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INTELLECTUAL PROPERTY AND GENETIC RESOURCES,  
TRADITIONAL KNOWLEDGE AND FOLKLORE**

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ELEMENTS OF A *SUI GENERIS* SYSTEM FOR THE PROTECTION OF TRADITIONAL  
KNOWLEDGE

*Prepared by the Secretariat*

## I. INTRODUCTION

1. This paper seeks to contribute to the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter “the Committee”), by discussing the elements that might form part of a distinct *sui generis* legal system defined specifically to protect traditional knowledge (“TK”). A parallel and complementary paper, WIPO/GRTKF/IC/3/9, discusses possible approaches to the definition of ‘traditional knowledge.’

2. At the second session of the Committee, held in Geneva from December 10 to 14, 2001, a number of delegations emphasized the relevance of examining possible modalities of intellectual property (“IP”) *sui generis* systems for the protection of traditional knowledge. For example, the Delegation of Algeria, speaking on behalf of the African Group, said that “[...] WIPO should determine which categories of traditional knowledge could be protected under existing legislation. For the other categories, WIPO should develop new *sui generis* mechanisms in order to ensure adequate protection.”<sup>1</sup> The Delegation of South Africa recommended that the work of the Committee “should also take into account possible *sui generis* systems in respect of genetic resources, traditional knowledge and folklore.”<sup>2</sup> The Delegation of New Zealand noted that it “considered that the examination of *sui generis* modes for the protection of traditional knowledge was both necessary and important.”<sup>3</sup> The Delegation of Peru emphasized that discussions in the Committee “should not distract the Committee from its main work which was to propose a *sui generis* system of protection for traditional knowledge of international scope.”<sup>4</sup> Similar views were voiced by the delegations of Thailand<sup>5</sup> and India.<sup>6</sup>

3. At that same meeting, and under agenda item 8 (“future work”)<sup>7</sup>, the Delegation of Venezuela requested the Secretariat of WIPO to prepare a document for the third session of the Committee “with elements for a possible *sui generis* system.”<sup>8</sup> That proposal was supported by the Delegations of Brazil, Egypt and Ecuador.<sup>9</sup> The present document is the response to that request.

4. There are several reasons why it may yet be premature to identify in a definitive way the precise characteristics of a legal framework especially adapted to the characteristics of traditional knowledge, especially if this is to be capable of broad application internationally. Firstly, although the international debate on the need for the development of mechanisms for

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<sup>1</sup> See *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Second Session, Report, adopted by the Committee*, WIPO document WIPO/GRTKF/IC/2/16, of December 14, 2001, at paragraph 17.

<sup>2</sup> *Id.* at paragraph 80.

<sup>3</sup> *Id.* at paragraph 121.

<sup>4</sup> *Id.* at paragraph 123.

<sup>5</sup> *Id.* at paragraph 124.

<sup>6</sup> *Id.* at paragraph 162.

<sup>7</sup> See WIPO document WIPO/GRTKF/IC/2/1 Prov., of June 1, 2001.

<sup>8</sup> *Report*, note 1, *supra*, at paragraph 188.

<sup>9</sup> *Id.* at paragraphs 189-191.

the protection of traditional knowledge started more than two decades ago,<sup>10</sup> not enough experience has yet been acquired, both at the national and the international levels, to ensure that the full scope of options for a workable and effective system are available. In practice, a ‘top-down’ or a pre-emptive approach to defining *sui generis* protection at an international level is less likely to succeed if it is shaped without reference to the experience gained from operational national systems that provide practical models for functioning TK protection, whether through *sui generis* protection or application of existing IP systems to TK subject matter. Secondly, a number of Committee Members have called for the consideration of how existing mechanisms of intellectual property can be more effectively used to protect traditional knowledge.<sup>11</sup> For at least those Members, therefore, there seems to be a need for a fuller articulation of how existing systems can be properly applied to TK subject matter. This may also be a useful guide to defining the specific area of need for any new, *sui generis* system. It may also be useful in determining how a *sui generis* system interacts with those elements of other IP systems which are relevant to TK protection. And thirdly, Members must still decide whether, if a future *sui generis* system were to be developed, such a system would cover all manifestations and expressions of traditional knowledge in a broad sense,<sup>12</sup> or whether they should pursue two different legal tracks: on one track, the efforts would be aimed at developing a system duly adapted to the characteristics of expressions of folklore (eventually through the review of the WIPO/UNESCO Model provisions); on the other track, Members would look into a *sui generis* system compatible with the particular features of technical traditional knowledge, in particular of biodiversity-associated traditional knowledge. Finally, and related to the preceding point, is the definitional question, discussed in the separate paper WIPO/GRTKF/IC/3/9: even if no conclusive or exhaustive definition is settled on, some general working consensus on the operational scope of the term ‘traditional knowledge’ would facilitate discussions on appropriate ways of protecting this subject matter.

5. Accordingly, any efforts to define a new, *sui generis* system at the international level prior to clarifying these issues may prove premature and thus ineffectual, or may actually serve to delay the establishment of practically effective systems of TK protection with an international character. Nonetheless, the need for exploration of the possible elements of such a system has been clearly identified during the work of the Committee, and this may help elucidate the issues and define the operational environment for TK protection. The present document accordingly does not seek to pre-empt the debate over the need for a *sui generis* system for the protection of traditional knowledge, but rather identifies some elements that might be taken into account should there be consensus on the need for work on the development of a *sui generis* system.

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<sup>10</sup> The approval of the WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions, of 1982, by a Committee of Experts, and the establishment of the Convention on Biological Diversity, of 1992, are two major landmarks of the debate on the protection of traditional knowledge.

<sup>11</sup> See WIPO document WIPO/GRTKF/IC/2/9.

<sup>12</sup> At the second session of the Committee the delegation of Egypt “noted that no distinction should be made between expressions of folklore and traditional knowledge; both concepts were interrelated to the extent that any attempt at separating one from the other would be highly difficult.” *Report*, note 1 *supra*, at paragraph 167. And the delegation of India “stated it was of the view that expressions of folklore should be given similar treatment like any other form of traditional knowledge.” *Id.* at paragraph 171.

6. A related question is the manner in which this issue would be dealt with by the Committee, should that consensus be reached. For the present, the Committee can continue to exchange views and practical experience on the relationship between intellectual property and access to genetic resources, traditional knowledge and expressions of folklore, with a particular focus on tasks that do not require the development of new concepts or legal mechanisms — such as discussions on traditional knowledge as prior art and the means to make it available for patent examiners; contractual clauses on access to genetic resources; and national experiences and views on the protection of traditional knowledge and expressions of folklore.

7. But, should a consensus be reached that work should proceed towards the development of a mechanism for the protection of traditional knowledge, the question remains what form that outcome would take. The Committee could engage in this work with a view to developing soft law, that is, non-binding guidelines and/or recommendations to be adopted or applied at the national level, leading to a *de facto* development of minimum harmonized standards for protection of TK. Suggestions could also be developed with a view to the adoption of international standards that, by undertaking a harmonized approach, could enhance international protection, avoid free riding and misappropriation, and reduce distortions and impediments to international trade of products and services incorporating traditional knowledge. Equally, development of, and experience with, non-binding guidelines or recommendations to guide national systems may lead to a greater sharpening of understanding of the essential elements of a successful, workable and effective national system, that may in turn feed into the identification of international standards.

8. Even seeking to identify elements of possible *sui generis* systems raises the question of whether the system is to be characterized predominantly at the national or international level. The Committee could focus on systems of protection at the national level, with a view subsequently to distilling out more general principles that could be expressed in an international framework; or it could seek directly to express what basic elements or principles would be sought in an international framework, whether indicative, illustrative or more formal in character.

