

NEWZEALAND

The following comments were received through a communication from the Ministry of Economic Development of New Zealand

1. New Zealand has been asked by the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (“IGC”) to join with other Member States and organisations to provide comment on the draft documents *Protection of Traditional Cultural Expressions/Expression of Folklore: Overview of Policy Objectives and Core Principles (WIPO/GRTKF/IC/7/3)* and *Protection of Traditional Knowledge: Overview of Policy Objectives and Core Principles (WIPO/GRTKF/IC/7/5)*.
2. The Ministry of Economic Development held a number of workshops around New Zealand to highlight the work of WIPO and provide background information on the two documents. Maori, in particular, were encouraged to attend these workshops. Through this process a number of interesting points were raised, some of which have been reflected in this response.
3. The New Zealand public, in particular Maori groups and individuals were also encouraged to provide commentary on the documents as New Zealand considers it important for the IGC to gain an indigenous perspective on these issues. Given the limited time frame, however, it was not possible to consult comprehensively and no written submissions were received. Our comments are, therefore, preliminary and without prejudice and we reserve the right to provide further comments on future iterations.
4. As noted at theseventh session of the IGC, New Zealand supports the continuation of this important work and recognises the need to reach some consensus on policy objectives and guiding principles before determining legal mechanisms for the protection of Traditional Cultural Expressions (“TCEs”) and Traditional Knowledge (“TK”). We note, however, that during the workshops a number of commentators raised concern with the rapid pace in which this work is progressing. They considered that the time frames in which to comment on this important work were tight, but, nevertheless, were interested in commenting on further iterations of the Policy Objectives and Principles. A number of workshop participants also stressed the importance of more discussion, debate and capacity building at the local level in relation to the underlying issues, before comprehensive consideration of principles and policy objectives could be undertaken. There was significant support for the IP/TK capacity building workshop scheduled to take place in New Zealand in the forthcoming year.
5. New Zealand therefore considers it important that WIPO provides the opportunity to comment on further drafts and considers the above points reprocess and capacity building when setting time frames for a response on any revised version of documents 7/3 and 7/5. It is also important that States do all they can to enhance indigenous participation in the WIPO process. Workshop participants also stressed the importance of acknowledging Maori contribution to such processes.

6. We note that the two documents cover similar principles and policy objectives, but there are minor points of difference. We have provided detailed commentary on Paper 7/3, and for brevity, where there is overlap in subject matter, please consider commentary for 7/3 to apply to 7/5. Where there are notable points of distinction for 7/5, we have provided distinct commentary.

*TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE
OVERVIEW OF POLICY OBJECTIVES
AND CORE PRINCIPLES (WIPO/GRTKF/IC/7/3)*

7. As a general comment, all of the principles and policy objectives outlined in this document *prima facie* appear to be relevant and unlikely to cause concern or offence. We query, however, whether certain principles and policy objectives might be missing, particularly those that may be relevant from an indigenous perspective. We have attempted to address this question in the following commentary.

PRINCIPLES

8. This section addresses the underlying principles in three parts: Core Principles, General Guiding Principles and Substantive Principles.

Core Principles

9. New Zealand is particularly supportive of the core principle of flexibility for national policy and legislative development. New Zealand considers that a “one size fits all” approach is unlikely to be suitable to protect TK comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of indigenous and local communities in all countries. New Zealand, therefore, advocates for a menu of options approach. It will, therefore, be necessary to ensure that each state maintains a reasonable degree of flexibility to implement policies that best suit their domestic situation.

General Guiding Principles

10. A number of the general guiding principles are particularly important to New Zealand. For example, the principle of responsiveness to aspirations and expectations of relevant communities is essential. Any mechanism developed for the protection of TCE’s and TK must meet the needs and gain the support of indigenous peoples if it is to be used effectively. To this end, we consider the active participation of indigenous peoples at the developmental stage is crucial. One way to achieve this is through increased participation of indigenous peoples in the IGC meetings.
11. New Zealand also considers the principle of combining proprietary and non-proprietary approaches to protecting TK important. During workshops held with interested Maori, concerns were expressed about the underlying basis of the intellectual property (“IP”) regime to accord property rights over knowledge, which may be inconsistent with customary approaches to managing traditional knowledge, and the aspirations of traditional knowledge holders. Cultural rights and public rights

models (with limited individual property rights and an anonuson individualst oprove the right to use, rather than an anonuson TK holderst o show customary rights or prove infringement of any new protective measure) were put forward at the workshops by non-governmental participants as possible solutions.

12. Concern with the property rights based IP regime has also been raised in New Zealand in the context of the Waitangi Tribunal Claim to Indigenous Flora and Fauna (Wai 262). Through the Wai 262 claim and feedback from the workshops New Zealand understands that ownership may not necessarily be the issue or the answer, but control over the use of traditional knowledge is important. It may, therefore, be necessary to develop measures that are not property rights based but which regulate third party use to prevent misappropriation and inappropriate use of traditional knowledge. For example, it may be useful to develop codes of conduct (incorporating customary approaches) around the use of traditional knowledge in various sectors, including advertising or marketing. A number of workshop participants noted the potential value of a "guidelines" approach in cases where prescriptive legal models will not be effective to address issues such as cultural sensitivities. This would tend to lend support to WIPO's work on guidelines in relation to TCEs. New Zealand considers it important that this work continue alongside consideration of principles and policy objectives.
13. New Zealand supports the principle of complementing and working with laws and measures that preserve and safeguard cultural heritage. Concern was raised at the workshops about the loss of some traditional knowledge and the need for communities to be supported as they work to restore and preserve traditional knowledge in a culturally appropriate way.
14. New Zealand would also give priority to the principle of respecting and co-operating with other international and regional instruments and processes. In particular, where outcomes will impact on IP regimes, New Zealand considers that they should comply with current international obligations.
15. As noted at theseventh session, the principles outlined are essentially derived from the IP regime and related areas of western law. It would be useful, therefore, to consider if there are additional principles, important from an indigenous perspective that may be missing. Maori commentators (including Mr. Maui Solomon who spoke at the seventh session of the IGC) have suggested that it may be useful to examine principles and objectives elaborated in the many extant declarations by Indigenous Peoples themselves such as the declaration of Belem 1988 and the Mataatua Declaration to name only two. In addition to this there are many useful codes of ethics, principles and guidelines promulgated by NGOs that have relevance in this context. One such document is the Code of Ethics by the International Society of Ethnobiologists that was developed over a period of 10 years between scientists, researchers and indigenous peoples and was ratified by the New Zealand Society of Ethnobiologists in 1998. We would be interested to seek guidance from the indigenous participants on this point and note that this issue could be addressed in the indigenous panel presentations planned for future meetings of the IGC.
16. At the workshops on the principles and policy objectives many participants raised the Treaty of Waitangi ("the Treaty"). The Treaty is a founding constitutional document

in New Zealand. A body of jurisprudence about the Treaty and its principles has been developed by the New Zealand Court of Appeal and the Waitangi Tribunal. The Treaty principles provide guidance to the Crown and Maori on how they shall engage with one another.

17. Attached is a link to a document titled “The Principles of the Treaty of Waitangi” which provides useful comment on the various Treaty Principles and how and why they were created. Please visit [http://www.waitangi-tribunal.govt.nz/doclibrary/Appendix\(99\).pdf](http://www.waitangi-tribunal.govt.nz/doclibrary/Appendix(99).pdf)
18. The Treaty is considered to be a living document. This allows the Treaty to be interpreted in a contemporary setting with new principles constantly emerging and existing ones being modified. Based on this experience, it may be useful for the current set of General Guiding Principles to reflect the reality that principles may need to change to better suit the needs and aspirations of the parties and indigenous peoples over time.
19. There are references to the principles of the Treaty in various pieces of New Zealand legislation and policies relating, for example, to environment, conservation, local government and state-owned enterprises. While the interpretation of the Treaty principles can in some cases be contentious, a number of the principles themselves may provide a basis for further discussion of possible principles by the IGC. Particular principles raised by non-governmental participants at the workshops included partnership, active protection [of TK and TCEs], and the authority, control or guardianship of Maori [over their TK and TCEs].

Substantive Principles

20. The substantive principles outlined appear, upon initial consideration, to be relevant and important. In particular we consider it important to examine the remedies and enforcement procedures available to indigenous groups for their appropriate use of their TK.
21. Anecdotal evidence provided by IP right owners suggests that the costs associated with enforcement of their rights can be burdensome. We are mindful that in the further analysis of this principle, it may be necessary to consider a range of remedies and enforcement procedures with the objective of reducing costs, including those that may exist within customary approaches. Enforcement across borders was a key issue raised by Maori participants at the workshops, especially in relation to TCEs.

POLICY OBJECTIVES

22. Although we have not had the opportunity to fully test the suggested policy objectives domestically, the objectives listed appear, *prima facie*, to be relevant. We note, however, that some are more directly associated with protection of TK at the IP interface than others. While objectives such as respect and safeguarding traditional cultures are important, these seem less likely to be directly achieved by an IP-type intervention than other objectives such as encouraging community innovation and creativity, precluding invalid IP rights and promoting community development. Perhaps it would be useful to distinguish between the objectives that can more directly

be achieved by protection at the IP interface, and a second level of objectives which the protective mechanisms developed should take into account and not run counter to. This second level of objectives relate in many respects to other policy areas, for example, cultural preservation.

*PROTECTION OF TRADITIONAL KNOWLEDGE:
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23. We note that the main distinction between 7/5 and 7/3 are the substantive principles of suppression of misappropriation; ensuring equitable compensation for the commercial or industrial use of TK and the inclusion of the principle of prior informed consent to access TK. New Zealand considers these principles necessarily underpin any overarching mechanism designed to protect TK.
24. New Zealand also supports the principle that any protection mechanism developed does not require any formalities, including registration or compilation of TK in databases. New Zealand has previously raised the point that documentation of TK is an area of concern for Maori, and therefore, considers it important that any protective mechanism allows for flexibility to determine whether the use of databases and registries is the best option. Concerns about databases were also raised by Maori at the workshops. We consider document 7/5 provides the necessary flexibility in this regard.
25. As noted above, these comments are preliminary only as New Zealand has not been able to fully test the suggested principles and policy objectives domestically or to determine if they are appropriate from a Maori perspective.

SINGAPORE

The following comment was received through a communication from the Intellectual Property Office of Singapore

Singapore is in the process of discussion and collating relevant comments from our local agencies and thus make no specific comments at this time; however, we wish to reserve our right to comment/intervene (if necessary) on these documents or the redrafted version prior to/at the June session of IGC.

ASSEMBLY OF FIRST NATIONS (AFN)

Introduction

The Assembly of First Nations (AFN) is the democratically elected representative body of the over 700,000 First Nations indigenous people in Canada. The Assembly serves as a national forum and political advocacy organization established to advance the aspirations of the First Nations. By virtue of Resolution 27/2003 of the Chiefs in Assembly, the AFN has been directed to ensure respect for traditional knowledge domestically and internationally, which includes the protection and preservation of traditional knowledge and to identify, support and network with First Nations and other organizations interested in understanding the application of customary laws, traditional laws or other laws to preserve and protect traditional knowledge.

The AFN has reviewed the documents produced for the seventh session of the International Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) operating under the auspices of the World Intellectual Property Organization, specifically the papers on *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Core Principles* (WIPO/GRTKF/IC/7/3) and *Protection of Traditional Knowledge: Overview of Policy Objectives and Core Principles* (WIPO/GRTKF/IC/7/5). It was agreed by the Parties at the seventh session of the IGC that comments on these documents would be received prior to February 25, 2005 for consideration in the development of further draft objectives and principles.

The comments found herein are preliminary in nature. The First Nations do not have adequate capacity to engage nor have they had the opportunity to turn their attention to the matters under discussion. These comments are without prejudice to positions the First Nations may present once they have had the facility to put their collective minds to the issues at hand.

General Comments

The following general comments apply to both documents reviewed herein. Specific comments on each of the documents are presented following these introductory remarks.

First, we acknowledge the work of the Secretariat to produce documents that support future discussions. This is intellectually complex and demanding work and the Secretariat has taken on this challenge with aplomb. The information documents that have been produced over the years will be helpful to us as we work to engage in a fully informed manner on this topic.

Second, the fact that the First Nations have not had the opportunity to engage in a full and informed manner on the issues under discussion at the IGC is a grave matter. It is unacceptable that governments, including the Government of Canada, are engaged in the

further development of an international regime on intellectual property and genetic resources, traditional knowledge and traditional cultural expressions, both at the IGC and in other fora, without the full and informed participation of indigenous peoples, and specifically the First Nations. While we must ascribe to governments the very best intentions in undertaking this work, proceeding without the involvement of the holders of the knowledge and genetic resources and practitioners of our arts undermines our confidence in their intentions.

Third, the First Nations are sovereign nations. Only the Assembly of First Nations has the authority to speak on behalf of the collective will of the First Nations in Canada unless there has been an explicit delegation of authority. No such delegation currently exists. Further, the Government of Canada is legally required to consult with the First Nations on matters that may impact on their Aboriginal and Treaty rights, which includes intellectual property rights, and to ensure the interests of First Nations are incorporated as appropriate in any final decisions. The Government of Canada has not consulted the First Nations. Thus, any further development of the international regime contemplated through the work of the United Nations is *ultra vires* the authority of the Canadian government.

Fourth, the philosophical tenets which underlie these documents are in some ways fundamentally at odds with ours. The conflict is rooted in the difference between the traditional and modern paradigms and protecting our traditional cultures in the modern setting.

One element of this challenge is the difficulty of conceiving how one might divide, categorize, or compartmentalize knowledge, expressions, or genetic resources as is contemplated in current intellectual property rights regimes and yet maintain a holistic perspective. From our traditional perspective these things are all captured in the whole. One cannot separate the knowledge of medicine from the techniques for its use, sacred items from their intrinsic role in ceremony. Yet, intellectual property rights regimes, founded on an Aristotelian perspective, are by their nature reductionist. We, therefore, have a philosophical conundrum at the heart of the discussion. The challenge to us all will be to determine how an intellectual property rights regime, which at least at currently conceived is reductionist in nature, can be made holistic.

That said some of the concepts of intellectual property rights are known in our traditional cultures. We had systems of apprenticeship, individual property rights, and notions of permission and exclusivity. However, while we generally recognized individual endeavour and capacity, individuals understood their obligation to the community at large. Our traditional laws were generally fashioned to serve and protect the community first, not the individual. The regime conceived currently is ostensibly based on notions of the greater good through innovation, but the benefits too often flow to powerful individuals, creating monopolies, and disenfranchising communities of their capacity to meet their needs. We will not contenance the enrichment of the individual to the disadvantage of the whole.

This brings us to the other element of the conflict this creates for First Nations. We are interested in protecting and preserving our traditional culture, but we also struggle against overwhelming economic disadvantage. Part of this economic disadvantage has been created by private property rights regimes, including the intellectual property rights regime, that divorce us from our own means of production. We have been forced off of our lands and at times we have lost the right to practice our religions or educate our own children. The growing interest in intellectual property rights is just another round in the fight for what is ours. As we have found to our detriment time and again is that if we fail to embrace the new reality we are doomed to dispossession, neglect, and poverty. If humanity fails to find a middle ground between the existing intellectual property rights regime and our traditions, then First Nations will be left the forlorn choice of preserving their traditional ways in the face of mounting economic disadvantage.

The Elders have told us of our collective responsibility to everyone on the earth, be they indigenous or not. Relationships between First Nations and immigrants were initially based on sharing and trade. The First Nations offered the new comers food, medicine, shelter, and clothing, helping them to acclimatize to the continent. This balance has been lost over the years and must be restored. First Nations have much to offer, as it evidenced by the interest in traditional knowledge, genetic resources, and traditional cultural expressions. We are interested in sharing and trading goods and services as a historic part of our economies, but we have long and painful experiences with those who would serve their own interests to the detriment of our own. We have been striped of our land and resources. We will not allow ourselves to be stripped of our rights to our own intellect, creativity, and ingenuity. While we recognize our interconnected responsibility to provide our support to others by sharing our knowledge and compassion, we will only do so in circumstances of respect, honouring our perspectives, and in recognition of our rights. We recognize the economic opportunities that may exist in an intellectual property rights regime, but we must first honour our obligations to protect the knowledge, culture, and genetic resources, including our obligations to those not yet born.

The First Nations of today are merely the keepers of our ancestors' wisdom, holding a grave responsibility for passing their knowledge to our children. We have obligations to our past and our future, as well as to those with us today. As such, we must be careful in our observation of these duties. We cannot undertake actions lightly that have the potential to undermine our collective long term well being. These matters require serious sober contemplation, analysis, and discussion. We will not be prepared to pass judgement until we have had this opportunity.

