

## 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 re process 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:  
OVERVIEW OF POLICY OBJECTIVES  
AND CORE PRINCIPLES (WIPO/GRTKF/IC/7/5)*

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.