9. In addition, there is not necessarily a firm division between the elements of existing IP systems that are relevant to TK protection, and distinct *sui generis* TK systems. To illustrate this point by taking the example of *sui generis* database protection, a compilation of data is partly recognized as a distinct object of protection under copyright law; yet it can also partly be viewed as an object of *sui generis* database protection in some countries' legal systems<sup>13</sup> – and indeed both legal mechanisms have been canvassed as possibly applying to collections of traditional knowledge and thus affording a measure of TK protection. Alongside any distinct *sui generis* IP systems specifically created for traditional knowledge as such, there can be *sui generis* elements of general IP law that may be relevant to traditional knowledge subject matter. Specific *sui generis* mechanisms have been developed within general IP law to deal with particular practical needs or policy objectives relating to specific subject matter: these include specific legal provisions and practical or administrative measures. For example, *sui generis* disclosure obligations, in the form of requirements for the deposit of samples, can

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<sup>13</sup> See, for example, TRIPS Article 10.2 and WIPO Copyright Treaty Article 5; cf. the EU Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20)).

apply to patent procedures relating to new microorganisms.<sup>14</sup> Proposals have been made for specific disclosure obligations in relation to patents for inventions derived from genetic resources and associated traditional knowledge.<sup>15</sup> In relation to TK as such, the development of distinct classes or sub-classes for traditional knowledge in the International Patent Classification could be characterized as a *sui generis* element of an existing system to facilitate defensive protection of traditional knowledge.<sup>16</sup> The extension of performers' rights to those who perform 'expressions of folklore'<sup>17</sup> captures *sui generis* TK-related subject matter within a broad IP system. To some extent, therefore, the Committee may need to explore or define the boundary or interaction between relevant *sui generis* elements of existing IP systems that have the effect of protecting TK to some extent, on the one hand; and the elements of distinct *sui generis* systems specifically for TK protection on the other hand.

## II. TRADITIONAL KNOWLEDGE: A WORKING CONCEPT

10. In previous work, the Secretariat of WIPO has used the term "traditional knowledge" in an open-ended way to refer to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment."<sup>18</sup> This is not a formal definition, but a working concept of traditional knowledge, which may not be as precise as a scientific or restrictive legal definition, but it provides nonetheless the essential elements for the understanding of the nature and scope of traditional knowledge as legal subject-matter, and is consonant with the general approach to the definition of subject matter that is taken in the international IP framework.

11. A survey of existing international standards in the field of intellectual property would illustrate that a precise definition of traditional knowledge is not necessarily a crucial requisite for identifying the legal elements of a mechanism for its protection. Most patent laws, for example, do not precisely define the concept of an 'invention'; equally, international harmonization and standard-setting in patent law have proceeded without specific or

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<sup>14</sup> In accordance with the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.

<sup>15</sup> 'Measures to encourage disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights' at paragraph 13(d)(ii) of the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of their Utilization*, adopted by the sixth Conference of Parties to the Convention on Biological Diversity. See Decision VI/24, Part A, Annex.

<sup>16</sup> See paragraphs 39-40, document IPC/CE/31/8, Report of the Committee of Experts, Special Union for the International Patent Classification (IPC Union), Thirty-First Session, Geneva, February 25 to March 1, 2002.

<sup>17</sup> WIPO Performances and Phonograms Treaty, Article 2(a).

<sup>18</sup> *Intellectual Property Needs and Expectations of Traditional Knowledge Holders — WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge*, WIPO, April 2001, at 25.

authoritative international definitions of this fundamental concept – although what constitutes an ‘invention’ has strong elements of harmony in practice, significant differences continue to apply at the national level after some 120 years of progressive international harmonisation. Likewise, most trademark laws do not define ‘signs’<sup>19</sup> in exhaustive terms and generally leave it to the examining authorities and the courts to decide case-by-case whether a specific sign serves as the necessary requirements for protection. The crucial element for the protection of any legal subject-matter is the identification of certain characteristics that it must meet as a condition for protection — such as novelty, inventive step and susceptibility of industrial application, for inventions, and distinctiveness, for trademarks. The same approach could be applied to traditional knowledge as well.<sup>20</sup> A fuller discussion along these lines on the possible approach to definition of the subject matter of protection is contained in WIPO/GRTKF/IC/3/9.

12. The working concept of traditional knowledge, as adopted for the purpose of this document, puts a particular emphasis on the fact that traditional knowledge is “tradition-based.” That does not mean, however, that traditional knowledge is old or that it necessarily lacks a technical character. Traditional knowledge is “traditional” because it is created in a manner that reflects the traditions of the communities. “Traditional”, therefore, does not necessarily relate to the nature of the knowledge but to the way in which the knowledge is created, preserved and disseminated. Two other characteristics stem from that same working concept: traditional knowledge is a means of cultural identification of its holders, so that its preservation and integrity are linked to concerns about the preservation of distinct cultures *per se*; and, even if it contains information of a practical or technological character, traditional knowledge has a cultural dimension and a social context that can distinguish it from other forms of scientific or technological information.

13. Because its generation, preservation and transmission is based on cultural traditions, TK is essentially culturally-oriented or culturally-biased, and it is integral to the cultural identity of the social group in which it operates and is preserved. From the point of view of the culture of the community in which it has originated, every component of traditional knowledge can help to define that community's own identity. This characteristic may sound obvious as far as expressions of folklore and handicrafts are concerned, but it also applies to other areas of traditional knowledge, such as medicinal and agricultural knowledge. A piece of medicinal knowledge developed from a given combination of plants by a South American community, for example, necessarily differs from knowledge developed by an African community, based on similar plants. The reason is that the origination of medicinal knowledge by traditional communities does not only attend to a certain need, but also responds to cultural approaches and beliefs.

14. This contrasts sharply with two scientific inventions made separately by two different teams of employed inventors, with the objective of solving the same technical problem: it is not uncommon that the two inventions turn out to be very similar, which, in patent law, may

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<sup>19</sup> Cf TRIPS Article 15.1: ‘Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark.’

<sup>20</sup> See *Information Note on Traditional Knowledge*, prepared by the Secretariat of WIPO for the WIPO International Forum on “Intellectual Property and Traditional Knowledge: Our Identity, Our Future”, held in Muscat, Oman, on January, 21 and 22, 2002.

give rise to interference proceedings or similar legal procedures which attribute ownership to one claimant or the other. Competing patent claims to overlapping subject matter are resolved without reference to the cultural environment which gave rise to the inventions. By contrast, the cultural identity dimension of traditional knowledge may have a dramatic impact on any future legal framework for its protection, because, being a means of cultural identification, the protection of traditional knowledge, including traditional knowledge of a technical nature, ceases to be simply a matter of economics or of exclusive rights over technology as such. It acquires a human rights dimension indeed, for it intertwines with the issues concerning the cultural identification and dignity of traditional communities. Analogues could also be drawn with the concept of ‘moral rights’ in copyright law, specifically the rights of integrity and of attribution, in that it may be considered necessary to protect against culturally offensive use of TK or other non-economic forms of perceived misuse of TK. Specific remedies, such as additional damages, may also be stipulated in case of culturally offensive misuse of protected material.

15. The fact that traditional knowledge is created in a distinctive cultural context also gives another important characteristics: in essence, to understand the full nature of the TK or simply even to record or define it, it may be necessary to understand the cultural influences that shape it. Whether or not the TK is produced within a formal or systematic tradition, or in a more informal or ad hoc context, it tends to be developed in a way that is closely related to the immediate environment in which traditional communities dwell, and to respond to the changing situation of that community. In that regard, it can have an empirical or trial-and-error basis. Yet traditional knowledge may be developed in accordance with systems of knowledge, and be incorporated into systematic concepts and beliefs. Culturally-based rules may apply to the way innovation proceeds. Yet the way TK is created may appear from an external or universal perspective to be non-systematic or unmethodical, partly because the rules or system governing its creation can be passed on in an informal or cultural manner, partly because the systematic element is not explicitly articulated, and partly because the process leading to the creation of TK may not be formally documented in the way that much scientific and technological information is recorded. The apparent non-systematic manner of creation of traditional knowledge, does not diminish its cultural value, or its value from the point of view of technical benefit, and raises the question of how to record or define its relationship with the culturally-specific knowledge system, set of rules or guidelines, or set of background beliefs which help to shape it. As with the “tradition-based” characteristic, the apparent “non-formal” characteristic leads to particular emphasis on the context in which is created, and the potential need for elements of this cultural context to be considered along with the knowledge *per se*. This third essential characteristic of traditional knowledge may have an impact on how it will be described and claimed, if a *sui generis* system of registration of traditional knowledge were to be developed.