Finally, the greatest challenge to any future regime will be in its application. Staying true to the policy objectives and core principles will be tested as the regime is further defined. We must ensure, therefore, that there is a meeting of the minds at the preliminary stages. There must be no ambiguity, guile, or dissembling; this will only lead to confusion, disharmony and ultimate failure.

REVIEW OF THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE: OVERVIEW OF POLICY OBJECTIVES AND CORE PRINCIPLES

The following comments are intended to facilitate further dialogue and discussion on the draft policy objectives and core principles for the protection of traditional cultural expressions as outlined in document WIPO/GRTKF/IC/7/3. While we are generally supportive of most of the objectives and principles, we are not satisfied they do justice to our traditional perspectives or are adequate for protecting our interests.

Policy Objectives

The list of intrinsic values of traditional cultures and traditional cultural expressions cited in policy objective (i) should include scientific value to be complete. Our cultural expressions often have specific purposes which include the scientific.

As noted above, respect for our values, as outlined in policy objective (ii) should begin with respect for our philosophical values. Intellectual and spiritual values are subsets of philosophical values and are incomplete expressions.

Policy objective (iii), *meeting the needs of the community*, must include contributing to sustainable environmental development in addition to economic, cultural, and social development. Otherwise the use of the term sustainable development in Policy Objective (ix) would be at odd with the general use of this term in international discourse over the past 25 years.

Empowering communities, policy objective (iv) states that protection should aim to effectively empower “indigenous peoples and traditional and other cultural communities to exercise due authority over their own TCEs/EoF [traditional cultural expressions/expressions of folklore]” (emphasis added). The reference to “due authority” is ambiguous and needs clarification. From our perspective it implies recognition of our inherent right to self-government. We will require reassurance that this phrase will not be used by colonial governments as a mechanism to deny us these rights.

There are a number of policy objectives that could potentially prove to be contradictory. For example, policy objective (vii), *respect for and cooperation with relevant international agreements and processes*, could conceivably conflict with the policy objectives listed above. It will depend on where the parties put the emphasis. If other international regimes do not accord adequate respect to the other policy objectives outlined in the document must those policy objectives be abandoned in favour of supporting a seamless international regime? In light of the fact that much of the existing international economic regime is inconsiderate of our interests we would expect that the other values noted above will take precedence and the international regime modified as necessary to reflect the other policy objectives.

Policy objective (x) supports cultural diversity, however the description of the objective creates challenges. Rather than an expression of support for all culture, it refers only to “cultural content and artistic expressions”. This is an example of the problem identified in the general comments above, specifically, failure to accommodate a holistic perspective. In supporting this approach the parties would be adopting a very narrow and ultimately unhelpful approach to protection of cultural diversity.

Core Principles

The principles identified are intended to support the policy objectives and in fact there is a considerable degree of agreement between them. There are shortcomings, however, that could be corrected.

First, we would recommend two additional principles, the inclusion of which would significantly strengthen the contemplated regime. One would be a principle of partnership. We are concerned that the system not be structured on an adversarial or competitive model. A principle of partnership, acknowledging our collective interests in working together to achieve the policy objectives, would demonstrate commitment to this ideal. Also, a principle of recognition of rights should be included. The rights of communities to effective protection of their traditional cultural expressions against misuse and misappropriation must be explicit in the document.

Second, the principle of respect for customary use and transmission of traditional cultural expressions is very important, and we would agree that our customary use, practices, norms should guide the further development of this regime. However, we would also argue that our customary laws should also be considered in the development of the regime. We have such laws, though there is diversity through out our nations.

The failure to include a reference to laws here and references elsewhere in the document to “folk” tales, art, dances, etc., are evidence of a disturbing sentiment expressed throughout the documents. Specifically there appears to be a propensity to dismiss or denigrate our societies and to downgrade our arts, cultures, and knowledge to curiosities or quaint relics. This is unacceptable.

There are additional matters to consider in the examination of the core principles in section B. *Specific substantive principles.*

First, as noted above, we object to the trivialization of our stories, poetry, songs, dances and arts as “folk”. They are no more or less “folk” than the works of Michelangelo or Kahlil Gibran. They are merely of a different culture. The term “folk” should be deleted from Section B.1, *scope of subject matter.*

Second, the First Nations are inherently self governing, and we must insist that there be explicit recognition that authority rests with the First Nations to delegate power as we see fit. Management of rights, therefore, as outlined in part B.4 must contain explicit

reference to the expectation that indigenous peoples will hold the authorities contemplated in the section. We are concerned that the document currently contemplates the status quo, specifically in the reference to “a responsible authority, which may be an existing office or agency...”. The Canadian government currently claims to serve as the authority acting on behalf of and in the interests of First Nations communities. The long and sorry history of betrayal belies any moral authority the Government of Canada may have in making this claim. The status quo is not acceptable to the First Nations. In a related vein, with respect to part B.4(b)(v), the First Nations exercising their right to self government will develop enabling legislation, processes, or administrative measures, or will work on a government to government basis with others to do so.

Third, many questions are raised as we consider the specific substantive principles further that must be the subject of more detailed analysis. For example: part B.4(b)(i) should contemplate the need for multiple or repeat authorizations; part B.5 may be crafted too narrowly so there should be a full investigation of other options and a determination of whether other elements would be appropriate; part B.7 raises concerns about who would be authorized to make the determination that an expression was no longer deemed to be characteristic of a people or community and under what circumstances this might arise; and part B.8 contemplates mechanisms for notification for particular elements for which protection is sought, which raises issues of accessibility to remedies and enforcement mechanisms for the poor and disenfranchised.

Overall, while this document is a good start at examining the issues within, its further development requires the full and informed participation of the First Nations, it must demonstrate respect, including respect for our culture and knowledge, and it must reflect our inherent right to self-government.

PROTECTION OF TRADITIONAL KNOWLEDGE: OVERVIEW OF POLICY OBJECTIVES AND CORE PRINCIPLES

First, in our review of the policy objectives outlined in this document, we found that there were policy objectives that were contained in this document that were not also found in the other and vice versa. First, the objective of promoting the equitable sharing of benefits, including monetary and non-monetary benefits is as equally valid with respect to traditional cultural expressions as it is to traditional knowledge. It should be added to the policy objectives outlined in the document on protection of traditional cultural expressions. Second, policy objective (xii), precluding the grant of invalid intellectual property rights, is the same as in the other document, except in this document there is no reference to curtailing the enforcement of invalid intellectual property rights. This should be added to the document on protection of traditional knowledge. Finally, the objective of contributing to cultural diversity also applies with respect to the protection of traditional knowledge. This has not been included in the document on traditional knowledge, but rightfully belongs therein. Likewise, specific substantive principle B7, *principle of prior informed consent* contained in the document on traditional knowledge should be repeated in the document on traditional cultural expressions. There is no

reason that an artist should not be accorded the respect of granting his or her prior informed consent for the use of his or her work as a traditional knowledge holder should be granted such a right.

Second, we noted above our concern about the potential for the *principle of respect for and cooperation with other international and regional instruments and processes* trumping the other principles. Our concerns would appear to be borne out by Principle A.6, *principle of consistency with existing legal systems*. This principle stipulates that, “traditional knowledge protection should be consistent with, and supportive of, existing IP systems...nothing in these Principles shall be interpreted to derogate from existing obligations that national authorities have to each other under the Paris Convention and other international intellectual property rights agreements”. If the parties are not prepared to engage in an examination of the appropriateness of those regimes, established without the full and informed participation or consent of the First Nations, we will likely find ourselves constrained by the philosophical tenets of those regimes restricting our collective ability to meet the other principles. While we respect the arduous negotiations that went into concluding the Paris Convention and other international intellectual property rights regimes, we cannot agree to have our hands tied in the negotiation of future regimes, particularly as we were not party to the original treaties. Finally, the refinement of the specific substantive principles outlined in the document on traditional knowledge will require considerable analysis and discussion. As noted earlier, it is the application of the policy objectives and principles that will form the greatest challenge as we move forward with the further development of an international regime.

Conclusion

In the comments above we have identified a number of issues that warrant further consideration. This includes recognition of the inherent contradictions between the traditional and modern philosophical paradigms and the challenge this will create for the further development of an appropriate regime for the protection of Traditional Knowledge and Traditional Cultural Expressions.

While we are prepared to offer some preliminary comments at this time, these comments do not and shall not be construed to imply the full and informed participation of the First Nations in this dialogue. We must insist that until such time as the First Nations have been fully included in this work that no final decisions are taken on the matters under discussion at WIPO. To do otherwise would contradict the very draft objectives and core principles set out in the documents, including principles of respect, empowering and meeting the needs of the communities and traditional knowledge holders, supporting customary practices and traditional knowledge systems, contributing to the safeguarding of traditional cultures and knowledge, promoting intellectual and cultural exchange, contributing to cultural diversity, and enhancing certainty, transparency and mutual confidence. Our actions must support our words; the ends do not justify the means; we achieve respect by being discourteous, protect diversity through unilateralism, or enhance transparency through exclusivity. We implore the parties to resist the temptation to

charge ahead with the negotiation of this regime without the intended beneficiaries at the table.

CALLOFTHEEARTH(CoE)

The following comments were received through a communication from Call of the Earth (CoE)

Call of the Earth Llamado de la Tierra is an independent indigenous controlled initiative that supports and enables indigenous people to reframe the discussions and negotiations on intellectual property rights and traditional knowledge that are occurring in a wide range of forum, through our own perspectives and from within our own cultures.

Call of the Earth Llamado de la Tierra submits the following comments on the Draft Policy Objectives and Core Principles.

We would like to preface our comments by repeating the points made by our members during the 7th Session of the Intergovernmental Committee (IGC) on Genetic Resources and Intellectual Property, Traditional Knowledge and Folklore held in Geneva from 1 - 5 November 2004.

We believe that to treat cultural expression in an isolated manner separate from traditional knowledge highlights the conceptual differences regarding protection that Indigenous communities have regarding systems of intellectual property rights. This isolated treatment by and large does not assist in securing its protection.¹

ANNEX 1

SUMMARY OF DRAFT POLICY OBJECTIVES AND CORE PRINCIPLES FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

Policy Objectives

- (i) This construction of the intrinsic value of traditional knowledge compartmentalises traditional knowledge into categories of value recognisable to non-Indigenous cultures rather than treating traditional knowledge in the interrelated and holistic manner it is regarded in Indigenous cultures. This reframing of traditional knowledge into an intellectual property framework is at the core of our dissatisfaction with the Draft. There is no mention of the role of traditional knowledge in sustaining culture and passing on information which perpetuates Indigenous identity.
- (ii) Again, while this construction promotes respect for Indigenous knowledge system, and Indigenous knowledge holders for a number of functions, their role in sustaining the lives and identities of Indigenous communities is not recognised.

¹ First Intervention, Call of the Earth, 7th Session of the IGC on Genetic Resources and Intellectual Property, Traditional Knowledge and Folklore in November 2004.

- (iii) The proposed manner of meeting needs of traditional knowledge holders is framed in terms of their contribution to science and the useful arts. Their contribution to their communities, their customary law obligations, and other considerations are not addressed. An intellectual property paradigm is adopted for reward. It would be insufficient for many traditional knowledge holders.
- (iv) This kind of protection is IP protection, which is based on monopoly rights, and rights to commercial use. This is not the spirit for protection for traditional knowledge. Appropriate economic and moral rights do not include communal rights, rights to prevent misappropriation, rights as cultural guardians and custodians, rights to practice customary law.
- (v) Support for Indigenous knowledge systems and appropriate transmission of such knowledge are important goals.
- (vi) The aims of (vi) are appropriate but they are directed at providing a benefit to traditional knowledge holders and the world. A more appropriate construction would be to prioritise traditional knowledge holders and their communities. As the history of colonialism has shown, benefits for humanity and benefits for Indigenous people are often at odds.
- (vii) This is a useful policy objective but is incomplete because misappropriation is not always an unfair commercial use. It could be an unfair non-commercial use.
- (viii) The requirement to operate in a manner consistent with international and regional instruments and processes is potentially inconsistent with Indigenous standards of respect, protection and maintenance of traditional knowledge. International standards of Indigenous peoples are enunciated in the Draft Declaration on the Rights of Indigenous Peoples and the Mataatua Declaration on Cultural and Intellectual Property. But it is not clear from para (viii) that they are among the instruments and regimes referred to as these declarations are not yet officially recognised by the United Nations. It would be preferable that they are specifically referred to as sources of standards for consistent conduct. Additionally, the proposed international regime to regulate access and benefit sharing of genetic resources and associated Indigenous knowledge currently negotiated by the parties to the CBD, and referred to in this para does not include standards for protection of traditional knowledge which fall short of those which would be endorsed or supported by Indigenous participants in the process.
- (ix) It would be more appropriate to encourage, reward and protect tradition-based creativity when it is desired by traditional knowledge holders. We recommend deleting “particularly”. We also recommend caution when dealing with innovation and transfer of technology, as mechanisms which protect the interests of Indigenous traditional knowledge holders are not firmly in place at this time. We recommend qualifying the second part of para (ix) with a more cautious approach which is more thorough in its

application of customary law in any innovation and technology transfer, and which guarantees effective protection of the rights of Indigenous providers of traditional knowledge.

- (x) While we favour fair and equitable terms for all dealings with Indigenous peoples, we believe the proposals for access and application of traditional knowledge are unsatisfactory unless they meet strict free prior informed consent standards and are firmly based in the customary law of the relevant Indigenous knowledge holders. Until mechanisms are in place to ensure the application of and compliance with the customary law of Indigenous peoples in their dealings with their traditional knowledge, it is premature to advocate wider dealings Indigenous knowledge. Indigenous customary law, and mechanisms which recognise Indigenous peoples' right of permanent sovereignty over natural resources should be the standard rather than the international or national regimes for access and use of genetic resources. At present Indigenous peoples do not support the international regime and it is premature to adopt it as a standard for protection of Indigenous traditional knowledge, lands or peoples.
- (xi) While we support fair and equitable dealings with Indigenous peoples, we note that Indigenous peoples have reserved their support for the international regime for access and benefit sharing of genetic resources and this regime should not be adopted as a standard setting measure.
- (xii) In consistency with Indigenous peoples' fundamental human right of self-determination we recommend the addition of the words "where traditional knowledge holders seek those opportunities consistent with their right of self-determination, including the right to freely pursue economic development" at the end of paragraph (xii).
- (xiii) We recommend including this paragraph unchanged.
- (xiv) We recommend including this paragraph unchanged.
- (xv) We recommend that the spirit expressed in this paragraph be extended to all policy objectives and core principles.

Core Principles

- A.1 The aims of A.1 are important and should be retained and strengthened. In order to strengthen the aims we recommend deleting the words "as far as possible".
- A.2 We recommend this paragraph is retained in its current form.
- A.3 We recommend this paragraph is retained in its current form.
- A.4.1 This should be a preamble rather than a standard setting paragraph.

- A.4.2 We recommend replacement of the word *may* with *should* so it would commence “Protection *should* combine” We further recommend that in the second sentence *should* ought to be replaced with *may*, and would state “Protection *may* include defensive measures to curtail” This would reflect the range of views and accommodate those who do not believe that defensive protection is beneficial to Indigenous traditional knowledge holders.
- A5.1 It is our view that the task of the IGC in drafting policy objectives and core principles for the protection of traditional knowledge should not be to balance rights, but rather to protect the rights of Indigenous traditional knowledge holders and their communities. If the purpose of the draft is to balance rights of Indigenous and non-Indigenous peoples, then perhaps the document could be renamed to accurately reflect this purpose and not purport to protect traditional knowledge.
- A5.2 While we support the fair and equitable sharing of benefits arising from the use of traditional knowledge where Indigenous peoples’ free prior informed consent is obtained, and where customary law is followed, we do not support the application of the Convention on Biological Diversity as a standard setting instrument. The standards of the Convention on Biological Diversity vary according to the national legislation. This is an inappropriate standard for protection of the rights of Indigenous peoples in relation to the use of traditional knowledge and genetic resources.
- A6.1 We recommend that the World Intellectual Property Organization (WIPO) take the opportunity to adopt standards providing for increased protection of Indigenous traditional knowledge holders and their communities rights rather than for the protection of national legislation by nation states for the following three reasons: Firstly, the standard of national legislation varies from nation to nation. Secondly, many nations do not provide recognition nor sufficient protection and where legislation is the standard, it is vulnerable to repeal or amendment to the detriment of Indigenous peoples. Finally, such standards fail to import the right of Indigenous peoples’ to permanent sovereignty over natural resources as stated in the report of the Special Rapporteur, Erica Irene Daes in her *Final Report on Indigenous People’s Permanent Sovereignty Over Natural Resources*.²
- A.6.2 The standards of protection offered by intellectual property laws are inappropriate as standards for Indigenous traditional knowledge holders. Intellectual property laws offer some protection to Indigenous traditional knowledge holders but these laws do not incorporate important features of traditional knowledge such as collective ownership, customary law principles, ownership in perpetuity, inalienability and others. IPRs are a governmental grant of rights, while Indigenous peoples rights, including those related to traditional knowledge are inherent rights.

