and Thai groups support the WIPO concept that third party rights already acquired should be secured. The Italian group considers that continuing acts with respect to TK should be brought into conformity.

### Consistency with other laws (Article 10)

The draft article proposes two alternatives:

- protection should take account of and operate consistently with other instruments (query whether this is international, regional and national instruments or international instruments only); or
- protection should leave intact and in no way affect protection provided for in other instruments.

The proposals generally supported consistency, although the Swiss group favoured option 2. While some groups specified that existing conventions and treaties should be observed, in particular the CBD and the UN Declaration on the Rights of Indigenous Peoples, this does not seem to be inconsistent with option 1.

### National treatment of foreign interests (Article 11)

Alternative principles are proposed without, ie:

- national treatment;
- reciprocity; or
- means for recognising foreign rights holders

The majority of proposals favoured national treatment, although Belgium and the Philippines favour reciprocity and Thailand favours appropriate means for recognising foreign rights holders.

The Canadian group noted that this issue would not necessarily factor into a specialised international dispute resolution context where the parties have an opportunity to agree to the rules and guidance to address a given conflict.

### Trans-boundary cooperation (Article 12)

The draft article provides that where TK is located in territories of different states, those states should cooperate to take measures that are consistent with this instrument, and with the participation of the TK holders. The draft article also provides that parties should consider a global mutual benefit sharing mechanism to address fair and equitable sharing of benefits derived from the use of TK that occurs in trans-boundary situations for which it

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is not possible to grant or obtain prior informed consent. The recent updated text of Article 12 has a number of proposals in relation to codification of oral TK and development of TK databases.

The general principle of cooperation was endorsed by those groups who provided a proposal. As previously noted, there is support for database systems amongst the groups.

#### Any specific measures

Twelve groups provided a proposal, the dominant theme of which was the desirability of some form of TK database or registration system, the benefits of which could include:

- effective prior art searching when examining a patent application
- confirming or invalidating an invoked copyright over TK
- identification of TK holders to ensure appropriate compensation for use of TK

### III) Conclusions

The Working Committee is reminded of the Resolution of Special Committee Q166 (**Q166 Resolution**), in particular, the following:

1) Traditional knowledge in the public domain should be treated as other information in the public domain for the assessment of patentability of invention.

...

3) If national laws require a declaration of the source of genetic material and traditional knowledge in patent applications, such laws should:

- only require that the patent applicant to the best of his knowledge identifies the source from which the inventor obtained the genetic material or the information based on traditional knowledge;
- entitle the applicant to rectify any failure to indicate the source or add any later information obtained on the origin of the genetic material.

4) Ways and means other than patent application should be developed to deal with prior informed consent and access and benefit sharing concerning genetic resources and traditional knowledge connected with it.

Of particular note:

- paragraph 1) is limited to patents;
- paragraph 3) only applies 'if national laws require a declaration of the source of genetic material and traditional knowledge in patent application';
- paragraph 4) provides an invitation. This Working Question provides an opportunity for the Working Committee to propose a resolution with a scope beyond that of the Q166 Resolution. For example, there was broad consensus in the group reports that TK can and should be treated as prior art for the purpose of patent applications. This simply reflects paragraph 1) of the Q166 Resolution.

Turning to the proposals for harmonisation, approximately two thirds of the groups were in favour of a harmonised definition, with approximately 60% of the groups providing proposals for the substantive content of a harmonised definition. The Working Committee



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may take guidance from the possibilities set out in response to question 13. Due to the variety of proposals, the Working Committee may wish to focus on a non-exhaustive list of key concepts, whether guided by the IGC draft articles or otherwise.

In relation to protection for TK, 75% of the groups favour at least defensive protection, with 50% of the groups favouring both positive and defensive forms. A starting point for the Working Committee may be to consider whether the protection afforded by existing Core IP Laws is adequate. If the consensus or majority view is that the existing level of protection afforded by Core IP Laws is inadequate, the next question is what more may be required and how is that to be achieved. It would appear from the answers to question 15 that more groups would favour something beyond the scope of existing Core IP Laws than those who do not. Key issues for consideration might include whether protection is available for TK in the public domain, and who the beneficiaries of any protection should be. In the context of considering protection, the Working Committee is invited to consider the scope of any rights, particularly in relation to informed consent and access and benefit sharing, as well as sanctions for failure to respect such rights.

In considering the extent of any harmonisation, it is suggested that the Working Committee give consideration to the Canadian group's proposal for an international administrative regime and how such a regime might sit with national or regional arrangements. The Canadian group has made various proposals for the functions of such regime, and further guidance may be taken from the work of the IGC as proposed in draft Article 5. Issues for consideration would be how such a regime would sit with other regional or national arrangements and whether such international regime would be on an opt-in or compulsory basis.

Whether such scheme finds favour with the Working Committee or not, there seems to be a degree of consensus for recordal systems which would, at least, assist in providing defensive protection.