16. The identification of additional characteristics so as to identify more precisely the scope of protectable subject matter is, of course, a question to be addressed by national laws. Limitations will apply depending on the policy objectives of the protection. For example, national laws may afford protection to knowledge that is held by certain communities only. In that vein, the law may limit the protection of traditional knowledge held by indigenous communities<sup>21</sup> or Afro-American communities.<sup>22</sup> Laws may also identify the technical field

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<sup>21</sup> See Brazilian Biodiversity Law, Provisional Measure No. 2.186-15, of July 26, 2001, Article 7.

to which the protected subject matter pertains, because the laws are aimed at specific policy objectives associated with that particular field of knowledge. For example, protection may be restricted to traditional knowledge that is associated with genetic (or, more generally, biological) resources<sup>23</sup> or to traditional medicines. Or protection may be linked to the susceptibility of commercial utilization of traditional knowledge<sup>24</sup> — putting aside, therefore, knowledge of a purely religious and cultural nature, such as rituals and sacred resources. The policy objective in this instance would be limited to addressing concerns about commercialisation of TK, leaving it to other legal instruments (including customary law, as appropriate) to address knowledge in the religious and cultural framework.

17. It should be noted that any addition of characteristics, such as those three mentioned above, with the aim of better defining the scope of protection will necessarily lead to the reduction of the scope of protection in practice. Nonetheless, it is a characteristic of IP systems that the actual legal protection afforded does not extend to all possible material that may fall within a broad inclusive definition of relevant subject matter; to some extent this is an inevitable feature of internationally agreed systems or standards, which does not rule out a broader approach at the level of domestic law.

### III. *SUI GENERIS* SYSTEMS OF INTELLECTUAL PROPERTY PROTECTION

18. Intellectual property is a set of principles and rules that discipline the acquisition, use and loss of rights and interests in intangible assets susceptible of being used in commerce. Its subject matter is inherently dynamic, and so are the principles and rules that it comprises. Consequently, intellectual property has evolved recently at a very fast pace so as to accommodate the new technologies and methods of doing business generated by the global economy. In some areas, existing legal mechanisms have been adapted to the characteristics of new subject matter: the patent system has been confronted with the challenges of biotechnological inventions and new processes of using information technology devices (so-called “business methods”); copyright and related rights have been broadened so as to meet the challenges of computer software, electronic commerce and protection of databases. But in other areas, new systems have been created, where it appeared that a mere effort of adapting existing mechanisms would not respond adequately to the characteristics of new subject matter. Plant varieties have justified the establishment of a *sui generis* system, whose leading regime is defined by the UPOV Convention;<sup>25</sup> layout-designs (topographies) of integrated circuits have also been the subject matter of a special system that combines features of patent, industrial designs and copyright laws. What makes an intellectual property system a *sui generis* one is the modification of some of its features so as to properly accommodate the

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<sup>22</sup> See Andean Community Decision 391 on the Common regime on Access to genetic Resources, of July 2, 1996, Article 1.

<sup>23</sup> E.g. the Brazilian Biodiversity Law, *supra* note 15, Article 1; the Venezuelan Law on Biological Diversity of May 24, 2000, Article 84.

<sup>24</sup> See Law No. 20, of June 26, 2000, of Panama, on the special property regime on collective rights of indigenous communities for the protection of their cultural identity and traditional knowledge, Article 1.

<sup>25</sup> See the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991. UPOV stands for the French acronym *Union pour la Protection des Obtentions Végétales* (International Union for the Protection of New Varieties of Plants).



special characteristics of its subject matter, and the specific policy needs which led to the establishment of a distinct system. As the WTO Secretariat put it in connection with the explanation of the *sui generis* system of plant variety protection, under Article 27.3(b) of the TRIPS Agreement, “*Sui generis* protection gives Members more flexibility to adapt to particular circumstances arising from the technical characteristics of inventions in the field of plant varieties, such as novelty and disclosure.”<sup>26</sup>

19. In this vein, any reference to a *sui generis* system for the protection of traditional knowledge does not mean that a legal mechanism must be entirely construed from scratch. On the contrary, intellectual property has ongoingly evolved to remain an efficient mechanism to promote technological progress, transfer and dissemination of technology and to serve the rights and interests of creators, as well as of fairness in commerce. The main thrust of intellectual property is that it covers intangible assets and that it provides its holders the right to exclude others from reproducing works and/or fixing performances and reproducing those performances (i.e. copyright and related rights) as well as the right to exclude others from using the protected subject matter (i.e. industrial property rights). The idea to be retained is that intellectual property is the right to say “no” to third parties (and, consequently, the right to say “yes” to a person who requests permission to reproduce and/or fix and/or use the protected subject matter). Intellectual property, broadly conceived, may be seen as a misnomer, because it does not necessarily cover “intellectual works” as such — it covers intangible assets of diverse origins, which need not entail abstract intellectual work; nor need it be defined and protected through property rights alone (the moral rights of authors and the reputation of merchants are not the subject of property, under a civil law concept).

20. If they develop in appropriate ways, intellectual property systems may therefore have an essential role in the preservation of the cultural identity of traditional communities and, consequently, in the empowerment of traditional knowledge holders, in the sense that they will be attributed the crucial right of saying “no” to third parties that engage in the unauthorized and/or distorting use of their traditional knowledge, regardless of its commercial nature. In other words, even those communities that believe their knowledge (or portions of it) should remain outside the commercial channels, may benefit from intellectual property protection, as it will give them the power to prevent their knowledge from being commercialized and/or used in a distorting or culturally insensitive manner.<sup>27</sup>

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<sup>26</sup> *The Convention on Biological Diversity and the Agreement on Trade-Related Aspects of Intellectual Property Rights, Note by the Secretariat*, WTO document IP/C/W/216, of October 3, 2000, paragraph 33. The TRIPS Agreement constitutes Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (the WTO).

<sup>27</sup> The empowerment of traditional knowledge holders may be seen as a human rights-related aspect of traditional knowledge protection. But that issue has two additional and no less important components. One is legal: a clear, transparent and effective system of traditional knowledge protection increases legal security and predictability to the benefit not only of traditional knowledge holders, but also of society as a whole, including firms and research institutions engaged in bioprospection. The other is of an economic nature: the formalization and recording of traditional communities’ intangible assets would transform them into capital, thus permitting the establishment of commercial ventures by traditional communities in a more secure manner. Many traditional communities that live in poverty are actually rich in knowledge — but their knowledge, not being the subject of formal property titles, is prone to commercial misappropriation by others. A strong case for the formalization of real estate belonging to poor communities in developing countries has been made by Hernando de Soto,

#### IV. A *SUI GENERIS* SYSTEM FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE?

21. As already noted, the present document is not intended to preempt the debate on the need for establishing a *sui generis* system for the protection of traditional knowledge either as a substitute or as a complement for the existing mechanisms of intellectual property. It merely aims, in line with the requests of several Committee Members, to identify some elements that should be taken into account if, and only if, a decision is made to develop such a system. Actually, there is a general understanding that some aspects of traditional knowledge can be adequately protected by existing mechanisms.