²E/CN.4/Sub.2/2004/30 Special Rapporteur, Erica Irene Daes, *Final Report on Indigenous People’s Permanent Sovereignty Over Natural Resources*

A.7.1 While we recognise the need to comply with national and international obligations, we note that international instruments do not provide adequate standards of protection for Indigenous traditional knowledge. Some international instruments can be interpreted as providing protection for traditional knowledge holders and their communities, but in fact, many fail to provide sufficient protection. For example, Article 27 of the ICCPR provides protection for the right to enjoy culture, but the Human Rights Committee has yet to consider an individual communication specific to traditional knowledge. Article 15 of ICESCR is framed to protect rights to intellectual property and as such, may fall short of providing traditional knowledge holders with adequate protection.

The Draft Declaration on the Rights of Indigenous Peoples provides some measures for protection but has yet to be adopted by the General Assembly of the United Nations.

A.7&A.8 For the abovementioned reasons, we do not support the application of international instruments as the standard for protecting Indigenous traditional knowledge. We recommend adopting standards which support and respect customary laws, the collective nature of ownership of traditional knowledge, ownership in perpetuity, the complex relationships governing ownership and the use of Indigenous knowledge and other matters arising in local areas, according to the local customs of Indigenous peoples. We note that national laws and policies including intellectual property laws provide inadequate standards for protecting traditional knowledge.

A.9 We recommend that the spirit and substance of this paragraph be incorporated throughout the document.

Specific Substantive Principles

We recommend a shift from reliance on national intellectual property laws for protection of Indigenous traditional knowledge. The current international intellectual property rights framework has not prevented the misappropriation and misuse of the cultural heritage of Indigenous Peoples. On numerous occasions, corporations, universities and others have gained intellectual property rights over knowledge and resources sourced from Indigenous Peoples without appropriate consent. Prominent examples of this include the patenting of:

- (a) a variety of the Ayahuasca vine by a United States citizen, used traditionally by Indigenous Peoples of the Amazon; and
- (b) properties of the Hoodia Cactus, used by the San of Southern Africa.

In addition, the misuse and misappropriation of Indigenous cultural expressions, such as costumes, artwork, songs, dance and stories and the patenting of DNA information and bodily samples of Indigenous Peoples are all of great concern.

We recommend that the specific substantive principle give respect to customary law, the collective nature of ownership of traditional knowledge, ownership in perpetuity, the complex relationships governing ownership and use of Indigenous knowledge and other matters arising in local areas, according to the local customs of Indigenous peoples.

Furthermore, we request that participation of Indigenous peoples be increased for the ongoing development of standard setting documents.

In addition, we make the following specific comments:

- We do not agree with a future international instrument providing a protection standard for traditional knowledge and we wish to make it clear that such an instrument must be based on customary indigenous laws and the specific cultural practices of indigenous peoples.
- We do not agree that this future instrument of protection for traditional knowledge should be produced within the current framework of intellectual property rights, especially within the patents system.
- The principle of free prior informed consent of indigenous peoples is a fundamental and essential requirement for the use of traditional knowledge. It should be emphasized that this principle is a fundamental human right of indigenous peoples and that it is associated with the free determination of indigenous peoples. Similarly, in relation to this subject it is important to stress the need to submit proof of this basic principle and that this principle should be granted in accordance with the cultural practices specific to indigenous peoples. Regulations should not exist on how indigenous peoples must grant free prior informed consent, and especially not on the basis of the precept of international law.
- As regards the sharing of benefits from the use of traditional knowledge, this is a critical point on which indigenous peoples have not yet expressed an opinion. However, we consider that it is important to mention that indigenous peoples should not participate in the same list together with the other players where the traditional knowledge is associated with genetic resources, but that indigenous peoples should have more preferential treatment. As regards whether the benefits should be monetary or non-monetary, we believe that this must be decided by the indigenous peoples themselves and such benefits should be devoted to their own priorities such as the consolidation of their own forms of organization, strengthening of cultural identity, legal security of their lands and territories, guarantee of food security, and improvement of health and education conditions.
- As to the participation of indigenous peoples, the criterion which WIPO is developing is that whereby preference should be given to indigenous peoples being part of official delegations and bearing in mind the participation of the United Nations Permanent Forum on Indigenous Issues. This criterion is exclusive and the need for indigenous peoples to participate should be stressed, also taking into account its representative structures and the specialized bodies of indigenous experts, while achieving a balance between geographical regions of the world.
- Finally, WIPO should establish a fund for the participation of indigenous peoples, with its own resources and which is open to voluntary contributions from governments and cooperation organizations.

INTERNATIONAL PUBLISHERS ASSOCIATION

The following comments were received through a communication from the International Publishers Association (IPA)

1. Publishers and traditional knowledge

Publishers come into contact with traditional knowledge (if spelled with lowercase we hereby mean traditional knowledge in the broader sense) and, indeed, form part of the fabric that sustains it, in many different ways:

- Local children's book publishers and school book publishers make reference in their work to the cultural context and environment of their readers. The retelling of folk tales or the depiction of the culture forming part of their readers' daily lives is part of the editorial content.
- Similarly, many writers of fiction are inspired by their local customs, traditions and the social environment in which they were raised. References may be made in the work to some specific experiences important to their local culture.
- Academic publishers publish works of scientists describing ethnological observations; others may publish medical research which is based on discoveries by indigenous peoples. In this area, there is a heightened awareness of the ethical implications of this kind of research and a series of codes of conduct have been established or are being debated.

Publishers are not mere exploiters but can be active custodians for cultures. Publishers preserve customs, traditions and traditional knowledge for local communities and help pass them on to future generations. Any international framework for the protection of TCEs/EoF/TK should therefore ensure that the positive impact of publishers' activities on the culture which they operate is not threatened by the impact of the future international framework.

2. IPA's support for general policy objectives

IPA highly appreciates WIPO's efforts to promote the respect for traditional knowledge by way of an international instrument. IPA believes that the formal identification and acknowledgement of TCEs/EoF and TK at an international level in itself strengthens respect for them.

IPA fully supports the general policy objectives set out in the Consultation Documents. IPA welcomes WIPO's desire to set up a protection system "inspired by the protection provided for intellectual creations" (see Consultation Documents, Policy Objectives (iv)). The intellectual property rights system is a balanced system with clearly defined rights, the ambit and depth of which lead to legal certainty.

Any transposition of one technical system to a new set of issues requires a very careful analysis of similarities and differences, so that the transposition does not yield unwanted results.

The following points highlight areas where particular care should be taken to ensure that all important characteristics in particular of intellectual property (IP) law are fully taken into account. The following comments therefore seek to compare IP principles with the principles proposed in the Consultation Documents.

3. Clearer and more concise definitions

IP relies on clear definitions of the kinds of works and the characteristics needed to benefit from IP protection. The framework of the Consultation Documents relies on a series of terms whose impact cannot be determined without further clarification of their exact meaning. Without such clarifications, the effect of the wording of such a Convention on the day-to-day activities of publishers remains unpredictable, a situation the likelihood of which has been successfully minimized in IP.

In particular, uncertainty surrounding the existence and scope of rights will discourage creators, including publishers, from incorporating potentially protected works in their creative efforts and making them available to the public. One aim of the envisaged protection system – the preservation and further development of TCEs/EoF and TK – may hence be precluded by unclear or very wide definitions.

The notion of “community” as used e.g. in WIPO/GRTKF/7/3, B.1 or in WIPO/GRTKF/7/5, B.3.2, must also be defined narrowly. Wording must be found that permits the free exchange between cultures whilst protecting the small core of particularly sensitive elements of traditional knowledge in the broader sense.

The Consultation Documents give some guidance as to what falls under a certain definition in the form of a “positive list” (see e.g. WIPO/GRTKF/7/3, B.5; WIPO/GRTKF/7/5, B.4). One way of achieving clearer definitions would be the introduction of “negative lists”, describing content/expressions/groups of persons *not* falling under the scope of the instrument. Such negative lists should include reference to expressions of folklore that have already been extended beyond the reach of a specific community or where the collective has developed only in recent times, such as with modern religious sects.

4. TCEs/EoF/TK and Freedom of Expression

The Consultation Documents, and in particular WIPO/GRTKF/IC/7/5 on TK protection, do not seek to protect specific manifestations but any manifestation of ideas and knowledge. This “catch-all” approach of the Consultation Documents means that the possibilities of freely using and disseminating content/expressions are severely restricted, thereby also curtailing the freedom of expression of individuals.

The impact on freedom of expression is extremely worrying in the area of traditional knowledge because of the effect of such limitations on the social, cultural and political dialogue and interactions within and outside of the local, national or international community.

5. Traditional knowledge administration and freedom of expression

The administrative framework proposed by the Consultation Documents creates a significant administrative burden. The substantial cost, which, unlike the patents system, is not balanced by commercial reward, and the potential for abuse are a major concern.

More importantly it also raises significant freedom of expression issues. The creation of a public administration that must be involved before a literary work can be published is a serious impediment on the freedom of expression and the freedom to publish of the writers and publishers respectively.

6. Traditional knowledge and the public domain

Material in the public domain remains an essential source of inspiration and forms part of the careful balance achieved in IP between the interests of the creator and the public. Publishing and other creative industries have always rejected the notion that after the expiry of IP protection any further payments should be made, i.e. “domain public payant”. The limitation of the commercial exploitation is part of the overall balance.

The proposals in the Consultation Documents do not limit the term of the proposed consideration. This concept is in breach of the well-understood balance of IP protection. Where “benefits” are shared, the compensation for the rights holding communities must be limited.

7. Benefit sharing

IPA would like to highlight the challenges that arise in the context of the use of the term “benefit sharing” in the Consultation Documents. Such a broad term creates a potential for misunderstanding. IP law, insofar as it is codified internationally, does not seek to interfere in the relationship between the creator and his or her commercial partners. The consideration given to creators can take many forms.

In many cases, use in the form of the publication of contents/expressions may in itself be sufficient consideration as it allows the beneficiaries to document their traditions, present their contents/expressions to a wider audience or to participate in the international dialogue of cultures. The new protection system should recognise the need for flexibility in this regard and leave it to the TCEs/EoF/TK owners and users to negotiate the terms of their agreement between themselves.

The new framework should also exercise restraint in dealing with continuing use of protected TCEs/EoF/TK following the entry into force of the protection system. Otherwise, it would violate the principle of legitimate expectations and jeopardise long term business models.

The above comments are preliminary and part of the ongoing consultation process IPA has with its rightsholders. We look forward to participating in the ongoing debate about these matters and look forward to a constructive solution of the aforementioned problems.

THE INUIT CIRCUMPOLAR CONFERENCE (ICC)

The following comments were received through a communication from the Inuit Circumpolar Conference (ICC)

INTRODUCTION

This paper analyzes the WIPO documents from an Inuit Circumpolar Conference (ICC) (Canada) perspective, based on the ICC aims and objectives and ICC policies. ICC has the mandate to analyze these documents based on these objectives.

ICC does not necessarily express the view of the four Inuit land claims regions. It would be far too onerous on ICC within its limited capacity to conduct a thorough analysis of these documents to determine its consistency with the land claim objectives, goals and principles. The best outcome that can be expected from this preliminary analysis is to communicate with WIPO secretariat that the issues raised in this paper are to be considered in the development of the international principles and mechanisms to ensure that Inuit traditional cultural expression and traditional knowledge are adequately protected.

The aims and objectives of the Inuit Circumpolar Conference (Canada) related to this work include the following:

- To act as the international vehicle through which all Inuit can voice concerns to world bodies, international conventions, intergovernmental forums, international nongovernmental organizations and global indigenous movements;
- To take measures at the international level to protect and promote Inuit rights related to their health, culture, language, values, human rights, or any other matter that impact on the ability of Inuit to shape the future of their society within the circumpolar arctic and the world at large;
- To maintain an ongoing dialogue with ministries of the Canadian Government on issues of international importance to Canadian Inuit;

ANALYSIS OF WIPO DOCUMENT WIPO/GRTKF/IC/7/3: THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS OF FOLKLORE: OVERVIEW OF POLICY OBJECTIVES

This document sets out possible substantive elements of protection of TCEs drafted by countries and suggests draft policy objectives and guiding principles and the legal measures used and practical experiences developed by countries.

ANNEX I

I. POLICY OBJECTIVES

[Empower Communities]

This seems to be a subjective test and the question to be raised is who determines due authority. Would this be negotiated at the domestic level?

[Enhance certainty, transparency and mutual confidence]

In addition the word governments should be added to the groups in relations between governments and indigenous peoples

II. CORE PRINCIPLES

The core principles set out the manner of international cooperation and attempt to clarify the details that should remain in the area of domestic law and policy and attempt to create harmony between national laws. The document argues that TCEs adopted at the international level would have to accommodate legislative and jurisprudential diversity with current national and regional approaches.

ICC Comment :

This is a crucial element for Inuit in light of the aboriginal rights in Canada and the right protected under land claims agreements that are constitutionally protected. In ICC's understanding the regional approaches may be more suitable and therefore more effective. The question to be raised is how prepared will each country be in developing national legal mechanisms for implementing international obligations? Before a national policy is taken, certain elements need to be considered such as enforceability, conflict of laws, and amendment to existing legislation. It would have to be ensured that any international regime does not conflict or minimize the Inuit rights already affirmed and which are contained under legal mechanism at the national level.

a) General Guiding Principle

The document points out that the TCEs should be protected in a way that is consistent with the objectives of other relevant international and regional instruments and without prejudice to specific rights and obligations under binding legal instruments.

Principle of respect for and cooperation with other international and regional instruments

ICC Comment : In this instance, other laws could dominate which would make this principle less effective, such as the TRIPS agreements. Other instruments that may be relevant are the international human rights covenants, convention and the draft declaration on the rights of indigenous peoples as well as the OAS Draft Declaration on Indigenous Rights.

Principle of recognition of the specific nature, characteristics and traditional forms of cultural expression

ICC Comment : a new principle could be added that the cultural expressions and that the TCE by one cultural grouping crossing more than one territory or jurisdiction have to be recognized as belonging to

that particular group and is to be protected in an equal manner despite the estate boundary. In an Inuit context, Inuit are located in four separate state jurisdictions.

b) Specific Substantive Principles

The substantive principles are more specific and address the main substantive issues that any approach system or instrument for protection and that the suggested specific principles would apply the guiding principles to these main issues such as terms of protection, application in time and international and regional protection, and would draw extensively upon existing IP and non-IP principles, doctrines and legal mechanisms as well as national regional experiences.

ICC Comment

The concern for ICC is that many of the principles laid out in some of those existing regimes do not reflect or consider the cultural aspects or collective aspects of Inuit society.

The document states that the principles do not address regional differences that need further consideration and may provide further work or focus by the IGC. The long list in this paragraph does not acknowledge the reality that before any of these principles occur that the existing legislation in Canada would have to be amended and the arrangements, and the rights under Inuit land claims for future legislation would have to be reflected in any developing framework.

Scope of subject matter

Regarding the scope of the subject matter ICC resides the point that the specific choice of terms to denote the protected subject matters should be determined at the national and regional levels “in consultation with and consent by Inuit regional claim areas”.

An additional element could be added (d) *contemporary expressions such as film and video as well as combination of traditional contemporary dance by indigenous performers.*

Beneficiaries

ICC Comment

(i) Measures for the protection of TCEs and additional issues to be addressed are that for some indigenous communities’ customary law has been lost or who live in areas and cannot access their traditional cultural expression.

The aim of the protection of TCEs may also include the aim to be a step in the survival of others on their traditional lands and is an obligation to share. ICC’s key concern is that the aim reflected in the documents of the promotion of intellectual and cultural exchange for the general public interests conjures up images of the right to access by the public and this may not be something that the Inuit wish to see happen. The aim of enhancing certainty, transparency and mutual confidence as outlined in the document creates potential contradictions. This statement makes many assumptions that may not necessarily be accurate.

It is ICC Canada's view that the overall aim of TCE protections should coincide with the goals under the land claims agreements and the binding obligations related to cultural wellbeing as outlined in the respective Inuit land claim agreements.

Principle of respect for and cooperation with other international and regional instruments and processes,

ICC Comment

An additional component to be made is the respect and cooperation with international and regional instruments that recognize indigenous peoples' rights on these matters, namely Inuit land claim agreements.