22. A short fable may help illustrate the nature of traditional knowledge and the availability of existing mechanisms of intellectual property that fit its characteristics. Let us imagine that a member of an Amazon tribe does not feel well and requests the *pajé*'s medical services (*pajé* is the tupi-guarani word for shaman). The shaman, after examining the patient, will go to his garden (many shamans in the Amazon rain forest are plant breeders indeed<sup>28</sup>) and collect some leaves, seeds and fruits from different plants. Mixing those materials according to a method only he knows, he prepares a potion according to a recipe of which he is the sole holder. While preparing the potion and, afterwards, while administering it to the patient (according to a dosage he will likewise prescribe), the *pajé* prays to the gods of the forest and performs a religious dance. He may also inhale the smoke of the leaves of a magical plant (the "vine of the soul"<sup>29</sup>). The potion will be served and saved in a vase with symbolic designs and the *pajé* will wear his ceremonial garments for the healing. In certain cultures, the *pajé* is not seen as the healer, but as the instrument that conveys the healing from the gods to the patient.

23. The traditional knowledge of the Amazon shaman is a combination of all those elements. If taken separately, existing intellectual property mechanisms could protect most of, if not all, those elements. For example:

- the different plants from which the shaman has made the potion may be protected under a plant variety protection system, provide the plants are new, stable, distinct and uniform;
- the potion (or the formula thereof) can be the subject matter of a patent, provided it is new, inventive and susceptible of industrial application, or as undisclosed information;

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*The Mystery of Capital — Why Capitalism Triumphs in the West and Fails Everywhere Else* (ed. Basic Books, 2000).

<sup>28</sup> See Mark J. Plotkin, *Tales of a Shaman's Apprentice — An Ethnobotanist Searches for New Medicines in the Amazon Rain Forest*, ed. Penguin Books, 1993.

<sup>29</sup> See Richard Evans Schultes and Robert F. Raffaut, *Vine of the Soul — Medicine Men, Their Plants and Rituals in the Colombian Amazonia*, ed. Synergetic Press and Conservation Int'l, 1992.

- the use and the dosage of the potion can also be protected by a patent, under the laws of a few Committee Members which make patents available for new uses of substances as well as for new and inventive therapeutic methods;
- the prayer, once fixed, could be copyrighted;<sup>30</sup>
- the performance, once fixed, can be protected by copyright-related rights, and the shaman - as performer - can be accorded the right to authorise the fixation of the performance;<sup>31</sup>
- the vase containing the potion can be patented or protected under a utility model certificate if it has new and inventive functional features; if not, it can be protected under an industrial design system;
- the designs on the vase and on the garments can be protected either by the copyright or by the industrial design systems.

24. As a matter of course, the availability of the existing mechanisms for the protection of those separate elements of traditional knowledge would depend on their meeting the legal requirements for protection. As document WIPO/GRTKF/IC/2/9 indicates, existing mechanisms of intellectual property are not necessarily incompatible with separate elements of traditional knowledge. Actually, in response to Question 1 of a survey on existing forms of intellectual property protection for traditional knowledge, some Members provided pertinent information on that issue:

“A number of Committee Members have indicated that existing mechanisms of intellectual property are generally available for the protection of traditional knowledge. Some Committee Members, such as the European Union, Hungary, Switzerland and Turkey, have identified an extensive list of existing mechanisms, [footnote omitted] thus implying that eligibility for traditional knowledge protection depends almost exclusively on meeting previously established legal conditions. Other Members’ responses seem to identify some specific mechanisms as being more adequate to protect traditional knowledge than others: Indonesia has emphasized the relevance of copyright, distinctive signs (including geographical indications) and trade secret law; Norway has made special mention of trade secret protection for traditional knowledge that is not in the public domain, [footnote omitted] as well as, indirectly, to trademark law. Samoa also has emphasized the importance of moral rights under copyright and related rights law.

“Australia, Canada, Kazakhstan and the Russian Federation have provided actual examples of how existing intellectual property mechanisms have already been used in order to protect traditional knowledge.[footnote omitted] Australia has identified four cases which, in its view, demonstrate the ability of the Australian intellectual property regime to protect traditional knowledge: *Foster v Mountford* (1976) 29 FLR 233,

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<sup>30</sup> The Berne Convention, Article 15(4)(a), also provides for the protection of unpublished works of unknown authorship.

<sup>31</sup> And the shaman would have a right of consent to the fixation of the performance, under the provisions of the WIPO Performances and Phonograms Treaty, Article 6(2)

*Milpurrruru v Indofurn Pty Ltd (1995) 30 IPR 209, Bulun Bulun & Milpurrruru v R & T Textiles Pty Ltd (1998) 41 IPR 513 and Bulun Bulun v Flash Screenprinters* (discussed in (1989) EIPR Vol 2, pp. 346-355). [citations omitted] From these cases it results that protection under the Australian Copyright Act can be as valuable to Aboriginal and Torres Strait Islander artists as it is to other artists. [footnote omitted] Furthermore, other intellectual property rights are available for traditional knowledge protection, namely certification marks, the trademark system as a whole, and the designs system.

“In Canada, copyright protection under the Copyright Act has been widely used by Aboriginal artists, composers and writers of tradition-based creations such as wood carvings of Pacific coast artists, including masks and totem poles, the silver jewelry of Haida artists, songs and sound recordings of Aboriginal artists and Inuit sculptures. Trademarks, including certification marks, are used by Aboriginal people to identify a wide range of goods and services, ranging from traditional art and artwork to food products, clothing, tourist services and enterprises run by First Nations. Many Aboriginal businesses and organizations have registered trademarks relating to traditional symbols and names. In contrast, industrial designs protection under the Industrial Design Act has not been widely used by Aboriginal persons or communities. The West Baffin Eskimo Cooperative Ltd. filed over 50 designs in the late 1960s for fabrics using traditional images of animals and Inuit people. It is becoming increasingly common for Aboriginal communities in Canada to sign confidentiality agreements with governments and non-Aboriginal businesses when sharing their traditional knowledge. For example, the Unaaq Fisheries, owned by the Inuit people of Northern Quebec and Baffin Island is involved in fisheries management. The company regularly transfers proprietary technologies to other communities using its own experience in the commercial fishing industry. The techniques it develops are protected as trade secrets.

“Both Kazakhstan and the Russian Federation have identified examples of protection of technical traditional knowledge through the grant of patents. Furthermore, in Kazakhstan, the external appearance of national outer clothes, head dresses (*saykele*), carpets (*tuskiiz*), decorations of saddles, national dwellings (*yurta*) and their structural elements, as well as women’s apparel accessories, like bracelets (*blezik*), national children’s cots-crib-cradles and table wares (*piala, torcyk*) are protected as industrial designs. The designations containing elements of Kazakh ornament are registered and protected as trademarks.”<sup>32</sup>

25. In the same document WIPO/GRTKF/IC/2/9, the WIPO Secretariat drew attention to some of the misconceptions about the perceived limitations of existing intellectual property mechanisms as an effective system for the protection of traditional knowledge:

“It should be noted, however, that almost all legal concepts involved in the above list of perceived limitations could be reassessed based upon the experience obtained from the application of intellectual property law. For example, the idea behind the perceived limitation that traditional knowledge is inherently in the public domain results from the concept that traditional knowledge, being traditional, is “old”, and thus it cannot be recaptured. Actually, as the WIPO Secretariat has already emphasized on different occasions, traditional knowledge, just because it is “traditional,” is not necessarily old.

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<sup>32</sup> See *supra* note 11, paragraphs 7 to 10.