The criteria for protection criteria

May include regional distinctive cultural identity so as to enhance the uniqueness of each Inuit region...

The beneficiaries of protection

As outlined in annex II, paragraph 43 is favourable to Inuit and is consistent with Inuit community and regional structures.

The principle on management of rights (i) the following wordings should be added: “*and consistent with Inuit Land Claim Agreements and constitutional laws and aboriginal governance arrangements and other legislation dealing with matters of aboriginal governance and decision-making bodies.*”

The remainder of the response to these documents should note the ICC Canada March 2004 comments on related documents.

ANALYSIS OF WIPO/GRTKF/IC/7/4:
THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS OF FOLKLORE:
OUTLINE OF POLICY OPTIONS AND LEGAL MECHANISMS

This WIPO document is an accompanying or supplementary document to WIPO/7/3 and focuses on the national measures that could be taken to protect TCEs in line with the objectives and principles articulated at the international level.

ICC Comment

Paragraph 9 provides that these documents aim to serve as a menu of options to assist policymakers and communities in making practical choices about protection. This is the guiding statement for an ICC response to these documents.

The underlying question throughout this analysis is whether or not the policy options provided are practical in terms of Inuit economic, political, cultural and social reality and even placed within the context of the constitutional arrangement in Canada if those options are realistic based on ICC goals and objectives and the alternative options that may be provided in light of this reality. At the outset ICC expresses concerns based on the conclusionary comments made by WIPO that the documents be given less immediate priority and that the focus is on the international dimension. This concern is based on the ICC perspective that the international regime cannot be established if the national measures are not seriously considered and planned to implement an international instrument.

ANNEX I

A. POLICY OPTIONS FOR THE PROTECTION OF TCES/EOF

[Empower Communities]

ICC Comment

This is a subjective test. Who determines due authority?

ICC can agree upon the draft policy options relating to the general form of protection.

A.2 Options Relating to the General Form of Protection

The options as provided are useful but mechanisms need to be developed.

An additional consideration may be extending from paragraph 35 of the annex with an added option is the self-government arrangement and provides more flexibility if various articles should be applied. Under paragraph 38 customary uses should go hand in hand with the present day circumstances and goals of the Inuit regions.

Under the legal elements of protection of TCE capacity building is required to ensure how legal aspects can be applied in various circumstances. These legal elements as stated in the documents have to be consistent with the existing aboriginal rights as provided under various self-government arrangements, national legislation and court decisions that affect aboriginal culture.

B.2 Criteria for Protection

Discussion of Options and Legal Mechanisms

ICC Comments

In terms of the examples and models used elsewhere, and the current systems of protection, these models can only have limited application in a Canadian Inuit context. Others can be very helpful in pointing out their irrelevance in a Canadian context. For example the Indian Arts and Crafts Act as outlined under paragraph 69 of annex 1. There may be some common issues; however the drawback is that this is very limiting in what products may not qualify. This aspect creates concern in the matters of

commercial products where Inuit are trying to establish their own economies including traditional economies.

On the other hand, ICC sees the *Toi Iho* Maori *Whakamārama* as a mark of New Zealand as an example of how this can be relevant to Inuit TCEs and Inuit goals around protection of their TCEs. The main reasons for this is that the perspective of the TCE subject matter and the fact that New Zealand has similar legal systems that may assist in providing a similar development and possibilities in Canada and can be used as a model and is worthy of further examination as to its potential and application in Canada.

The Prevention of exploitation of sacred and secret materials component and the example case under paragraph 89 of *Foster v. Mountford* is a potentially useful case for application in a Canadian context. The analogy can be drawn to such Inuit symbols as the Inukshuk that may have similar aspects of sacred material or sacred symbols.

Overall the options provided are useful but only to the extent that the structures in place within the respective country mentioned have similar components or legal frameworks that of Canada. Otherwise it would be like comparing apples and oranges.

ANALYSIS OF WIPO/GRTKF/IC/7/5: PROTECTION OF TRADITIONAL KNOWLEDGE: OVERVIEW OF POLICY OBJECTIVES AND CORE PRINCIPLES

This document suggests the possible content of a common international approach or a shared international perspective to protection of TK.

Although ICC's comments are limited at this time, ICC asserts that an international approach would have to reflect or provide an opportunity for regional approaches and that a pan-indigenous approach is not feasible or desired based on differences of how traditional knowledge is interpreted, applied, used and future evolving uses and application of traditional knowledge.

II. CORE PRINCIPLES

ICC Comment

Most of the principles are consistent with Inuit views of traditional knowledge and how it is to be applied. However, there are still further considerations.

Principle of equity and benefit sharing

As presently drafted it makes the assumption that TK holders and TK users are not the same group. More flexibility is required especially in light of the various economic goals of Inuit and the establishment of companies by Inuit peoples. The core principles should be consistent with land claims goals of cultural wellbeing and self-reliance. One good example is the efforts made under Inuitland

claim regions where traditional herbal teas are produced from the Inuit land claim area, marketed and profits/benefits are returned to the Inuit region.

Principle of consistency with existing legal systems

New words to be added after the word “nothing”... *and the authority also rests with the land claim agreements where such arrangements have been already negotiated between governments and indigenous peoples...* In Canada, determining access rests with the respective land claim agreements and is subject to them and not necessarily with the national government. This arrangement is a result of successful negotiations between the federal government and the land claim agreements and is constitutionally protected realties as defined under section 35 of Canada’s constitution.

Principle of respect for and cooperation with other international and regional instruments and processes

The Arctic Council is an instrument worthy of more consideration. The Arctic Council is an intergovernmental forum for addressing many of the common challenges faced by arctic states. The cooperation is between national governments and indigenous organizations. The Arctic Council cooperates with international organizations such as the United Nations Environment Program.

Principle of respect for customary and transmission of traditional knowledge

In addition, the process itself which has already been negotiated with national bodies and indigenous peoples.

Principle of recognition of the specific characteristics of traditional knowledge

This should also address protection of traditional knowledge and evolving uses of traditional knowledge as identified by various indigenous groups.

Eligibility for Protection

A new item should be added with the following wording (iv) *associated or utilized by EIA projects and where filed by government EIA and environmental protection agencies*”

Administrative and enforcement of protection

Additional wording to include *“measures and procedures developed to address the jurisdictional extent of the right of traditional knowledge protection”*

ANNEX II

ICCA Comments

Legal Form of Protection

Other national laws to be considered within a Canadian perspective are CEPA, and the Fisheries Act in determining when the traditional knowledge can be used and that further analysis is required of these pieces of legislation to determine how often they are used and the potential gaps.

Other international instruments to be considered include the Draft Declaration on the Rights of Indigenous Peoples as well as other international rights related covenants. In addition the Arctic Council, as a high-level international cooperation agreement which has a policy to utilize the traditional knowledge and the participation of arctic indigenous peoples.

Principle of Prior Informed Consent

International standard settings should be harmonized with those instruments relating to indigenous peoples and human rights covenants and the CBD, the principles of the Rio Declaration and Agenda 21 as it relates to the participation of indigenous peoples in decision making processes as well as the WSSD Plan of implementation.

Under the principles of Prior Informed Consent, the overarching statements should be that the land claims is the basis for the assertion as a way of repeating it throughout the document.

Inuit have the right to participate fully in all stages of regional, national and international development plans that may impact upon them. In cases where plant wildlife and other habitat are affected by research activities and development activities where their traditional knowledge is applied Inuit have a right to be informed of the use of that knowledge?

The measures to ensure compliance with prior and informed consent are also spelled out in the various Inuit land claims agreements. For example under Canada Inuit land claim agreements with the Labrador Inuit, under Article 12.9, the prior and informed consent principles applied through the Torngat Wildlife and Plants Co-Management Board under this particular article. This board has the powers and responsibilities to make recommendations regarding research respecting the conservation and management of wildlife, plants and habitat. Article 12.7.2 states that the Nunatsiavut Government may make laws in relation to the quantities of plants that may be harvested on Labrador Inuit lands. Article 12.7.1 states that Labrador Inuit have the right to exercise their rights to harvest wildlife and plants subject to Inuit laws where the Nunatsiavut Government may make laws in relation to the collection and publication of Inuit traditional knowledge with respect to wildlife, plants and habitat.

Under another Inuit land claim agreement article 12.2.24, provides that the Nunavut Impact Review Board in dealing with impacts and in designing rules of procedure for the conduct of public hearings, the board shall to the extent consistent with the broad application of the principles of natural justice and procedural fairness, emphasize flexibility and informality, and specifically give due regard to the tradition of Inuit oral communication and decision making.

The principles as laid out in this particular document are agreeable to ICC and consistent with ICC own policy objectives. These policy objectives and core principles also respond to the concerns that ICC has raised in the past. However room has to be made in an international regime for a regional approach and flexibility is the key. There are established efforts within various forums that could be examined in more detail to assess its workability. Any attempt to leave out or ignore regional approaches ultimately will

mean that some indigenous groups will not have the objectives benefit them to the fullest extent possible.

It is ICC's perspective that the policy options objectives at the international level to include the cultural well-being and self-reliance of indigenous people. The legal mechanisms to respond to the objectives at the international level should include the principles under modern day treaties such as land claim agreements, which could be used as a tool for implementation of the objectives set at the international level. These land claim agreements are also a regional legal mechanism that is available but additional wording may have to be added as part of the objectives at the international level so as to ensure that no conflict between the two are created. An international regime can only be workable if the national mechanisms are in place.

ANALYSIS OF WIPO/GRTKF/IC/7/6: THE PROTECTION OF TRADITIONAL KNOWLEDGE: OUTLINE OF POLICY OPTIONS AND LEGAL ELEMENTS

ICC Comments

This document is a supplementary resource of draft outline of the policy options and legal mechanisms that would operate at the national level to protect traditional knowledge. ICC's perspective that this documents should not be used only as a supplementary source but as a source that will determine the workability and flexibility of the international perspective.

ANNEX I

THE DRAFT OUTLINE OF POLICY OPTIONS AND LEGAL ELEMENTS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

A. POLICY OPTIONS FOR THE PROTECTION OF TK

A.2 Options for the General Form of protection

ICC Comment

The options should suit the needs on a regional basis and should be flexible and options to be determined on this basis. Paragraph 9 is particularly significant for Inuit where their rights are recognized under legal instruments within national laws and modern treaty agreements. This does not mean that the other principles in the documents are less significant.

Legal Basis for Protection

Paragraph 13 on the legal basis for protection PIC is especially important and needs further elaboration and extensive discussion at the national level. Traditional knowledge and PIC is a major issue for Inuit especially where research is concerned.

B. LEGAL ELEMENTS OF PROTECTION OF TRADITIONAL KNOWLEDGE

Paragraph 30 as presently worded is troublesome. The exceptions to the right over the TK subject matter as recommended in this paragraph is not agreeable to ICC objectives and goals and based on the ICC own research and views of Inuit and its experiences with researchers and the obtaining and documentation of the Inuit traditional knowledge. If this right was limited, for any reason, ICC argues that consequences would be that it would fail to address the outstanding traditional knowledge related issues facing Inuit communities and their relations with outside university researchers. This limitation would also create havoc with the existing Inuit land claims agreements.

General Scope of subject Matter

d) Proposal for a comprehensive working definition of TK

Under the Labrador Land Claim Agreement, under the definition section “Inuit law” means (b) an Inuit customary law proclaimed, published and registered in accordance with part 17.5 dealing with registry of laws. This definition could be an added element to a comprehensive working definition of traditional knowledge.

In addition the words “public interest” as referred to in paragraph 30 should be subject to some type of test to be determined by indigenous communities and their holders of traditional knowledge. The rationale for this statement is that in some Inuit regions in Canada, the public is made up of a majority of Inuit, for example in the territory of Nunavut.

Beneficiaries of Protection

The beneficiaries of protection should also include the beneficiaries under land claims agreements and as defined by those agreements.

Consistency with the general legal framework

Access and benefit sharing regimes for genetic resources

From an ICC Canada perspective the consistency with the legal framework as another legal option would also mean consistency with existing Inuit land claims agreement and an example of how the legal framework ties in with efforts by those seeking access to genetic resources. In an national context, this occurred soon after one of the Inuit land claims was settled, namely the Nunavut Land Claim Agreement. Soon after the 1993 land claim was settled, the Department of Fisheries began refusing fish harvesting, research and fish farming permits in the Nunavut region without the prior consent of local communities had been obtained. The Inuit communities under this claim have the right to prior and informed consent to the collection of fish broodstock. *The Icy Waters Arctic Char Fish Farming Company* proposed a joint venture with Inuit communities and a university research group to set up a new company to improve the company's existing broodstock. *Icy Waters* suggested that Inuit communities would also benefit through education and practical experiences in fish farming and access to genetically improved stocks as they were developed. The business proposal provided that each community would own its

original fish contribution. The proposed project would result in *Icy Waters* gaining access to a total of 14 genetically distinct char stocks through local communities. Final approval required consent from the communities and the Nunavut Wildlife Management Board, established to oversee the protection and wise use of wildlife for the benefit of Inuit in Nunavut. Some Inuit expressed concern that the project showed a lack of respect for char and the spirit of the char might take revenge on the Inuit people if the project went ahead.

This example signifies the access and benefit sharing issues but also the application of the traditional knowledge in ensuring that the access was not to be permitted. The other significant element is that this occurred within a national legal framework and the result that the TK was not only applied but also protected. It also indicated the existing legal measures at various levels of government have taken to ensure that the compliance of legal instruments occurred.

The ICC policy provides that Inuit resource rights including genetic resource rights must not be diminished or otherwise affected without the free and prior informed consent of those Inuit concerned as witnessed by a treaty or other agreements. Inuit have the right to participate fully in all stages of regional, national and international development plans and actions that may impact upon them. According to the Inuit Circumpolar Conference's Comprehensive Arctic Policy, Inuit traditional knowledge is a valid system of knowledge that should be integrated and harmonized within the context of cooperative research.

I. INTRODUCTION

This paper is prepared by the Inuit Circumpolar Conference (Canada) in response to the legal and policy options presented in WIPO document GRTKF/K/6/3 and GRTKF/K/6/4. The responses are made in a respective manner. There is some overlap of responses based on some similarity presented in the WIPO documents, which are reviewed. ICC's view is that overall these options are a good framework for issues to be considered further in a Canadian context. This paper therefore may assist in the contribution to an ongoing dialogue with the Government of Canada and Inuit and points raised may add to the list of possible options. Hopefully, a national strategy could be built that reflects Inuit issues indicated in this paper.

WIPO/GRTKF/6/3 PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS

The goal of this WIPO document is to facilitate further consideration of the material on this subject that has already been placed before WIPO Intergovernmental Committee.

1. SUBJECT MATTER

Inuit culture is transmitted through symbols, geographical indicators and other cultural expressions. Inuit have survived as a distinct culture for thousands of years together with and through intellectual property and cultural property as well as their cultural innovations, practices and cultural expressions that continue today. They represent where Inuit reside. The igloo with its unique architectural design and the kayak with its unique structural design are examples of Inuit innovation. Inuit have many types of intellectual property including traditional clothing designs, traditional songs and lyrics and geographical indicators such as the Inukshuk.

The Inuit artists' work is often inspired by stories featured in the art and there is meaning behind the figures and situations are represented in the artistic designs and Inuit artistic productions. How stories are gathered is then reflected in the artwork itself.¹ The intellectual property of Inuit carvers is reflected in the carving itself. Therefore the traditional knowledge of the landscape and the animals surrounding them is reflected in the work that they produce.²

In the past, Inuit customary laws protected Inuit cultural property. Presently, Inuit cultural expressions are being misappropriated and misrepresented by corporations, individuals such as other indigenous business people³ and the fashion industry such as those in Milan and Paris. The Fashion Industry also imitates Inuit cultural expressions and a spokesperson for the fashion industry has stated that "He loves to marry the savage with the refined, so he was pairing his Eskimo boots with a black cocktail dress."⁴ Another designer's spark was meant to invoke the Eskimo spirits which he described as "It's like the deep winter, the deep cold"⁵ In the insular world of fashion, designers have long relied on what they call the Eskimo influence. They stow away fur-trimmed hoods and mukluks in their appropriation of deep

¹M. Olsen, "The Pangnirtung Tapestry Studios" *Inuit Art Quarterly*, fall 2002. Pages 30 -31.

²

³See annex

⁴National Post, November 23, 2002, fp 7

⁵Ibid.

freezelikeyabagoffrozenpeastobehauledoutandappliedwhentheidea musclesaresoreandtired.⁶
InCanada,oneleadingpharmaceuticalcompanyhasbeenmisappropriatingtheInukshuktoselltheir
productsfrompeniledysfunctiontoenailfungus.(Seeannex).Thismisappropriationincludes
offensiveandderogatoryusesofInuitculturalexpressions.Thisgoestothemisrepresentation,
misappropriation,andderogatoryandoffensiveuseofInuitculturalexpressions.

2.POLICYOBJECTIVES

TheWIPOdocumentevaluateshepossiblemenuofpolicyoptions.TheICCpaperevaluatesthese
optionsintermsofInuitpolicyobjectivesandsurroundingissues.

PolicyObjectivesofInuit

ThepolicyobjectivesofInuitssofaridentifiedandexpressedthroughvariousourcesincludethe
following:

-Protectionofculturalexpression sandinnovationsforeconomicdevelopmentandself
reliance.FormostofCanada's41,000Inuititisstilltheonlywaytheyhavetoearnthecashnow
neededtosurvive;⁷

-Protectionofmisappropriationandmisrepresentation;

-MandateundertheNunavutLandClaimAgreementsArticle32istoassistInuittodefineand
promotetheirsocialandculturaldevelopmentgoalsandpolicies⁸

-Protectionoftraditionalclothingdesigns;⁹

-RespectgiventotheartworkofInuitartistsandtobeshowninare spectfulplace;¹⁰

-Moremanagementandcontrolofhowandwheretheirartworkisdisplayed;¹¹

-ProtectionfromderogatoryandoffensiveusesofInuitculturalexpressions;

-ApolicyobjectivegoalsetbythenationalInuitbody(ITK)isthatacollect ivecopyrightbe
filedbyITK;¹²

-ICCexecutivecouncilresolution;¹³

⁶Ibid.

⁷Supra,note1.

⁸Ibid,page3

⁹Ibid,page18

¹⁰Supra, note1 ,page31.

¹¹Ibid,page31

¹²SeeITKBoardofDirectorsresolution

¹³Seeannex

Report of the Royal Commission on Aboriginal Peoples

-The report identifies three specific goals:

-To ensure that the knowledge is used appropriately

-To ensure their identity is portrayed authentically

-To receive fair compensation when their intellectual and cultural property is turned to appropriate commercial use¹⁴

The community derived interests are noted in the report and include but not limited to:

-Preventing the loss of control over traditional knowledge that could lead to its commercialization or to identification of sacred sites by those who do not appreciate their significance;

-Inappropriate imitation of indigenous practices which are a misrepresentation of Aboriginal culture and weaken its teachings

-Protection from imitative works

-Control over the integrity of TK but yet exercising control over who has access to it and how it can be used

-Where it is appropriate to use the knowledge in commercial settings which benefit others, a sharing of the benefits should be required

Policy Objectives of Canadian Government

The policy objectives of Canada on the issue of cultural expressions are not clearly defined at this time but based on the existing intellectual property laws of Canada it can be said that they reflect the promotion of folklore and would also include their obligations under the WTO TRIPS Agreement which Canada is a party to. The TRIPS Agreement is a part of the global trading regime. This agreement sets out minimum standards of the content of these laws, which essentially follow current developed country requirements for copyright, trademarks and geographical indicators. TRIPS also requires states to provide equal treatment for foreign and domestic claimants to intellectual property protection.¹⁵

The position of the federal government in regard to intellectual property law is stated in the 1995 Federal Policy Guide to Aboriginal Self Government¹⁶. The guide provides a listing of what subjects

¹⁴ Report of the Royal Commission on Aboriginal Peoples, Vol 3, section 3.1, p., 596 -7

¹⁵ Howard Mann, "Intellectual Property Rights, Biodiversity and Traditional Knowledge: A Critical Analysis in the Canadian Context" [unpublished, filed with the author]

¹⁶ *Federal Policy Guide to Aboriginal Self Government*, Minister of Indian Affairs and Northern Development, 1995.

should be the subject of aboriginal jurisdiction in whole or in part and hence should be subject to self government negotiations. Intellectual property is found in the category of national interest powers for the management and regulation of the national economy where it is asserted that there are no compelling reasons for Aboriginal governments to exercise law-making authority.¹⁷

Canada's general policy position is to provide a comprehensive system of protection for intellectual property rights, which provides a balance between the protection of creators and owners and the needs of those who use these creations. Canada's system is premised on the belief that the rights holders themselves usually best protect intellectual property rights.¹⁸ These policies are not consistent with Inuit policy objectives or those set out under the recommendations of the Royal Commission on Aboriginal Peoples.

3. OPTIONS FOR PROTECTING TRADITIONAL CULTURAL EXPRESSIONS AND IMPLICATIONS FOR INUIT

The options, as proposed in the WIPO document below are those that have already been considered or used at the national level of some member states.

The responses outlined below are made in a general manner on the options proposed.

Current Intellectual Property Systems

Although many committee members have asserted that existing intellectual property systems are useful in meeting the needs of indigenous communities, in the Canadian Inuit experience this has not been the case so far, and are not adequate to fit Inuit needs and does not reflect the values, and approach of Inuit goals and policy objectives. The lessons, which Inuit in Canada has learned under existing IP systems in Canada, include the following example. The Igloodik Floe Edge Boat example is also cited by others.¹⁹ A floe edge boat is a traditional boat used to retrieve seals shot at the floe edge (the edge of the ice floe), to set fishing nets in summer, to protect possessions on sled when traveling by snowmobile on wet spring ice and to store hunting or fishing equipment. In the late 1980's the government sponsored the Eastern Arctic Scientific Research Center to initiate a project to develop a floe edge boat that married the traditional design with modern materials and technologies. In 1988 the Igloodik Business Association sought to obtain a patent for boats. The Canadian Patents and Developments initiated a project patent search that noted several existing patents on boats with analogous structures. The letter concluded that it was difficult for the CPDL to distinguish inventively the new design from previous patents.

Options for Protecting Traditional Literary and Artistic Productions

Criteria for Protection

¹⁷Ibid. p. 6-7. Also see H. Mann Traditional Knowledge and IPRs: A Canadian Perspective

¹⁸www.apec-iap.org/document/CDA_2003_Intellectual_Property_Rights.htm. Retrieved 2/26/2004

¹⁹H. Mann, "Indigenous Peoples and the Use of Intellectual Property Rights in Canada: Case Studies Relating to Intellectual Property Rights and the Protection of Biodiversity" [unpublished filed with the author]

Under one existing system or under sui generis systems of protection capable of commercial use, the question is capable of commercial use by whom? The word traditional as an option listed in the document states that several sui generis systems provide for that the protected subject matter must be based upon traditional or be traditional meaning that the traditional cultural expression must have been created for traditional purposes, be intergenerational or be collectively owned. This option raises concerns for Inuit for the following reasons 1) unsure what sui generis would mean in the Canadian context; 2) traditional may have been created for other purposes. Inuit use their traditional knowledge in evolving ways. Under the traditional knowledge criteria for protection the implications of such criteria keep the protected subject matter frozen in time and do not recognize the policy objectives of Inuit on the subject matter as outlined above.

Holders of Rights/Management of Rights

The WIPO document outlines various options possible in cases where preference is for vesting rights rights other than in a community, such as a statutory body designated as the holder of the rights. This may be a favorable option for Inuit and could be added to the menu of options based on the way Inuit regions are represented and how Inuit beneficiaries under the land claims are represented. They are statutory bodies and this option may have some appeal.

These options cannot be commented on at this time due to lack of research and internal dialogue amongst Inuit communities. This option may respond to some of Inuit collectively owned or community owned or regionally identified cultural expressions.

This may have a positive implication for Inuit and is worthy of further consideration. The communal option holds some appeal for Inuit and may be consistent with Inuit land claim objectives, which focus on cultural well-being and self-reliance.

Folklore Shared by Others

The WIPO document presents the option that includes the co-ownership of rights. This may have some appeal. Based on the values that Inuit hold on the sharing of traditional cultural expression these are favorable options. This would address some potential concerns and would gain some sense of collective control over their cultural expression. However, practical scenarios are worthy of further examinations as to determine its true practical effect.

The issue of dispute resolution mechanism is a critical component of this option and should reflect customary methods of dispute resolution respective of a particular region.

Rights, Exceptions and Limitations

The nature of the right as an option includes prior informed consent. Prior informed consent is a crucial element. An implication for this option is the required capacity to ensure this happens. Exclusive rights as proposed is also a favorable option and is one of the most desired favored options presented. However, its usefulness is to be determined by its context. This option would address the Inuit concern around respect and integrity of their cultural expressions as stated in the list of Inuit policy objectives. The exclusive right may require further consideration.

Procedures and Formalities

The WIPO documents suggest the forms of protection should not create administrative burdens for rightsholders.

This option does not address the long-term effects of how Inuit want their TCEs protected and may only have a limited use. In addition, the procedures may place an additional burden on Inuit communities and individuals.

How Rights are Lost

Enforcement procedures have not been addressed in the WIPO document.

It has been suggested in the WIPO document that the claims for an indefinite period of protection might be limited to a forward-looking term of protection rather than retrospective and that traditional cultural expressions could be protected for the next 150 years. Another suggestion is that the maximum term of protection could be linked to the lifespan of the source community. Although these may be favorable, Inuit may prefer an indefinite term. ICC agrees with paragraph 162 in the acknowledgement that many indigenous peoples desire an infinite protection. The ICC position is that as long as Inuit are striving for the goals of cultural well-being and self-reliance, the rights should exist.

Recordings and Performances of Literary and Artistic Production

An option in the WIPO document states that field recording held by archives, museums and others such institutions assume a central importance because they may be the only recordings of a song and its performance that is available and accessible by commercial and other users. This option contradicts the goals and policies of Inuit, which is to prevent this type of commercial use by others.

The WIPO document lists as an option, the WIPO Performances and Phonograms Treaty (WPPT) to protect performer's rights. The document also outlines that one limitation of this treaty is that the protection does not extend to the visual part of performances.

The option proposed in paragraph 168 does not address the concern of Inuit and ability to control their TCE. This option contradicts the goal of Inuit and the repatriation of their cultural property. It perpetuates the issue. A more favorable option to be proposed is if Inuit were able to set up their own institutions where they could gain control of the subject matter.

Many young Inuit performer themes are based on traditional movements but are for purposes other than traditional. It can be used for economic development and cultural development.

The options surrounding the protection of performer's rights do not address the concerns around performances such as dancing, drumming and throat singing. These performances and visual aspects are the very things that make the performances unique and attractive. This is an issue that will grow in

importance as Inuit traditional performances are performed at the international and national forums and where it gains exposure in the popular media such as movies and television shows. The WTTP does not address this aspect.

Documentation of Literary and Artistic Production

The WIPO document acknowledges that documentation plays a role in strategies for the safeguarding of cultural heritage and traditional cultures and that it could be further explored how existing cultural heritage inventories and lists could be used for IP purposes, such as to identify traditional owner's applicable customary laws.

The option proposed is unfavorable and is a goal for some Inuit regions. This option may be favorable if there is some type of control and protection when it has become documented. As pointed out in paragraph 181 some TCEs are often intangible and orally maintained and if it is documented may create some stagnancy. It is more important to ensure that Inuit TCEs continue in an active living manner, that ensures maintenance and continuity of Inuit cultural identity.

Protection against Insulting and Derogatory and Offensive Uses

The WIPO document suggests a registry or an international registry of those TCEs whose uses should not be permitted for spiritual and cultural reasons. This may place an administrative burden on Inuit communities and due to traditional beliefs may not want them registered.

Options for Protection of Handicrafts

The option proposed in the WIPO document suggests that the designs of handicrafts can be protected under industrial design law and that the IP protection of traditional designs can support the economic development of traditional individuals and their communities. The options and points raised in this part of the document reflect the needs of Inuit and address the present issues and policy objectives.

Imitation of Style

The law of unfair competition as proposed may be favorable. Other branches of laws such as passing off may not be appropriate for Inuit communities as it does.

False and Misleading Claims to Authenticity

The Indian Native Arts and Crafts Act as an option listed in the WIPO document may be a favorable option for Inuit in Alaska.

Under the option regarding geographical indications and their recognition in the WIPO document that some traditional cultural expressions such as indigenous and traditional names, signs and other indications may qualify for goods protected under the geographical indications. This is a favorable option for Inuits since many Inuit symbols are already misappropriated by corporations.

Traditional Words, Names Symbols and Other Distinctive Signs

The options provided include specific legislation or legislative amendments to prevent or regulate the granting of trademark rights over traditional symbols. Another option proposed is the development of registries in which communities could register words, names symbols and signs that they would not wish form part of the registered trademark. Options of legislative amendments would take care of a lot of the current issue facing Inuit and the misuse of their cultural expressions. One of the largest concerns for Inuit is the overuse of one of Inuit key cultural symbols and that is of the Inukshuk and many companies such as pharmaceuticals, and sport shops have used this symbol. (See annexed attached).

4. PRACTICAL STEPS

Because Canada has a similar federal structure as that of Australia and New Zealand, it may be worth considering that the future work of this Committee focus on countries that have similar legal systems so as to find commonalities of legal and policy questions.

A set of principles to guide WIPO work should be based on the existing problems and the reality that states are parties to other international trade agreements that address intellectual property rights.

The Sui generis aspect of protection should be further examined in light of existing aboriginal rights in Canada.

Overall the options presented are favorable.

WIPO/GRTK/IC/6/4 TRADITIONAL KNOWLEDGE - POLICY AND LEGAL OPTIONS

This part of the paper addresses: Inuit policy objectives and the ICC response to the options laid out in the document, which includes a determination if these options meet the objectives of Inuit.

The WIPO document provides a summary of policy and legal options and categorizes these options. It addresses traditional knowledge in its strictest sense.

Part One - Inuit Policy Objectives

The Inuit issue around protection of their traditional knowledge stems from many factors and has caused many concerns over the last few years. Indigenous environmental and ecological knowledge in the circumpolar regions is directly related to activities and the skills developed in ways, which permit people to live from the land and the sea. It is also the practical and abstract expression of their understandings about operation of the physical and spiritual world. When these activities are curtailed, or worse, characterized as unacceptable or irresponsible within the world at large, the consequences include not only serious economic impacts but also erosion of confidence in the culture and the knowledge and skills necessary to support these activities.

The lack of control of their information is linked to the protection. It has been expressed time and time again that the traditional knowledge is itself part of an age-old system of beliefs, values and practices that define important interrelationships between indigenous peoples and the environment. There are fears that environmental and ecological knowledge will soon become yet another aspect of their culture that will be taken over and exploited according to the needs or motivations of academics, consultants or other outside interest groups. One Inuk has expressed this view in the following way:

“Down south, scientists may sometimes leave to go to another country to make more money or to do interesting work and they call this brain drain. Up here it is different kind of brain drain. Researchers come here to drain off what we know and then they leave. They use notebooks and tape recorders but if a bucket would work they would use that because it would be easier.”

It has been pointed out by Inuit that there is a need to develop a system of participation that enables them to maintain control over their information and has identified barriers to this participation aspect of the information, which they share with scientists. They are concerned about who actually controls the research. One of the primary barriers that separate Inuit from the processes has arisen from the collection and use of scientific information about their culture, environment or ecology by outside researchers. Conflicts and misunderstandings most often arise when research programs are carried out without reference to their concerns. This objective must be approached in a manner, which will respect the need for indigenous peoples to direct and exercise control of this process.

Part Two - Key Principles for Traditional Knowledge Protection

The options provided by WIPO are outlined as follows:

(i) Comprehensive and Combined Approach to Traditional Knowledge Protection: The WIPO document outlines a variety of protection approaches including sui generis rights, prior informed consent linked to access regimes. The combined approach may be a favorable option for Inuit as it provides for flexibility and covers many aspects of Inuit issues around traditional knowledge protection.

(ii) Repression of Unfair Competition: This option entails the legal suppression of any false, misleading or culturally offensive reference to traditional knowledge in the commercial arena. This option provides Inuit with an opportunity to address the concerns outlined earlier in the paper.

(iii) Prior Informed Consent Principles: This option would entail confirming traditional knowledge, which is held by a traditional community, should not be accessed, recorded or commercialized without the prior informed consent of traditional knowledge holders. Although this option may be suitable to meet the needs of Inuit it does not address how Inuit traditional knowledge has been accessed or how the past misappropriation can be addressed.

(iv) A Principle of Equity and Benefit Sharing: This option focuses on the protection of traditional knowledge conducive to social and economic welfare and that the commercial use of traditional knowledge should be subject to equitable sharing of benefits. This option would be a positive step to balance the misappropriation of Inuit traditional knowledge by scientists, researchers and corporations.

(v) A Principle of Regulatory Diversity: This principle could cover such sectors as traditional medicines and traditional knowledge associated with genetic resources.