Tradition, in the context of traditional knowledge, refers to the manner of producing such knowledge, and not to the date on which the knowledge was produced. Traditional knowledge is knowledge that has been developed based on the traditions of a certain community or nation. Traditional knowledge is, for that simple reason, culturally driven. But traditional knowledge is being produced, and will continue to be produced everyday by communities as a response to their own environmental demands and needs. Besides, even traditional knowledge that is “old” — in the sense that it has been produced yesterday or, eventually, many generations ago — can be novel for the purposes of several areas of intellectual property. Novelty, in general, has been defined by laws according to more or less precise criteria according to which the specific piece of technical knowledge has been made available to the public. In the field of patents, for example, it is disclosure (or the lack thereof) that establishes whether the condition of novelty (and of inventiveness) has been met. The date on which the invention was realized is not necessarily taken into account for that purpose.<sup>33</sup> However, this is not an absolute concept even in the field of patents. It is a well known fact that a few WIPO Member States have accepted to extend pipeline patent protection for certain inventions that have already been patented in other countries, provided those inventions have not yet been subject to commercial utilization. A similar notion of “commercial novelty” can be found in the fields of *sui generis* plant variety protection<sup>34</sup> and layout-designs (topographies) of integrated circuits.<sup>35</sup>

26. Another commonly perceived limitation is that traditional knowledge is generally created and held collectively, while copyright and patent laws require the identification of individual creators. Document WIPO/GRTKF/IC/2/9 proposes a different approach to the issue of ownership:

“Moreover, the fact that the creators/inventors of traditional knowledge are not easily identifiable does not necessarily prevent the applicability of existing intellectual property standards. Most intellectual property assets are owned by collective entities, which in many cases represent large and diffuse group of individuals (General Motors owns intellectual property rights on behalf of a community of shareholders that is much larger and more diffuse than most identified traditional communities). On the other hand, patent law is not necessarily about protecting *inventors*, but about appropriating *inventions*. Likewise, copyright, especially in a TRIPS-context, is not about protecting *authors*, but rather about appropriating *works*. In other words, the protection of individual rights of authors and inventors in the field of intellectual property has developed in the direction of the adoption and operation of national standards, particularly through contractual arrangements and labour standards, rather than through the establishment of international standards. For example, many national patent laws have exceptionally acknowledged that where the inventor cannot be identified or he/she does not want to be identified as such, national patent offices should not be prevented from issuing the patent letter, in spite of the provisions of Article 4*ter* of the Paris Convention. Short terms of protection, which are said to be characteristic of intellectual

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<sup>33</sup> In the few countries that follow the first-to-invent rule, the date on which the invention was realized is nonetheless of relevance in the context of examination as well as of interference proceedings.

<sup>34</sup> See UPOV 1991, Article 6.1.

<sup>35</sup> See TRIPS Agreement, Article 38.2.

property law, should not be a matter of concern either. Intellectual property and long-term, if not indefinite, protection may not be incompatible. The law of trademarks and geographical indications could provide extremely useful insights in that regard.”<sup>36</sup>

27. However, the possibility of protecting separately the elements of traditional knowledge does not necessarily cover the need for protection of traditional knowledge. Traditional knowledge is not the mere sum of its separated components: traditional knowledge is more than that — it is the consistent and coherent combination of those elements into an indivisible piece of knowledge and culture. For the *pajé*, needless to say, the merit of the healing resides in the combination of the extract with the religious rituals, and not on the potion individually. The features of the several intellectual property mechanisms mentioned above do not accept such a combination of elements of knowledge as a subject matter. It may be necessary, therefore, to design a system that responds to the holistic nature of traditional knowledge and takes a comprehensive approach to it. Patents, trademarks, designs, etc, may be very effective in providing protection for the individual elements of traditional knowledge; but they do not attend to its holistic nature.

28. Traditional knowledge, in that holistic concept, has four unique characteristics: the spiritual and practical elements of traditional knowledge are intertwined and thus are inseparable (it is in this sense that every element of traditional knowledge serves as an inherent factor of cultural identification of its holders); since traditional communities generate knowledge as a response to a changing environment, traditional knowledge is in constant evolution and incrementally improving; traditional knowledge covers different fields, in areas of cultural expressions and in technical domains; finally, because its creation is not necessarily undertaken through a formal, expressly systematic procedure, traditional knowledge may appear less than formal in character, and its full character and systematic nature may only be apparent with a greater understanding of the cultural contexts and rules that govern its creation.

## V. ELEMENTS OF A *SUI GENERIS* SYSTEM FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

### (a) *general legal framework of a sui generis system*

29. Those four characteristics of traditional knowledge must be somehow reflected in the general framework of any *sui generis* system to be considered at the international level, should a consensus on the development of such a system be reached. Given its holistic nature and the need to respond to the cultural context, the *sui generis* system should not require the separation and isolation of the different elements of traditional knowledge, but rather take a systematic and comprehensive approach. Actually, suggestions have already been tabled to reflect (and respect) the holistic nature of traditional knowledge in a way that permits its description and fixation into general inventories of knowledge belonging to a certain community (or group of communities).<sup>37</sup> The inventory, or compilation, or database would

<sup>36</sup> *Id.* at paragraph 24.

<sup>37</sup> “The forms of protection of traditional knowledge is another issue that calls for clarification. One possibility to ensure such protection could be the establishment of databases at the national or international levels, and the enforceability of rights in the data against their use by unauthorized parties.” Statement of the Delegation of Brazil at the WIPO Meeting on

describe in detail the knowledge of traditional communities, without separating its components.

30. A system based on an inventory of knowledge would also have the advantage of permitting the updating and modification of its contents, as well as the adding of new contents, without the need for complex and costly formalities, such as a new registration procedure.

31. The fact that the traditional knowledge would be described in its entirety would attend to the complementary nature of its (inseparable) elements. The knowledge of that shaman could therefore be fixed into a database and protected under different (and likewise complementary) sets of rights: the rights to prevent the reproduction and/or fixation of the literary and artistic elements of his knowledge; and the rights to prevent the use of the technical elements of the database contents.

32. Because of the intrinsically practical nature of traditional knowledge, its description and fixation into an inventory would necessarily be extremely flexible, in the sense that the only requirement — particularly as far as technical elements are concerned — would be that the description should be comprehensible by a person skilled in that particular field of the art. No one should expect, for example, that the shaman provided the formula or the composition of the formula or molecule of a particular chemical component, but simply a description of the materials he uses, in a manner that another person could reproduce it.

33. Finally, it should be noted that the holistic nature of traditional knowledge is not a legal concept in itself, but rather results from the complementary nature of certain elements of that knowledge, some of which are mainly of a cultural and spiritual sort, while others are

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[Footnote continued from previous page]

Intellectual Property and Genetic Resources, Geneva, April 17 and 18, 2000 (on file with the WIPO Secretariat); “System of *sui generis* databases: among the positions taken by legal writers, [citation omitted] there are some that tend to claim that the best way of protecting traditional knowledge, given its characteristics, variety and sheer scale, would be through the introduction of *sui generis* databases. Apart from the standard rights in databases that are original in terms of the selection or arrangement of their contents, these would be characterized by the following additional features: Protection of undisclosed information: protection of the arrangement of the information within the database would not be sufficient; there would have to be rights in the knowledge actually recorded. Without protection of the subject matter, there would be no incentive to pass it on in the case of innovations, or to organize it and refine it in the case of traditional knowledge. Right of exclusion applicable not only to reproduction of the information, but also to the use of registered information. No need for prior fixing of the information as a condition of the grant of protection.” *Traditional Knowledge and the Need to Give It Adequate Intellectual Property Protection — WIPO Committee on the Relationship Between Intellectual Property, Genetic Resources and Traditional Knowledge — Documents submitted by the Group of Countries of Latin America and the Caribbean (GRULAC)*, WIPO document WIPO/GRTKF/1/5, of March 16, 2001, Annex I, page 9; “The Delegation concluded that the only manner to adequately address the concerns of traditional knowledge holders would be to develop a positive protection system by means of a *sui generis* system for the intellectual property protection of the contents of indigenous knowledge databases.” Statement of the Delegation of Venezuela, speaking on behalf of Cuba, Ecuador and Venezuela at the third session of the Committee, Report, *supra* note 1, at paragraph 122.