(vi) A Principle of Adapting the Form of Protection to the nature of traditional knowledge: This option may include defensive versus positive protection

(vii) A Principle of Effective and Appropriate Remedies: This option includes the possibility of addressing practical issues such as collective administration of rights

(viii) A Principle of Safeguarding Customary Uses: The Option proposes that customary uses of traditional knowledge and association of genetic resources should be encouraged. This principle is favorable to Inuit as it maintains the connectedness of Inuit to their traditional knowledge and traditional use of its genetic resources;

(ix) A Principle of Consistency with Access and Benefit Sharing Frameworks: This option proposes that traditional communities should be directly involved in the decision making about the protection, use and commercial exploitation of their traditional knowledge. This option would give Inuit the opportunity to regain some control over how their traditional knowledge is used.

(x) A Principle of Coordination with other related forums and processes and in particular, the Convention on Biological Diversity

Part Three: Legal Doctrines and Policy Tools for Protection

The WIPO document acknowledges flexibility at the level of national systems. It sets out four doctrines that have been used for traditional knowledge protection:

(i) The Grant of Exclusive Property Rights: The Inuit Circumpolar Conference is not certain whether or not this would be a favorable option or whether or not it would fit or reflect Inuit values, beliefs on how Inuit traditional knowledge is to be protected;

(ii) The Application of Prior Informed Consent: This option provides traditional knowledge holders with the entitlement of PIC for the use of traditional knowledge;

(iii) A Compensatory Liability Approach: This option allows for some type of equitable remuneration or compensation to traditional knowledge holders;

(iv) An Unfair Competition Approach;

(v) Recognition of Customary Law;

Generally speaking the Inuit Circumpolar Conference sees these options as being favorable and that they would meet some of the Inuit policy objectives around protection of their traditional knowledge. The legal doctrines and policy tools for protection as discussed in the document has potential in the Canadian context but further examination of its components and consequences in Canadian context is required.

In the Canadian context, the basis for sui generis regimes was first established as interrelated to aboriginal rights in the *Guerin* case. Under this doctrine, points of mutually shared agreements can be highlighted and issues of difference can be preserved to facilitate more productive and peaceful relations.²⁰ One has to keep in mind that what are derived from a sui generis approach are duties and obligations based on interactions and relationships. Challenges for a sui generis regime may mean relinquishing control of their legal system and rights to another's culture laws. This is the dilemma surrounding aboriginal peoples' preservation of their sovereignty in their interaction with Canadian law or what will be described as an external challenge of the sui generis principle.²¹

The sui generis concept is employed to discard notions of the common law that have not been sensitive to the aboriginal perspective itself on the meaning of the rights at stake.²²

The internal challenges include an absence of interpretative standards and leave it vulnerable to influences from inappropriate sources. Presently there are few standards to direct sui generis applications.²³ There are few standards to treat sui generis rights.

Aspects of Traditional Knowledge to be Protected

The WIPO document proposes that the use of intellectual property related laws and doctrines may focus on three general aspects of traditional knowledge and culture and include the content, substance or idea of traditional knowledge, the form, expression of traditional knowledge; and the reputation and distinctive character of signs, symbols, indicators, traditional clothing designs, and style associated with traditional cultures.

Part Four - Detailed Elements of Protection in National Laws

The WIPO document sets out the scope of protected subject matter and includes the settling on the use of terms and the criteria that apply to the subject matter.

Use of Terms

Inuit have various terms for traditional knowledge and varies from region to region in some instances. WIPO sets out the examples such as association of traditional knowledge with tangible subject matter and association of traditional knowledge associated with specific knowledge holders.

Scope of Protected Subject Matter

There are gaps in the scope of the subject matter around genetic resources and traditional ecological knowledge is not included in the focus of the subject matter to be protected and is not consistent with

²⁰J. Burrows, "The Sui Generis Nature of Aboriginal Rights" (1997) 36(1) *Alta. L. Rev.* 1 at 11.

²¹*Ibid.* page 26.

²²*Ibid.*

²³*Ibid.*

Inuit policy objectives raised in the above section. This forms the basis of Inuit link with the land and their culture.

Criteria for Protection

The WIPO document states that traditional knowledge may need to meet certain substantive conditions or criteria to be eligible for protection and may include living links with a traditional community, current public domain status of traditional knowledge and benefits and costs of a system based in documentation.

A definition of traditional knowledge may be a positive suggestion and in light of the discussion that have already occurred some indigenous peoples feel that some terms relegate their knowledge to an intellectual artifact while other terms are derogatory. Traditional knowledge for example was thought by some to give the idea of pushing their knowledge into the past thus denying its relevance as a dynamic system that will continue to change and develop.²⁴ One Inuk has stated that traditional knowledge:

*“Sound the same as some type of handicraft that we make and then sell to tourists.”*²⁵

For Inuit, traditional knowledge is much more than an art or handicrafts and the criteria for its protection need to be expanded to include such things as traditional Inuit medicines, how they have been used, potential for its future use.

This element places a heavy burden on Inuit communities. The discussion and suggestions as outlined under this element may be too strict criteria and may not leave room for the evolving uses of Inuit of their knowledge and information systems. Inuit continue to determine their traditional knowledge needs and uses and its application based on their cultural development and economic self-reliance.

Nature of Rights

The options provided include limiting the exclusive rights to the uses of traditional knowledge that involves deriving economic benefits from traditional knowledge. Inuit concepts of intellectual property as property and the individual and collectively owned nature of rights as discussed in the documents both may create some difficulty. In addition the concept of property rights as normally used implies exclusive rights and may create some difficulty for Inuit communities and may go against values of Inuit. The entitlement to compensation is linked with the retrospective issue. However the right to be consulted does fit with the Inuit objectives and is worthy of further consideration.

Nature of the right depends on the legal doctrine that forms the basis of protection. The rights and how they are defined depends on the aim and objectives of the protection and the scope of the protection.

Scope of Rights

²⁴Brooke, Lorraine F., “The Participation of Indigenous People and the Application of their Environmental and Ecological Knowledge in the Arctic Environmental Protection Strategy” Inuit Circumpolar Conference, Ottawa 1993

²⁵J.N. Kangirsuk, 1987

The option outlined that potential rights over traditional knowledge and may include the entitlement to prevent unauthorized access to traditional knowledge by third party claims, misleading practices relating to the use of traditional knowledge.

The scope of the right determines the degree of control over the protected traditional knowledge. This is a major issue for Inuit where for example the research is published based on the traditional knowledge given to the researcher and then it becomes interpreted differently.

Right Holder, Owners, Custodians or Beneficiaries

Options outlined in the WIPO document include the concept of ownership may apply in relation to traditional knowledge. The option reflects that some form of protection such as geographical indication need not have distinct owners and may be administered by the state. Other options proposed may require that the right holders should be recognized under the law as having legal personality and also may have to meet specific criteria and that a sufficient connection must be made between the rights holder and the protection of traditional knowledge.

The following quotes from Inuit Elders support the assertion that the existing IPR regimes may not be an appropriate mechanism to protect traditional knowledge and these quotes add to the debate of who the right holder is and the beneficiary:

*The leaders were the ones with the knowledge but were not seen as the owner of that knowledge because he was always sharing that knowledge with those who needed it. The knowledge belonged to no one and had to be known by everyone to survive.*²⁶

This section of the WIPO document reflects indigenous views on the topic. ICC proposes that identifying right holders or beneficiaries may also include the following elements:

- A beneficiary as defined under the respective land claims agreements

- A right holder as being part of the indigenous group as identified under the Canadian Constitution so as to ensure that the rights of the person are linked with the defined indigenous group in the region for purposes of legal challenges and legal resources available

- The beneficiary/right holder is that identified or recognized by the community or region;

Expiration and Loss of Rights

Options include possibility of a limited term for some form of protection and the possibility of inalienable rights. These options may coincide with various Inuit policy objectives especially around economic development and cultural development. However without adequate time and resources it is difficult to determine its potential implications. Within the context of Inuit beliefs and values and continuity of Inuit culture, it is very difficult to conceive and even foreign to Inuit the idea of a term or length of protection. It does not fit in with Inuit concepts of property. The assumption can be made that

²⁶George Kappinanaq, Igloodik, September 16, 1997.

as long as Inuits survive as a distinct culture, the protection term will also survive for the same time immemorial and through cultural activities.

Sanctions and Enforcement

Many rights related to Inuit are identified through the respective land claims agreements, or through the Canadian Constitution and arbitration matters are handled under respective land claims agreements boards as to the interpretation and application of these land claims agreements. This may be good starting point and therefore this option may be appropriate.

Linkages with Access and Benefit Sharing Arrangements

In the old day they would gather all their property so that everybody had equal access to them. 27

The access and benefit sharing arrangement is a favorable alternative tool to control the use of traditional knowledge by third parties. In the context of resource management, access to traditional knowledge should first be accessible in the community where it is held. The resource managers within the community such as the wild life management boards and hunters and trappers associations require this information to make wise decisions on resource use. The Inuit communities would like to see such studies designed, conducted and evaluated by Inuit themselves. Younger generations who have not had the opportunity because of cultural, social and institutional influences placed on them are an ideal position to have access to this knowledge. This access is significant and beneficial if Inuit are to survive with their culture intact.

The issues surrounding access to and control of this knowledge relate to present day researchers usually from southern academic institutions that gain control of this knowledge, remove it from the community and the community does not benefit from such research. At the same time this knowledge is then interpreted not by the community or the original holders, but by the researchers and others. These results in the potential for it to be misinterpreted in the sense of its concepts, context, applicability, utilization and limitations. An example of where the benefit had not occurred is in Labrador about ten years ago where government biologist wanted to conduct surveys for peregrine falcons with Inuit for purposes of getting Inuit knowledge about locations of nesting birds in the region. The biologists went out and did helicopter surveys and mapped active peregrine falcon nests. When the Labrador Inuit Association asked for a copy of this information at the completion of the survey, LIA was told that the information was confidential and that the government would not disclose it. Government's main reason for not disclosing the information to Inuit was that it was sensitive information and if people knew where they nest where it might put the nest and birds at risk. To determine its implications for Inuit the examination of access and benefit sharing arrangement presently taking place within Inuit regions should be analyzed further.

Further Considerations

- In a Canadian context, examination of the mining exploration permits and the contents of the terms and conditions under the permits that may provide access to the genetic resources in the north and may not provide the benefit to the region;

²⁷Michael Kopaq, Igloolik, January 12, 1987

-ExaminationoftheEIAguideline(CEAA)anduseoftraditionalknowledgeandhowitis handledafterwards,thirdparties,PICprocedures;

-Constitutionalla wandSection35rightsishworthyoffurtherexamination;

ORGANISATION AFRICAINE DE LA PROPRIÉTÉ INTELLECTUELLE (OAPI)

The following comments were received through a communication from OAPI

OAPI congratulates the WIPO Secretariat for having provided the most faithful rendering of the various ideas put forward and issues dealt with in the course of the sessions of the Intergovernmental Committee. It therefore subscribes to both documents, and considers that the comments submitted below could contribute to the further improvement of these working instruments.

GENERAL COMMENTS

In OAPI's view, there appear to be three points on which there is disagreement:

- The necessary compatibility of traditional knowledge protection systems with existing intellectual property systems.
- The very strong predominance to be given to the national system as the only legal protection system, which is in marked conflict with the proposal of an international legal system.
- The holistic nature of the three areas is acknowledged, but no longer appears in the proposed machinery. Protection systems should indeed be designed separately, but not in isolation.

SPECIFIC COMMENTS

OAPI suggests:

Document IC/7/3

Chapter I : Policy objectives:

In paragraph (i), these sentences should be expanded to read "that benefit indigenous peoples, cultural communities, other cultures and all humanity;"

In paragraph (iv), "should they wish to do so" should be deleted, as the communities are expecting just that.

In paragraph (vi), the "of" before "traditional" in the last phrase should be deleted, and the phrase should read "...for the direct benefit of indigenous peoples and traditional and other cultural communities, and...". This correction should be repeated throughout the text.

In paragraph (viii), “particularly, when so desired by them,” and the comma preceding it should be deleted.

Paragraph (x) should be amended to read “contribute to the promotion and protection of the diversity of cultural contents and artistic expressions with a view to the enrichment of the culture of mankind, in so far as it highlights supreme human values without denying the specific cultural features that characterize peoples and groups;”.

In paragraph (xii), “invalid” should be replaced by “improper”. The text itself should be amended to read “curtail the grant, exercise and enforcement of improper intellectual property rights in TCEs/EoF, and derivatives thereof;”.

Chapter II : Core principles

A. General guiding principles

Principle of balance and proportionality: this should become “Principle of balance”. The wording of the principle should be “Protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and sustain TCEs/EoF and of those who use and benefit from them; the need to reconcile diverse policy concerns;...”.

Principle of respect for and cooperation with other international and regional instruments and processes: the whole principle should be removed.

Principle of flexibility and comprehensiveness: the last sentences should be deleted.

Principle of recognition of the specific nature, characteristics and traditional forms of cultural expression: in the first sentence, the “and” after “preservation should be replaced by a comma and the sentence should be completed as follows : “...and intra-cultural exchange, within one and the same people whose name or designation may vary on one side or another of a frontier”.

Principle of respect for customary use and transmission of TCEs/EoF: the idea of promotion should be removed, and the sentence should read “protection should not hamper the use, development, exchange, transmission and dissemination of TCEs/EoF...”.

Principle of effectiveness and accessibility of protection: the notion of enforcement should be removed, and the sentence should read “measures for the acquisition, exercise and management of the rights and for the implementation of other forms of protection should be effective, appropriate and accessible, taking account...”.

B. Specific substantive principles

The following amendments to the number of articles as a result of the insertion of a new article mean that the documents should read as follows:

“B.1 Definitions

The following terms and alternatives thereto as used shall have the meanings specified :

(i) ‘Traditional cultural expressions or ‘expressions of folklore’ means productions consisting of characteristic elements of the traditional cultural heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community.

(ii) ‘Community’ means indigenous peoples, traditional communities and other cultural communities.”

B.2 “Scope of subject matter” should become “Subject matter of protection” and the text should read as follows:

“(a) Traditional cultural expressions or expressions of folklore as defined in Article 1 include, for example, the following forms of expression or combination thereof:

- (i) verbal expressions such as folktales, folk poetry and riddles and aspects of languages such as words, signs, names, symbols and other indications;
- (ii) musical expressions such as folk songs and instrumental music;
- (iii) expressions by actions such as folk dances, plays and artistic forms or rituals, whether or not reduced to a material form; and
- (iv) tangible expressions such as:

- (a) productions of folk art, in particular drawings, designs, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket-weaving, handicrafts, needlework, textiles, carpets, costumes;
- (b) musical instruments;
- (c) architectural forms.

(b) The specific choice of terms to denote the protected subject matter may be determined at the national and regional levels.”

B.3 Criteria for protection

[amendment applicable to the French version only]

B.4 Beneficiaries

The beginning of the first paragraph should remain unchanged, and then should read “should serve the interest of communities

(i) to whom the custody and protection of the TCEs/EoF are entrusted in accordance with their customary law and practices, and...”.

B.5 Management of rights

The amendment should read as follows :

“(b) authorizations required to exploit TCEs/EoF should be obtained directly from the authority acting on behalf of and in the interests of the community. Where authorizations are granted by that administration,

(i) such authorizations should be granted only after appropriate consultations with the communities concerned, in accordance with their traditional decision-making and governance processes;”

Subparagraph (iv) as amended should read as follows:

“any monetary or non-monetary benefit deriving from the use of the TCEs/EoF should be passed on directly by the collecting authority to the community concerned;”

B.6 Scope of protection

The amendments should read as follows:

“(i) the prevention of:

- the reproduction, adaptation, communication to the public and other such forms of exploitation of TCEs/EoF of particular cultural or spiritual value (such as sacred TCEs/EoF), and derivatives thereof;
- the distortion, mutilation or other modification of such TCEs/EoF or other derogatory action in relation thereto;
- the unlawful acquisition by third parties of IP rights in TCEs/EoF;

(.....)

(iv) that, in the case of the use and exploitation of other TCEs/EoF,

- the communities concerned are identified as the source of any work derived from or inspired by the TCEs/EoF;
- [amendment applicable to the French version only].
- where the exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the competent administration.”

B.7 Exceptions and limitations

No change.

B.8 Term of protection

The amendments to the first subparagraph should read as follows: “Protection of any TCE/EoF should endure for as long as the TCE/EoF continues to be maintained and used by, and is characteristic of, the cultural identity and traditional heritage of the community concerned.”

Paragraph (b) should be deleted.

B.9 Formalities

No change.

B.10 “Sanctions, remedies and enforcement” should become “Sanctions, remedies and exercise of rights”.