essentially practical, as the *pajé*'s fable illustrates. But some communities have been able to separate their knowledge into different forms of cultural and economic uses, namely in the fields of expressions of folklore and handicrafts. That may lead to a recommendation to pursue different (and complementary) legal tracks that better fit the characteristics of those pieces of knowledge no longer intrinsically associated to the whole system of culture of communities but which fit better within compartments of that system. The "holism" of traditional knowledge, therefore, should not be carved in stone and a flexible approach should be preferred. A protection system may only be aimed at serving specific policy needs, rather than protection of all aspects of the TK. In this vein, the elements that are identified below, and which are based on a possible mechanism for the protection of inventories or compilations of traditional knowledge, should not be seen as exclusive. For example, expressions of folklore that have been dissociated from the physical environment where communities dwell and that, therefore, have acquired an independent standing in the cultural universe of certain communities, are probably better addressed under a WIPO/UNESCO Model Provisions approach, as discussed in document WIPO/GRTKF/IC/3/10. Protection of handicrafts also may be eventually addressed under a registration system that recognizes its unique *style* that unequivocally materializes the soul and spirit of certain traditional communities. It is possible, then, that the work on the protection of traditional knowledge leads to the designing of a "menu" of *sui generis* mechanisms that represent the different aspects of traditional knowledge and that, like the existing mechanisms, can be used complementarily by traditional knowledge creators and holders as they see fit.

(b) *Elements of a sui generis system*

34. One issue is to identify the general features of an adequate *sui generis* system for the protection of traditional knowledge, and another to identify the elements that system must contain in order to be effective. In order to identify those elements, one has to provide responses to several essential questions to which any effective legal system for the protection of property rights must be able to respond satisfactorily:

- (i) what is the policy objective of the protection?
- (ii) what is the subject matter?
- (iii) what criteria should this subject matter meet to be protected?
- (iv) who owns the rights?
- (v) what are the rights?
- (vi) how are the rights acquired?
- (vi) how to administer and enforce the rights?; and
- (vii) how are the rights lost or how do they expire?

(i) What policy objective?

35. How a *sui generis* system is shaped and defined will depend to a large extent on the policy objectives it is intended to serve. Is it essentially defensive, in that it seeks to prohibit



the misappropriation or culturally offensive misuse of traditional knowledge, or is it analogous to laws for the protection of cultural heritage? Does it have a broader policy goal, such as a system established in response to Article 8(j) of the Convention on Biological Diversity, with the overall goals of conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources? Is it focussed on promoting the appropriate commercialisation of traditional knowledge, or in preserving it within a specific cultural context?

(ii) What is the subject matter?

36. Committee Members would need to consider what subject matter would potentially benefit from protection, and how this corresponds with the policy objectives of a protection system. By analogy with copyright law, this could be similar to the open-ended, illustrative list of works eligible for protection under the Berne Convention; or, by analogy with patent law, this could refer to a general concept to be interpreted and applied at the practical level through the regular operation of domestic law. An option, of course, is to include all traditional knowledge, without any restriction or limitation as to subject matter, thus including cultural expressions, such as artistic, musical and scientific works, performances, technical creations, inventions, designs, etc. Simple inclusion within a general definition need not trigger enforceable rights, and this approach would leave open the possibility of defining more precisely the restrictions on what specific criteria the subject matter would have to meet in order to be eligible for protection.

37. Another option, mentioned above, is to confine protection to technical biodiversity-associated traditional knowledge, leaving handicrafts and expressions of folklore to be covered by separate provisions — bearing in mind that the decision of breaking holistic traditional knowledge into separate components (in other words, the choice as to the most adequate mechanism in the “menu” above mentioned) should belong to traditional knowledge holders. This approach could take account of the fact that some policy objectives may be addressed by existing IP systems (including possible *sui generis* elements of those systems), and a separate, *sui generis* system may only be required or be suitable to serve other policy objectives.

(iii) What additional criteria for protection?

38. It may be necessary to clarify that even if some traditional knowledge fits within a broad definition, it may need to meet distinct criteria to be protected under a *sui generis* system. This may apply, for instance, to traditional knowledge which has already entered the public domain. Traditional knowledge holders should be aware that traditional knowledge that is in the public domain cannot be recaptured without affecting legitimate expectations and vested rights of third parties. Therefore, there is the need for defining public domain in connection with traditional knowledge. If, under a broad approach, information that has been disclosed is deemed to be automatically in the public domain, a vast area of traditional knowledge has been effectively lost, for the purposes of intellectual property protection, and it will be difficult, if not impossible, to recapture it. On the other hand, the preparation of databases or inventory with the purpose of documenting traditional knowledge for the purposes of barring its misappropriation by third parties' patent applications could contribute to aggravating the problem. Committee Members can, however, resort to the concept of commercial novelty and establish that all elements (within the predetermined scope of subject matter) of traditional knowledge which have not been commercially exploited prior to the date

of the filing of the database are protected. The concept of commercial novelty, actually, is not foreign to existing intellectual property mechanisms, such as UPOV's plant variety protection,<sup>38</sup> the protection for layout-designs (topographies) of integrated circuits,<sup>39</sup> and the pipeline patent protection.<sup>40</sup>

39. Two additional elements, which have been adopted by the Law No. 20 of Panama, that could help confine protected subject matter within a better defined scope are: (a) the expression of the cultural identity of a given community; and (b) the susceptibility of commercial exploitation. First, only elements of traditional knowledge that remain "traditional," in the sense that they remain intrinsically linked to the community that has originated them, would be protected under the *sui generis* system. In contrast, elements of traditional knowledge which have lost that link, through a process of industrialization, for example, are not to be protected under the *sui generis* system.<sup>41</sup> Second, law makers may decide that traditional knowledge that is not susceptible of commercial application shall not be covered by the *sui generis* system. In fact, it is not probable that third parties engage in the unauthorized or distorting use of traditional knowledge that has not a commercial or industrial utility. By limiting the scope of traditional knowledge, the law would reduce the costs of inscribing it into registries or inventories. However, it should be noted that the classification of traditional knowledge into two categories (one that has commercial utility, either potential or actual, and another that has not) may run counter the very holistic nature of traditional knowledge, according to which its spiritual and practical components are entangled in a manner that makes them more often than not indistinguishable.

40. Finally, the law may establish that the subject matter of protection must be contained in inventories, collections, compilations or, simply, databases of traditional knowledge. The legal implications of this provision are examined below. What is relevant at this juncture is that Committee members that decide to establish a national *sui generis* system may very well end up by acknowledging that traditional knowledge, in order to be protected, must be documented and fixed. Documentation is of the essence for the process of preservation of traditional knowledge. At the same time, description of traditional knowledge has the advantage of giving public notice of the intention of the communities to appropriate the knowledge in question — documentation and fixation, therefore, operate as "no trespassing" signs, exactly like the claims of inventions in patent letters.

(iv) Who owns the rights?

41. Intellectual property rights are originally vested in the originators (authors, inventors, designers, creators, etc.), who then can transfer their rights through contract or legal arrangements. But traditional knowledge is generally understood as being the result of

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<sup>38</sup> UPOV, 1991, Article 6.

<sup>39</sup> Treaty on Intellectual Property in Respect of Integrated Circuits, of 1989, Article 7, incorporated into the TRIPS Agreement, Article 35.

<sup>40</sup> See WIPO document WIPO/GRTKF/IC/2/9.

<sup>41</sup> They can nevertheless be protected under other forms of intellectual property. Some forms of handicrafts, for example, have been subject to intensive industrialization and modernization, thereby losing their traditional characteristics and consequently ceasing to function as elements of cultural identification. Those handicrafts may be protected under the industrial design system, because they have become essentially consumption products.

creation and innovation by a collective originator: the community. The same rationale, therefore, suggests that rights in traditional knowledge should be vested in communities, rather than in individuals. It is this reasoning that explains the tendency of those few national and regional laws that provide for traditional knowledge protection of designating indigenous communities, or Afro-American communities, or local communities, or native communities, as the right holders. Obviously, it may become then necessary to establish a system of geographical and administrative definition of communities.<sup>42</sup>

42. Although traditional knowledge protection is generally perceived as a matter of collective rights, it may nonetheless be vested in individuals. The solution for that must be found in accordance with customary law.<sup>43</sup> Actually, the importance of customary law is crucial for the attribution of rights and benefits within the community. Any legal solution concerning the protection, both at the national and international levels, of traditional knowledge must recognize the importance of communities' customs and traditions involving the permission for individuals to use elements of traditional knowledge, within or outside the community concerned, as well as issues concerning ownership, entitlement to benefits, etc. Those customs and traditions should be described and recorded together with the elements of traditional knowledge, so that legal security could be created not only as regards the appropriated elements of traditional knowledge themselves, but also in connection with their sharing within the communities. An example of how customary law can be integrated into a *sui generis* system of traditional knowledge protection is found in Panama's Law No. 20, which, in Article 15, states:

“The rights of use and commercialization of the art, crafts and other cultural expressions based on the tradition of the indigenous community, must be governed by the regulation of each indigenous communities, approved and registered in DIGERPI or in the National Copyright Office of the Ministry of Education, according to the case.”<sup>44</sup>

43. Regional traditional knowledge can be held by a community that extends across national borders. It can also be held by two or more neighboring communities that share the same environment, the same genetic resources and the same traditions. In the first case, intellectual property being territorial, the community would need to obtain the recognition of its rights in the different countries in whose territories it traditionally dwells. In the second case, lawmakers have a choice: they can establish co-ownership of rights, or they can leave for the communities to separately apply for and obtain rights in jointly held traditional

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<sup>42</sup> Panama, for example, has passed a series of laws defining the territory of indigenous communities and establishing their own administrative bodies, according to the respective customs and traditions. See Aresio Valiente López (Compilador), *Derechos de los Pueblos Indígenas de Panamá, Serie Normativa y Jurisprudencia Indígena*, OIT y CEALP, Costa Rica, 2002.

<sup>43</sup> The Brazilian Law on Biodiversity, *supra* note 15, in Article 8, paragraph, states that the rights may be vested in the community even in those cases where the knowledge is held by a single individual. Article 8 is not mandatory, however, which seems to indicate that the ultimate decision on attribution of rights lies on the community.

<sup>44</sup> An unofficial English version of Law No. 20 of Panama can be found in the WIPO document OMPI/CRTK/SLZ/02/INF/3, of March 5, 2002 (submitted by Mr. Atencio López to the WIPO International Seminar on the Preservation, Promotion and Protection of Folklore and Traditional Knowledge, held in São Luiz of Maranhão, Brazil, on March 11 to 13, 2002. Article 85 of the Biodiversity Law of Costa Rica, Law No 7.788, of 1998, contains similar provisions.

knowledge. In either case, however, it is for national law to decide whether communities would be allowed to collude so as to avoid competition among themselves as regards the assignment and transfer of their rights to third parties. Given that collusion between competitors, particularly in connection with price fixing, where they have a relevant market share, is deemed an antitrust violation in several Committee Members, national laws might be needed to establish corresponding antitrust exemptions. On the other hand, competition between traditional communities for assigning or transferring knowledge susceptible of industrial application would lead to a reduction of prices and benefits to be paid for such knowledge, hence to the ultimate benefit of consumers, and thus could be preferred by some Committee Members.

44. An alternative to the attribution of rights to communities is the designation of the State as the custodian of the interests and rights of traditional knowledge holders.

(v) What are the rights?

45. The various elements that compose traditional knowledge in an intertwined manner belong both to the artistic/cultural and the technical/commercial/industrial fields. The rights to be acquired in those components must therefore be relevant in order to protect the legitimate interests of traditional knowledge holders. When an authorized or distorting use is made of traditional knowledge elements of an artistic and literary nature, right holders should be entitled to prevent others from reproducing and/or fixing and reproducing the product of the fixation. But when the unauthorized use is made of technical components of traditional knowledge, right holders should be capable of preventing their use (use meaning the acts of making, using, offering for sale, selling, or importing for these purposes the protected traditional product, or, where the subject matter of protection is a process, the acts of using the process as well as the acts of using, offering for sale, selling, or importing for these purposes at least the product obtained directly by the traditional process). A *sui generis* system of intellectual property protection of traditional knowledge should therefore combine the features of copyright and related rights with the features of industrial property.

46. Like intellectual property in general, and copyright in particular, so traditional knowledge rights should also comprise material and moral rights. Strong moral rights in traditional knowledge may be indeed a crucial component of future *sui generis* systems because of their particular role on the protection and preservation of the cultural identity of traditional communities, including those elements of traditional knowledge that are not to be commercially used.

47. The rights in traditional knowledge could also comprise the right to assign, transfer and license those contents of traditional knowledge databases with a commercial/industrial nature. If the possibility of transferring rights or licensing is not included in the law, any attempt to address the issue of benefit sharing under the Convention on Biological Diversity would necessarily fail.

48. The fact that traditional knowledge rights are essentially of a collective sort does not impair their private nature — unless the law opts for electing the State as a custodian of community rights. Private rights must therefore interact with the public interest of society as a whole. Like all other intellectual property rights (as well as all other private property rights), rights in traditional knowledge may not be owned and enforced in a way as to prejudice the legitimate interests of society as a whole. Traditional knowledge rights

conferred, therefore, must be subject to exceptions, such as the use by third parties for academic or purely private purposes.<sup>45</sup>

49. As noted above, the elements previously mentioned refer to the intellectual property protection of the contents of inventories of traditional knowledge data, as suggested by a number of delegations.<sup>46</sup> Those elements differ from the provisions of Article 2(5) of the Berne Convention,<sup>47</sup> of Article 10(2) of the TRIPS Agreement<sup>48</sup> and Article 5 of the WIPO Copyright Treaty, of 1996,<sup>49</sup> in the sense that protection is not to be provided merely on the creative or original selection or arrangement of the contents, but also on the contents themselves. Moreover, they also differ from the provisions of Chapter III of Directive 96/9/EC of the European Parliament and of the Council of March 11, 1996, on the legal protection of databases, to the extent that it is suggested that the rights be vested in traditional knowledge holders, not in the makers of the databases; the protection should be afforded against the reproduction and/or the use of the contents of the databases, and not simply against their extraction or “re-utilization” in the sense of making them available to the public; and finally, rights would be enforceable against any sort of unauthorized reproduction and/or use of any content of the database, and not only against data the obtaining, verification or presentation of which has required “qualitatively and/or quantitatively a substantial investment.”<sup>50</sup>

50. The idea of protecting the contents of traditional knowledge databases is therefore closer to the exclusive nature of test data protection under Article 39.3 of the TRIPS Agreement,<sup>51</sup> as these data must be protected against unfair commercial use even if the

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<sup>45</sup> Law No. 20 of Panama contains two exceptions to rights conferred: “small non-indigenous artisans” who dedicate to the manufacture, production and sale of the reproduction of crafts belonging to indigenous Ngobes and Buglés, and who reside in certain districts, are exempt of the provisions of the Law (Article 23); moreover, a sort of “prior user” exception applies to “small non-indigenous artisans” who were registered with the General Office of National Craftsmanship on that day of the entry of the Law into force (Article 24).

<sup>46</sup> See note 28, *supra*.

<sup>47</sup> Article 2(5) of the Berne Convention for the protection of Literary and Artistic Works (1971) states:

“Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.”

<sup>48</sup> Article 10.2 of the TRIPS Agreement reads:

“Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.”