The amendments to the two paragraphs should read as follows:

“(a) Accessible and appropriate enforcement and dispute resolution mechanisms, sanctions and remedies should be provided for cases of breach of the protection of TCEs/EoF.

(b) An authority should be tasked with, among other things, advising and assisting communities with the exercise of rights and with instituting civil and criminal proceedings on their behalf when appropriate or requested by them.”

B.11 “Application in time” should be reworded as “Transitional measures”.

The word “encouraged” should be deleted from the second sentence, which should read “Long-standing prior use in good faith may be permitted to continue, but the users should be

required to acknowledge the source of the TCEs/EO F concerned and to share benefits with the original community.”

B.12 Relationship with intellectual property protection
No change.

B.13 International and regional protection

In subparagraph (a), the phrase “indigenous peoples and traditional and other cultural communities” should be deleted and replaced by “communities”.

In subparagraph (b), “should” should be deleted and replaced by “may”, and “among other things” should be added before “customary laws”.

Document IC/7/5

Chapter I: Policy Objectives:

In paragraph (iv), “provided for” should be deleted and replaced by “of”.

In paragraph (viii), the passage from “that recognize farmers’ rights” to “desertification” should be deleted, and the amendment should read as follows: “(viii) take due account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit -sharing from genetic resources which are associated with that traditional knowledge;”.

The amendment to subparagraph (ix) should read as follows:

“(ix) encourage, reward and protect tradition -based creativity and innovation; and promote innovation and the transfer of technology to the mutual advantage of holders and users of traditional knowledge”.

In paragraph (xii) [sic], “invalid” should be deleted and replaced by “improper”. We support more over the amendment proposed by Brazil, namely “and derivatives thereof”.

In paragraph (xiii), “invalid” should be deleted and replaced by “improper”.

[the proposed amendment to paragraph (xv) applies to the French version only]

Chapter II: Core principles

A. General guiding principles

Principle of effectiveness and accessibility of protection

In the last sentence, “enforcement procedures” should be replaced by “procedures for the exercise of rights”.

Principle of equity and benefit -sharing

We support the statement by Brazil, and propose amendments to both paragraphs reading as follows:

- “1. Protections should reflect the need for an equitable balance between her rights and interests of those who develop, preserve and sustain TK and of those who use and benefit from TK, and the need to reconcile diverse policy concerns.
2. Holders of traditional knowledge should be entitled to fair and equitable sharing of benefits arising from the use of their traditional knowledge. Where traditional knowledge is associated with genetic resources, the distribution of benefits should be compatible with measures conforming to the Convention on Biological Diversity, providing for a sharing of benefits arising from the utilization of genetic resources.”

Principle of consistency with existing legal systems

In paragraph 1, “if any,” and the comma preceding it should be deleted. With regard to paragraph 2, we support the statement by Brazil, and propose the following amendments: the phrase “and supportive of,” and the comma preceding it should be deleted, as should the remainder of the sentence, from “and should enhance” to the end of the paragraph.

Paragraph 2 would then read “Traditional knowledge protections should be consistent with existing IP systems where those systems promote the objectives of traditional knowledge protection.”

B. Specific substantive principles

B.1 Protection against misappropriation. The word “misappropriation” should be deleted and the title should read “protection against unlawful acts”. Misappropriation is indeed only one such unlawful act, and does not cover all the acts targeted.

The subheading “Suppression of misappropriation” should be deleted.

Paragraph 1 should read “Traditional knowledge shall be protected against unlawful acts.”

The subheading “General nature of misappropriation” should be deleted.

Paragraph 2 should read as follows:

“2. Any acquisition or appropriation of traditional knowledge by unfair or illicit means constitutes an unlawful act. Unlawful acts may also include deriving commercial benefit from the acquisition, appropriation or use of traditional knowledge when the person using that knowledge knows, or is grossly negligent in failing to know, that it was acquired or appropriated by unfair or unlawful means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge”.

The subheading “Acts of misappropriation” should be deleted.

In paragraph 3, the words “available” and “suppressed” should be deleted, and the sentence should read:

“3. In particular, legal means should be provided to prevent” (with the remainder of the paragraph unchanged).

The subheading “General protection against unfair competition” should be deleted.

The subheading “Recognition of the customary context” should be deleted.

In paragraph 5, the phrase “misappropriation of traditional knowledge” should be deleted and replaced by “unlawful acts”.

B.2 Legal form of protection

In paragraph 1, “among other things” should be added after “implemented” and “the law of torts, liability or civil obligations”, so that the paragraph becomes:

“1. Protection may be implemented, among other things, through a special law on traditional knowledge; the law on intellectual property, including unfair competition law and the law of unjust enrichment; the law on contracts and civil liability; criminal law; laws concerning the interests of indigenous peoples; regimes governing access and benefit sharing; or any other law or a combination of any of those laws.”

B.3 No change.

B.4 Eligibility for protection

The passage from “such as a sense of obligation” to “harmful or offensive” should be deleted so that the whole provision becomes: “protection should be extended at least to that traditional knowledge which is:

- (i) generated, preserved and transmitted in a traditional and intergenerational context;
- (ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and
- (iii) integral to the cultural identity of an indigenous or traditional community which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility; this relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.”

B.5 Beneficiaries of protection

The last sentence should be deleted.

B.6 Equitable compensation and recognition of knowledge holders

“Equitable” should be deleted.

We support the statement by Brazil, and propose the following text for B.6:

“1. Use of traditional knowledge should be subject to just and appropriate compensation for the benefit of the traditional holder of the knowledge.

2. Those using traditional knowledge beyond its traditional context should mention its source, acknowledge its holders and use it in a manner that respects the cultural values of its holders.”

B.7 Principle of prior informed consent

In paragraph 1, “direct” should be deleted.

In paragraph 2, the passage from “and legitimate users of traditional knowledge” to “based on legal grounds” should be deleted.

Paragraph3:Nochange.

B.8Exceptionsandlimitations

Subparagraph (ii)shouldbedeleted,andtheremainderleftunchanged.

B.9Durationofprotection

Theword“misappropriation”andthepassagefrom“inparticular”to“thoselawsor measures”shouldbedeleted.Theparagraphthusbecomes“protectionoftraditional knowledgeagainstunlawfulactsshouldlastaslongasthetraditionalknowledgefulfilsthe criteriaofprotection.”

B.10Applicationintime:thisshouldbe“Transitionalmeasures”.

Theamendmentswouldcausetheparagraphtoreadasfollows:
“Protectionoftraditionalknowledgenewlyintroducedinaccordancewiththeseprinciples shouldbeappliedtonewactsofacquisition,appropriationanduseoftraditionalknowledge. Acquisition,appropriationorusepriortotheentryintoforceoftheprotections shouldbe regularizedwithinareasonableperiodofthatprotectioncomingintoforce.Thereshould howeverbeequitabletreatmentforrightsacquiredbythirdpartiesingoodfaith”.

B.11Formalities

Inparagraph1,“misappropriationandotheractsofunfaircompetition”shouldbe deletedsothattheparagraphbecomes:

“1. Eligibilityforprotectionoftraditionalknowledgeagainstunlawfulactsshouldnot requireanyformalities”.

Paragraph2:nochange.

B.12Consistencywiththegenerallegalframework

Paragraph1:Nochange.

Inparagraph2,deletefrom“andsupportiveof”to“traditionalknowledge”.
Theparagraphthenbecomes:

“2. Traditionalknowledgeprotections shouldbeconsistentwithexistingintellectual property systemswherethose systems promotetheachievementoftheobjectivesofthesaid protection.”

Thewholeofparagraph3shouldbedeleted.

B.13Administrationandenforcementofprotection

Insubparagraph(ii),thepassagefrom“actofmisappropriation”to“unfair competition”shouldbedeletedandreplacedby“unlawfulact”,thecommaafter“inrelation to”shouldbedeletedandtheremainderleftunchanged.

THE UNITED NATIONS UNIVERSITY INSTITUTE OF ADVANCED STUDIES
(UNU-IAS)

The following comments were received through a communication from the United Nations University Institute of Advanced Studies (UNU-IAS)

1. Introduction

The United Nations University Institute of Advanced Studies (UNU-IAS) wishes to congratulate the Secretariat for the comprehensive and thought-provoking nature of the documents prepared for IGC 7, in particular documents 7/3 and 7/5. These documents constitute a significant advance in the development of proposals for the development of international mechanisms to effectively recognize, respect and protect the rights of indigenous peoples and local communities over their TK. The present communication seeks to contribute to the discussion by considering in more detail a number of the key notions mentioned in document 7/5, some of which are equally relevant to document 7/3.

Document 7/5 serves as a useful basis for the discussion on the content of a regime of protection for traditional knowledge. It brings together three elements: policy objectives, general guiding principles, and specific substantive principles, and also provides specific definitions of traditional knowledge¹ and protection². The proposal for a system to protect traditional knowledge as set out in the document centers around the principle of misappropriation which, at least in part, provides a justification for protection, the objectives of protection and the scope or the content of protection. The document also sets down a list of questions that must be answered in order to develop any legal system of intellectual property protection.

UNU-IAS has been carrying out research into a number of issues relating to protection of traditional knowledge and the following commentary builds heavily upon this research. The commentary is set out in seven general sections.

In the first place, we observe that the notion of misappropriation offers an organizing principle for discussion of development of mechanisms for the protection of TK. Secondly we note that misappropriation serves as a justification for the creation of a regime. Thirdly we argue that, while the notion of misappropriation (rights-based or moral-based justification), provides a strong argument for convincing people of the

¹ “The term traditional knowledge refers to the content or substance of traditional know-how, innovation, information, practices, skills and learning”. However, doc 7/5, par.31 adds “rather than to the forms of its expression” which might be problematic as it seems difficult if not impossible to design property rights without considering the form of the object of protection (*Cf. infra*)

² The term protection refers to protection such as that provided by IP laws, essentially to provide legal means to restrain third parties from undertaking certain unauthorized acts that involve the use of the protected material. (par 33)

need for a protection regime it provides little help in designing the precise content of such a regime. Fourthly, the present document suggests that a utilitarian justification could contribute to designing customized instruments of protection. Fifthly, with regard to international action we suggest that each possible instrument of protection should be considered in the light of the extent to which protection can be secured through existing law or modification of national or regional law as opposed to requiring international action. Sixthly, we argue that customary law and practice has an important role to play in protection of TK and suggest that one means for securing the effective enforcement of customary law rights may be through a system of licenses and contracts. In order to support such a system it is argued that there will be a need for some form of recognition of rights over TK, sui generis or otherwise. Finally, the present document includes some comments on the possible interaction between the principle of Prior Informed Consent and Compensatory Liability Rules.

2. Misappropriation as an organizing principle

The use of the notion of “misappropriation” as an organizing principle to design a protection regime is potentially useful as a first step in a process of consensus building on TK protection. Interestingly, the expression chosen – misappropriation – does not imply the granting of a right or a protection but rather the idea of a sanction for the breach of right or for reprehensible acts in relation to protected knowledge³. The expression “misappropriation” allude to the establishment of a system entitling to a remedy to prevent, compensate for, or otherwise mitigate, the effects of misappropriation but it does not in itself create a new right nor identify an existing right on TK.

Document 7/5 identifies various forms of misappropriation⁴

- a) Acquiring invalid IP right over TK
- b) Acquiring TK in violation of PIC
- c) Acquiring and commercially using TK contrary to honest practices or for inequitable benefit, such as through failing to share benefit equitably.

The very notion of misappropriation as an organizing principle requires identifying

- What right has been breached or what acts are being repressed as acts of misappropriation (scope of protection)
- What is the object of the right (subject matter and conditions of protection)
- Who are the right holders (beneficiaries)
- What are the sanctions for the breach of right

Document 7/5 includes a similar list of questions and provides a beginning of answer that need to be further discussed.

³ As such, it may be seen as being analogous to acts of unfair competition, which are sanctioned by antitrust/competition law

⁴ WIPO/GRTKF/IC/7/5 p. 6. In the Annex 1, p.5 the presentation is different but the content is similar.

Other potential acts involving a breach of a right over TK might include passing off, damaging moral rights of the author or authors of a work, misrepresentation as to the source of TK, failure to recognize the origin/ source of TK, etc. whether such and other similar acts would be protected under a system of misappropriation requires further consideration

3. Misappropriation as a justification for protection

The concept of misappropriation does not only include the idea of a right for TK holders to be protected against acts which violate the principles of equity and fairness, but it also contains more or less explicitly a justification of a protection regime for traditional knowledge. Indeed, the concept of misappropriation echoes the numerous books and articles written on traditional knowledge protection that justify the need for a protection regime on the basis of natural or moral rights. The numerous advocates of such a justification observe that there seems to be a growing consensus with the idea that there is something wrong in the use and appropriation of TK without prior permission and compensation of TK custodians. The strength of such justification can be observed in the fact that TK protection is now discussed in many international forums and WIPO is considering the possibility for negotiation of an international agreement.

However, if rights-based justifications play an important role in convincing people of the need of a protection regime, they do not lend themselves so easily to designing the precise content of a protection regime. Moral justifications do not provide criteria precise enough to identify the object of protection, the form and the scope of protection nor the beneficiaries.

Accordingly, some of the answers provided in document 7/5 to these questions require further precision, for instance:

- Paragraph b.2 *Legal form of protection* provides a long list of legal instruments that could be useful for TK protection. There is a need to identify connections between different (existing or to be created) legal instruments, different objects they can protect and different beneficiaries.
- Paragraph b.3 *General scope of subject matter* provides a useful definition of TK and states that protection should not be limited to any technical field. It is an important precision, and an international instrument may include a general and comprehensive requirement to protect TK. However, at the implementation level, it might be necessary to distinguish different uses of TK to be able to design the most suitable instrument(s) for its protection.
- Paragraph b.4 *Eligibility for protection* establishes the traditional character of knowledge as the requirement for its protection. Knowledge must come from a traditional context, be associated with a traditional or indigenous community, and be part of the cultural identity of this community. To some

extent this repeats what is already said in paragraph b.3 and it may be useful to seek to more fully develop the issues in paragraph b.4.

Firstly, if the traditional character of knowledge is to be selected as a criteria for protection, one must explain how to check that the conditions for protection are met; who will check it; whether there will be an *ex ante* examination, like in patent, or an *ex post* examination, when TK custodians will claim that part of their knowledge has been misappropriated; and whether there will be a system to indicate to third parties what knowledge is protected.

Secondly, identifying knowledge by its traditional character comes down to identification of the object for protection by the beneficiaries. This may lead to confusion between two different questions, i.e. meeting the requirements for protection and identification of the right holder. The problem is further complicated by the fact that the next paragraph (b.5) identifies beneficiaries of protection as TK holders. There is thus a circular definition: the object of protection is defined by its beneficiaries and beneficiaries are identified by the object of protection and none of them is defined independently.⁵

Another issue, which will need to be considered, is at what stage eligibility for protection may be exhausted. Indeed, traditional knowledge is not static but is rather dynamic, ever evolving and is more and more adapting itself to respond to new challenges and opportunities arising through interaction in a global economy, and in the face of external impacts upon local development and subsistence strategies. Therefore, one must take into consideration the fact that it is possible that any TK regime may in some cases be exploited to secure extended rights over knowledge for commercial rather than spiritual or cultural purposes, beyond a similar period for protection of non-traditional knowledge. It would appear to be counter-productive to develop a regime for protection of traditional knowledge against misappropriation if the result was to further promote the commoditization of knowledge. To do so would run contrary to the frequently expressed wishes of indigenous and local communities to avoid creating new forms of monopolistic property rights and to avoid commoditization of TK.

- Paragraph b.5 *Beneficiaries of protection* identifies beneficiaries as the holders of knowledge in accordance with the relationship described under “eligibility of protection. The relationship between peoples and knowledge is essential in identifying beneficiaries of protection. However, further precision is needed to make the system of protection work. In addition, as we

⁵ It could be argued that this is also the case in other sectors of intellectual property law. For instance, in patent law, the object of protection is an *invention* and the beneficiary of the right is the *inventor*. However, the situation is different in patent law. Protection requirements identify what is protectable. For each individual patent, patentee’s claims identify the scope of protection; the examination process decides whether the invention is protected or not and provides a kind of registration and evidence of the right. Patent law therefore includes mechanisms to identify the object of protection.

mentioned in the previous paragraph there is a problem of circular definition between the paragraph on *eligibility of protection* and the one on *beneficiaries of protection*.

In brief, the answers given to these issues in document 7/5 are very broad. One reason for this might be the will to design a comprehensive protection system that includes all traditional knowledge.

This suggests the need to consider an important trade-off that must be made between flexibility and comprehensiveness on one hand and legal certainty and effectiveness on the other. Setting broad principles/definitions at the international level may offer the flexibility that countries need in order to implement a system of protection through customized implementation, which reflects their TK holders' needs and national priorities. However, broad principles/definitions may also engender legal uncertainty both for TK holders and potential users who do not know exactly what is protected and who is the rightholder.