<sup>49</sup> Article 5 of the WIPO Copyright Treaty (1996) provides:

“Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.”

<sup>50</sup> See Directive 96/9/EC, Article 7, Official Journal L 077, 27/03/1996.

<sup>51</sup> The first part of Article 39.3 of the TRIPS Agreement reads:

“Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of

government itself makes the data publicly available.<sup>52</sup> This might enable traditional knowledge databases to function as a practical mechanism for *sui generis* systems of traditional knowledge protection.<sup>53</sup> The protection of the contents of traditional knowledge databases should be without prejudice to the complementary use of other intellectual property mechanisms, such as copyright, patents, plant variety certificates and geographical indications.

51. As noted above, a *sui generis* system could also be developed so as to comprise specific features applying to specific elements of traditional knowledge, such as handicrafts. Handicrafts of a certain community obey technical and artistic standards, which have been developed along generations, such as the particular choice of raw materials, methods of manufacture, colors, decorative motives, etc. Those standard elements could be the subject of a general registration (or description in the database), which would grant exclusive rights in the style of a certain line of products handmade by the community in accordance with the described standards. Individual pieces deriving from that style could then be individually registered if the community so wished, in order to facilitate protection. Such a system would secure community rights in their handicrafts, thus avoiding their distorting reproduction by unauthorized third parties.

(vi) How are the rights acquired?

52. One option could be total lack of legal formalities, that is, protection is available as of the date the element of traditional knowledge in question was created, irrespective of any formality.<sup>54</sup> That option, however, may give rise to problems of practicality, such as the need for giving evidence of the very existence of the piece of knowledge — a problem which is solved by means of an obligation of fixation — and the eventual need for proving plagiarism or infringement — a hurdle that is overcome by documentation/description and presumption of public availability of that information, as with patents and trademarks.

53. The second option would be to establish the right upon the filing of the compilation of traditional knowledge data with a governmental agency. The database may be automatically registered, upon a formal examination as to documentation, legal representation, etc, or may be subject to a substantive examination. The latter was the solution envisaged by Law No. 20 of Panama, which has created the post of indigenous rights examiner in the industrial property office (DIGERPI), who works as a sort of examiner and auditor for all matters involving intellectual property rights and interests of indigenous peoples (including, but not limited to, the filing of indigenous knowledge based applications in the area of patents by third parties).<sup>55</sup>

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[Footnote continued from previous page]

undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use.”

<sup>52</sup> The second sentence of Article 39.3 reads:

“Members shall protect such data against disclosure [...] unless steps are taken that the data are protected against unfair commercial use.”

<sup>53</sup> For a detailed discussion of existing experiences with traditional knowledge databases, see document WIPO/GRTKF/IC/3/6 (“Inventory of Online Databases Containing Traditional Knowledge Documentation Data”).

<sup>54</sup> See Law on Biodiversity of Costa Rica No 7788, of 1998, Article 82.

<sup>55</sup> Law No. 20, Article 9. This point brings up the matter of costs of making and registering traditional knowledge databases or inventories. Society must decide: those costs shall be borne

[Footnote continued on next page]

54. Formal protection entails the issue of preventive control of the registrability of traditional knowledge, in order to avoid the unwarranted claiming of subject matter. Moreover, both formal and informal systems of protection require the establishment of subsequent mechanisms of control over the legitimacy of claims. For example, if the law adopts the commercial novelty requirement as a condition for protection, elements that have been previously commercialized and, therefore, fallen into public domain, would be subject to be either previously rejected or subsequently invalidated. Additionally, administrative opposition and appeals could also be made available to third parties eventually harmed by undue claims.

55. The law may require that all traditional knowledge elements submitted to registration and which have, potentially or actually, an industrial/commercial application be disclosed. Conversely, all other data of a purely spiritual and sacred nature could be kept confidential, if the community concerned so wished.

(vii) How to administer and enforce the rights?

56. Intellectual property rights are useless if they cannot be enforced. Traditional knowledge protection would not be effective without the availability of effective and expeditious remedies against their unauthorized reproduction and/or use (thus combining the features of copyright and related rights, on one hand, and of industrial property, on the other, for those elements of traditional knowledge contained in inventories without a separation as to their spiritual or technical nature), such as injunctions and adequate compensation. The provisions of intellectual property rights enforcement might be applicable in a subsidiary and *mutatis mutandis* manner.<sup>56</sup> In addition, there may be practical difficulties for holders of traditional knowledge to enforce their rights, which raises the possibility of administration of rights through a distinct mechanism, possibly a collective or reciprocal system of administration, or a specific role for government agencies in monitoring and pursuing infringements of rights.

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[Footnote continued from previous page]

either by the communities which will obtain property rights in the contents of inventories (in the form of fees), or by society. Panama has decided that society should subsidize communities' acquisition and maintenance of intellectual property rights in their knowledge (Law No. 20, Article 7: "[...] The procedure before DIGERPI will not require the service of a lawyer and it is exempt of any payment. [...]"). That decision is ultimately related to a concept of distribution of wealth and the need for providing assistance for the empowerment of indigenous persons and traditional communities. On the other hand, the adoption of a transparent and effective system of traditional knowledge protection shall reduce transaction costs because it will eliminate the uncertainty that presently involves all matters of access to genetic resources, biopiracy and the distorting use of other traditional expressions of culture. Furthermore, once intellectual property protection of traditional knowledge is inserted into international trade agreements, distortions and impediments to trade in goods and services incorporating traditional knowledge will be reduced, to the benefit of exporters of legitimate handicrafts and traditional agriculture products. Incidentally, subsidies to individual inventors and small enterprises are available in the patent laws of several Committee Members — subsidizing traditional communities would not, therefore, run against the very concept of formal intellectual property rights.

<sup>56</sup> See Law No. 20 of Panama, Article 21.

(viii) How are the rights lost or how do they expire?

57. Two approaches to this last issue are possible. One approach, which is generally preferred by the national laws which have so far dealt with protection of traditional knowledge, is to establish protection for an indefinite period.<sup>57</sup> This approach speaks to the intergenerational and incremental nature of traditional knowledge and recognizes that its commercial application, once the protection is secured, may take an extremely long time.<sup>58</sup> But if the protection of traditional knowledge is to be established upon an initial act of commercial exploitation (for example, a period of fifty years counted from the first commercial act involving the protected element of traditional knowledge, which could be renewable for a certain number of successive periods), then it might make sense to establish a predefined expiration, provided it would apply exclusively to those elements of traditional knowledge with a commercial/industrial application and which could be isolated from the whole of the contents of the database without prejudice to its integrity. Actually, as traditional knowledge evolves, some of its elements necessarily become obsolete.

## VI. CONCLUSION

58. These elements of a *sui generis* system of traditional knowledge protection have been identified for the purpose of attending to a request of a number of Committee Members and do not reflect a consensus of the Committee. The basic thrust of the present document is to show that there are already elements available in existing mechanisms of intellectual property protection, both in a traditional knowledge context and outside it, that could be transposed into a *sui generis* system for the protection of TK. Using available elements has the advantage of avoiding uncharted waters. Moreover, concerns with biopiracy and transaction costs in the areas of expressions of folklore and biodiversity-associated traditional knowledge are better (if not only) overcome by resorting to the adaptation of tested systems, and the legal principles that they contain.

59. *The Intergovernmental Committee is invited to note the contents of this document and to make general comments thereon.*

[End of document]

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<sup>57</sup> *Id.* Article 7.

<sup>58</sup> Traditional knowledge protection would thus perform a prospecting function, such as purported by Edmund Kitch in connection with patents (see Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & Econ. (1977)). Only a few patents perform such a function because most inventions are developed as a response to actual market needs. But traditional knowledge is not created for a commercial purpose. Its commercial applicability, therefore, unlike most patented inventions, require market prospecting.