In addition, badly defined property rights cause high transaction costs that might hinder those TK holders that want to trade their knowledge⁶ from doing so. Theoretically, it is possible to have broad principles/definitions at the international level and to complement them by customized national principles/definitions. However, differences between national definitions hinder effective international protection, which is particularly harmful for TK protection because TK holders and potential users are most often in different countries.

There is another reason for broad principles/definitions: rights-based justifications provide little help in designing the precise content of a protection regime. Moral justifications do not provide criteria precise enough to identify the object of protection, the form, and the scope of protection nor the beneficiaries. In order to contribute to the necessary identification of the precise answers to those questions, it might be worthwhile to complement the rights-based justification of TK protection by a utilitarian justification.

4. Utilitarianism as a complementary justification

Considering a regime of protection of TK from a utilitarian perspective consists in looking at the consequences of the creation and attribution of rights. When it is used to explain the functioning of intellectual property law or other forms of knowledge control and exchange, utilitarianism looks at the nature of knowledge and its usefulness as the key criteria to identify the object of protection and the beneficiaries. Rights are regarded as an incentive to produce and/or disseminate the desired

⁶ One must keep in mind that in the protection of genetic resources, legal uncertainty and transaction costs are an important reason for the limited use of access and benefit sharing contracts.

knowledge.⁷ Therefore a possible contribution of a utilitarian approach might be to identify different types of knowledge, their respective usefulness and the effect that different protection mechanisms could have on the provision and/or dissemination of these different types of knowledge. Such an approach might help us to find more accurate answers to the list of questions identified above. An additional advantage of a utilitarian approach is that one can benefit from the lessons of the economics of information. Any such approach must of course consider the issue not only from an economic perspective, but also on the basis the cultural, social, environmental and spiritual value and/or impact of recognizing rights over knowledge.

As an illustration, we may consider one of the forms of misappropriation of TK and a possible mechanism of protection against this form of misappropriation. See Box 1.

Box 1

Example of a utilitarian (consequential) approach to identify forms of misappropriation and possible mechanisms of protection

The non-authorized and uncompensated use of TK by biotech companies in their R&D effort to find new medicines or new seeds has been widely denounced. Several studies have concluded that TK can provide valuable inputs in a R&D process by identifying plants that should be tested for pharmacological effect⁸. Beyond the few examples mentioned in existing surveys, it is likely that many traditional knowledge holders could provide important contributions in numerous R&D projects with the possibility to obtain compensation for their contributions.

One difficulty is that knowledge has been frequently misappropriated creating a lack of confidence in knowledge exchange. Another important difficulty is that valuable TK is not easily accessible and may be regarded as tacit knowledge. Tacit knowledge includes know-how of any sort which is best communicated through personal communication between peoples as opposed to codified knowledge documented in a systematic way and accessible by any entitled person. Codifying or documenting knowledge can complement the transmission of knowledge by personal communication from one generation to another, and it further enables communication of knowledge to third parties. What then would be the incentive effect of recognizing and protecting rights over such knowledge?

A right over TK could act as an incentive to reveal knowledge and facilitate its wider utilization.

⁷ Padmashree Gehl Sampath (2003), "Defining an Intellectual Property Right on Traditional Medical Knowledge: A Process-oriented Perspective", United-Nations University, Institute for New Technologies, Discussion Paper Series, 2003-4.

⁸ See notably Walter Reid *et al* (1993), "A New Lease on Life", in Walter Reid *et al* (eds.) *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development*, World Resources Institute p.17 and Michael J. Balick (1990), "Ethnobotany and the Identification of Therapeutic Agents from the Rain Forest" in D.J. Chatwick and J. Arsh (eds.), *Bioactive Compounds from Plants*, CIBA Foundation Symposium, p. 26-28

In situations where TK custodians want to prevent dissemination and inappropriate use of some knowledge like sacred or culturally sensitive knowledge, such an incentive would have little effect because keeping the knowledge tacit and/or secret may be the best mechanism of protection even if it provides only a limited control on knowledge.

In other situations, a right over TK could act as an incentive to reveal knowledge and facilitate its wider utilization. Indeed, without clear rights, keeping knowledge tacit (secret) amounts to an imperfect means to control it, undermines possibilities to effectively trade it, where desired; and may lead to the disappearance of knowledge. At the same time, revealing and documenting knowledge without a clear right implies a loss of control over knowledge and reduces further the possibility to negotiate compensation for its use.

By contrast, a clear right enables TK holders to reveal their knowledge, where so desired, while keeping (or even increasing) their control and placing them in a position to negotiate access to their knowledge if they wish⁹.

Once one has identified the object of protection and the likely effect of property rights, it is necessary to look at mechanisms for protection. In the example given above, the potential utility of a mechanism for documenting TK, and holding it in some form of community register or other database may deserve further consideration, albeit as a support to the grant of and recognition of property rights over knowledge. In such a case the documentation and registering of knowledge might be linked to a system for recognition of rights thereby placing TK holders in a position of control and ability to negotiate compensation for access to the knowledge.

UNU-IAS has previously considered the potential role of TK registers and Databases in the protection of traditional knowledge in a policy report distributed at IGC 6¹⁰. This document highlighted the potential drawbacks with the development of any rights regime which is based upon the use of databases and registers without the prior recognition of property rights over traditional knowledge. We would refer you to our report for analysis on the role of databases and registers. This report also argues for the development of some form of database trust to incorporate the protection of TK which has fallen in the public domain, prior to the development of an international TK regime, and which is currently held in databases and registers which are not under the control of the rightful custodians of relevant TK.

UNU-IAS is now conducting a more extensive research of TK registers and databases in order to consider the role they may play to support a TK rights regime,

⁹ One potential problem with the recognition of a right over knowledge is the possibility that it will be time limited; implying a loss of control over knowledge once a specific period of protection has expired.

¹⁰ See Alexander et al, 2003, The Role of Registers & Databases in the Protection of Traditional Knowledge, UNU-IAS, Tokyo, 2003 available at: http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf

including through the creation of incentives for documentation of and as a means to provide TK holders with an enhanced position to negotiate agreements for access to their knowledge and appropriate benefit sharing. This study of the contribution of registries and databases to positive protection of TK will complement UNU-IAS's earlier report, which provided cases studies of existing TK databases and pointed to their utility and limitations as a tool for protection of TK. UNU-IAS's work will also consider the *Technical proposals on databases and registers* submitted by the Asian Group as well as the recent decision of the South Asian Association for Regional Cooperation (SAARC) to favor development of databases.

The study does not assume that TK registries or databases are a mandatory requirement of protection for a system to protect TK, but rather, explore the role of registries and databases as an optional tool in positive protection systems. As several countries are already using or considering the use of databases and registries as an instrument of defensive protection, it is worth considering whether those databases and registries could simultaneously serve as a means to provide positive protection for TK.

This is very brief presentation set out in Box 1 was only an hypothetical case study using an utilitarian (or consequential) approach involving identification of useful knowledge, of the potential incentive effect of property rights and the identification of a potential legal form of protection. In order to provide a variety of examples for consideration in future IGC meetings, it might be useful to promote cases studies using such an utilitarian (or consequential) approach for several types of knowledge, identifying their respective usefulness, the likely consequences of the creation of property right for this knowledge and then choosing an existing form of protection or designing new ones

5. The international dimension

Many Member States have observed that, it is essential to keep in mind the international dimension –well analyzed in document 6/6 –when discussing the best form of protection for TK. Intellectual property legislation are by their nature national in application being limited by the bounds of national jurisdiction. Protecting someone's invention or knowledge in foreign countries has always been a delicate issue in all domains of intellectual property. Securing extra territorial protection is even more essential for TK because in many cases TK holders and potential users are not in the same country.

A few legal principles such as national treatment, the most favored nation provision, reciprocity, mutual recognition, etc may play an important role in the international protection of TK. However, whether or not these principles apply, an effective protection regime requires some international standards of protection. The need for international standards has two consequences for TK protection. First, national legislations enacting *sui generis* rights are very valuable in testing new instruments

of protection and contributing to the discussion, but they have a limited effect as they do not apply outside the country. Similar limitations in securing the rights of national governments over their genetic resources has led to the development of the concept of user measures within the international debate on access to genetic resources and benefit sharing (ABS).¹¹ Second, there are two main options for TK holder to obtain international protection either they resort to an existing system of IPRs with international standards or protection or to promote the adoption of new international standards in a widely ratified international treaty. Therefore, in the process of examining and comparing existing or potential protection instruments, there is a need to identify what TK holders can do in the current state of the law, including under customary law and practice, second whether and how a national government or regional groupings of countries may modify or adopt legislation to secure the protection of rights, and thirdly what can or must be done at the international level.

6. Customary Law

Document 7/5 proposes a *Principle of respect for customary use and transmission of traditional knowledge* (Principle A.8). It says *that respect for customary use, practices and norms has two aspects: ensuring that protection does not override existing customary practices, and using the customary context as a positive guide in the application of protection.*

The importance of customary law as the basis for developing mechanisms for protection of TK is receiving increased attention at the IGC, CBD and other international forums dealing with issues pertinent to the recognition and protection of the rights of indigenous peoples. Calls for recognition of the role of customary law in development of TK protection are based upon the perceptions of a strong convergence between the claims for empowerment and increased autonomy for indigenous peoples and protection of rights over TK.

Customary law has been described as one of the three pillars of traditional resource protection and is seen as playing an important role in regulating access to genetic resources and traditional knowledge.¹² Recognition of customary law is important because any form of knowledge, including TK, is not only the product of individuals but also the result of an innovation system where control and exchange of knowledge is often ruled by social norms or customary law. Maintenance of these customary

¹¹ See UNU-IAS report "User Measures: Options for Developing Measures in User countries to implement the Access and Benefit Sharing Provisions of the Convention on biological Diversity" for a detailed discussion of potential user measures, including the issues of disclosure of origin and access to justice, some of which may be relevant for the development of an international regime on protection of TK. The report is available at http://www.ias.unu.edu/binaries/UNUIAS_UserMeasures_2ndEd.pdf

¹² See Brendan Tobin, *Customary law as the basis for Prior Informed Consent of local and indigenous communities*, available at: http://www.ias.unu.edu/binaries2/Tobin_PIC_Customary_Law.doc
<http://www.canmexworkshop.com/documents/papers/III.4.1.pdf>

laws or social norms is often closely linked to the maintenance and continuing growth of knowledge and innovation systems.¹³

In developing an international system for protection of TK the challenge will be to determine the relationship between customary, national, regional and international norms, identifying clearly the contribution/place of customary law in the protection of TK. One possible and often mentioned contribution consists in using customary law as a base to build an international regime for the protection of TK. The challenge in doing so would be to develop a system which is sufficiently flexible to allow for due recognition of the multiplicity of customary law regimes which exist, sufficiently precise to provide legal certainty for providers and users of TK, and sufficiently robust to stand alongside other international law securing TK rights in the face of potential overlaps and conflicts with trade and IP regimes.

Building an international regime based upon customary law and practice could prove an arduous and long process, as in many cases it will first require the legal recognition of local and indigenous communities' customary law by their own States. This can be a lengthy process as many states may not be convinced of the need to provide such recognition. Added to this will be the difficulty of securing agreement to enforce customary law in foreign jurisdictions, especially where the application of customary law may depend upon arbitrary exercise of power by chiefs with little or no exercise of judicial or quasi judicial proceedings or due process. In addition, there will be the added difficulty of identification of the exact content of customary law provisions on intellectual property, where existing. In many countries and amongst many indigenous peoples and local communities the concept of ownership over knowledge is alien, however, ownership rights of differing levels; from full ownership to custodian responsibilities do exist for many communities. As mentioned above, both the recognition and the identification difficulties are further complicated by the great variations among customary law and the fact that most often TK holders and potential TK users will not be in the same state.

Another possible and rarely mentioned contribution to the expansion of the remit of customary law could be called “Contracting in to customary law”. Under such a system a community of TK holders granted internationally recognized rights over their knowledge could use licenses to contractually construct or strengthen a regime for the control and sharing of knowledge that takes into account their customary law both among members of the community and in their relations with third parties. As an illustration, one might look at biotech US academic scientists who draw a Uniform Biological Material Agreement that regulates the exchange of research material according to preexisting norms of science¹⁴. Initiatives such as those

¹³ See for example the work of Professor Rebecca Eisenberg and Professor Arti Rai on the norms of science and the Bayh-Dole Act, notably Arti K. Rai (1999), “Regulating Scientific Research : Intellectual Property and the Norms of Science. 94 NORTH WESTERN LAW REVIEW 77

¹⁴ See <http://www.autm.net>

involving open -software¹⁵ or that of creative commons¹⁶ are other examples of use of IPRs and licenses to take into account collective innovation and sharing of them.

UNU-IAS is currently exploring further how TK holders could resort to similar mechanisms, and is seeking to build collaborations to promote such research.

7. Prior Informed Consent and Compensatory Liability Rule

In paragraph B.6, document 7/5 notes that the principle of prior informed consent (PIC) has been central to policy debate on TK protection since the inception of the Committee. Simultaneously, in paragraph B.5, document 7/5 takes into consideration proposals for compensatory liability rules¹⁷ that *grant a right to compensation for commercial follow -on uses, but not a right to block such follow -on uses and do not remove knowledge from the public domain; this arrangement could be loosely compared to a paying public domain.*

PIC and compensatory liability rules are important concepts and for the clarity of the debate, it is important to clarify how these, two interplay. The principle of PIC means first that a potential user may not access knowledge before having the consent of the knowledge holder and second that compensation and other conditions of access will be mutually negotiated. Compensatory liability rules have a double characteristic. First, it suppresses the need to obtain the consent of knowledge holder. Second, compensation and other conditions of access are settled by a collective valuation mechanism rather than by a face to face negotiation between the parties. Therefore, PIC and compensatory liability rules are a priori two opposite notions. However, if both notions cannot simultaneously apply, they can apply at different moments. For instance, at a preliminary stage, TK holders can give their prior informed consent for placing their knowledge in a system applying compensatory liability for the determination of compensation and then, in a second stage, make the information held in this system accessible for users under a compensatory liability rule.

Compensatory liability rules are useful because they reduce transaction costs. In a context of collective innovation, exchanges of knowledge are very frequent. Obtaining prior informed consent might be lengthy and negotiating compensation for each transaction might be difficult, especially because the value of a piece of knowledge is difficult to evaluate before a commercial product is put on the market. Therefore, compensatory liability rules can potentially reduce transaction costs and facilitate collective innovation by suppressing the need for individual negotiations

¹⁵ See <http://www.gnu.org/home.html>

¹⁶ See <http://www.creativecommons.org>

¹⁷ See notably Jerome Reichman (2000), "Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation" 53 VANDERBILT LAW REVIEW 6 at 1743 or Tracy Lewis and Jerome Reichman (2005) "Using Compensatory Liability Rules to Stimulate Innovation in Developing Countries" in Keith Maskus and Jerome H. Reichman (eds.) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime*, Cambridge University Press (to be published in May 2005)

for PIC and providing a standardized set of terms and conditions to apply to valuation of the transferred knowledge.

An additional step to reduce transaction costs and facilitate knowledge exchange might be the use of collective administration and management of IP rights mentioned in document 7/5, paragraph B.8(g). A compensatory liability rule could reduce one kind of transaction costs sometimes referred as bargaining cost, that is to say the cost of negotiating compensation and other conditions of access. Collective management of rights may also help reduce other types of transaction costs. This could potentially help TK holders and potential users to identify each other, reducing search costs. It can also reduce enforcement costs by helping TK holders to monitor the use of their knowledge and sanction misappropriation.

Development of any compensatory liability regime would likely involve the use of collection societies for the collection and distribution of benefits. This could help to reduce transaction costs. Collection societies established, managed and run by indigenous and local community organizations could help to develop more community sensitive negotiating strategies promote collective interests of local and indigenous communities and develop the portfolios of knowledge necessary to negotiate major agreements with industry. Once again these are issues which require the full and active involvement of indigenous and local communities in their consideration and development.

As a conclusion, UNU-IAS would like to insist that whatever means is taken it should be recognized that any system, which is developed without the full and effective participation of indigenous and local communities, will be unlikely to succeed. Therefore, at the earliest possible moment there will be a need for a concerted international consultation process with local and indigenous communities to secure their informed and active participation

UNU-IAS welcomes the opportunity, which WIPO through the IGC has provided for the receipt of commentaries on these important documents. The Institute looks forward to continuing to play an active role in the work of the IGC and to submitting further input to the development of international law and policy in this area.