

Twenty-Eighth Session of the IGC
July 7 to 9, 2014

Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources:
Certain suggested cross-cutting issues –
Issues Paper prepared by the IGC Chair, His Excellency, Ambassador Wayne McCook

BACKGROUND

1. In October 2013, the WIPO General Assembly agreed that the IGC should “[...] continue to expedite its work with open and full engagement, on text-based negotiations with the objective of reaching an agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.”
2. Pursuant to the Committee’s 2014/2015 mandate and its work program for 2014, at its 26th and 27th sessions, in February and April 2014 respectively, the IGC developed the following texts: “Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2”, “The Protection of Traditional Knowledge: Draft Articles Rev. 2” and “The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2”. The Committee decided that these texts, as at the close of the 26th and 27th sessions, “be transmitted to the WIPO General Assembly taking place in September 2014, subject to any agreed adjustments or modifications arising on cross-cutting issues at the Twenty-Eighth session of the Committee, taking place in July 2014, in accordance with the Committee’s mandate for 2014-2015 and the work program for 2014, as contained in document WO/GA/43/22”.
3. The 28th session of the IGC will take place from July 7 to 9, 2014. The texts referred to above have been made available for this session as WIPO/GRTKF/IC/28/4, WIPO/GRTKF/IC/28/5 and WIPO/GRTKF/IC/28/6, respectively. According to the IGC’s 2014 work program, IGC 28, taking place from July 7 to 9, 2014, shall undertake a cross-cutting review on GRs, TK and TCEs. This review might result in agreed adjustments or modifications arising on cross-cutting issues in the texts to be transmitted to the WIPO General Assembly taking place in September 2014. In other words, the texts to be transmitted to the General Assembly are either the texts as already before the IGC at its 28th session or further versions of one or more of those texts as amended on the basis of a cross-cutting review at IGC 28.
4. In preparation for IGC 28, the attached table reflects the Chair’s views on some of the possible cross-cutting issues which could be considered in this context. These views are merely points of departure, and the Committee might identify other such cross-cutting issues.

TABLE OF CROSS-CUTTING ISSUES WHICH COULD BE CONSIDERED BY IGC 28

Nb	Issues	Themes concerned	Relevant provisions/articles	Commentary
1	Policy objectives	TK/TCEs/GRs	<i>Preamble/Introduction/Principles/Objectives</i>	<p>The IGC could reflect on which of the concepts featuring under Objectives, Principles, Introduction or Preamble in the three texts are most directly related to IP, as the mandate of the IGC is to find an appropriate IP-like agreement(s) for the protection of TCEs and TK, at the international level, at WIPO.</p> <p>The purpose of this part of the texts is to concisely state the guiding concepts which will nurture the operative provisions by giving a clear sense of direction to the texts.</p> <p>The IGC could thus consider rationalizing and reorganizing the texts to avoid redundancies and irrelevance and place focus on common, concisely-stated core IP-related principles and objectives for the instrument. For example, in the TCE text, some text appears both in the Preamble and in the Principles. Perhaps the IGC could determine where to better place the text to avoid repetition. This could result in simple, direct and efficient texts and bring clarity to the process thereby facilitating further progress.</p> <p>Examples of IP-focused objectives could include, broadly, <i>inter alia</i> the prevention of misappropriation and misuse, the promotion of innovation and creativity and the prevention of improper or erroneous grant of IP rights.</p> <p>There should also be a distinction between operative language and objectives as well as a direct correlation between the objectives of protection and the operative/substantive provisions.</p> <p>Lastly, for some concepts that might be better articulated at the national level, the IGC should consider whether the international instrument should simply provide a policy framework to allow more detailed articulation at the national level.</p>

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2	Definitions/ use of terms	TK/TCEs/GRs	<p><i>Principles/ Objectives/ Preamble and Use of Terms of the TK and TCE texts</i></p> <p><i>Article 3.3 of the TK text</i> <i>Article 3.3 and Article 3.2 of Option 2 of the TCE text</i> <i>Article 4.1 (d) GRs text</i></p>	<p><u>Public domain</u></p> <p>IGC 27 introduced into the TK and TCE texts a definition of the term “public domain.” This fundamental concept is integral to the balance inherent in the IP system. Exclusive rights are balanced against the interests of users and the general public, with the intent to foster, stimulate and reward innovation and creativity.</p> <p>Some argue that the public domain is essential to give rise to further creativity and that without a rich and robust public domain, creativity could be stifled. Hence, the scope of protection of TK and TCEs should be limited in order not to encroach too far on or imperil the public domain.</p> <p>In contrast, some contend that the protection of TK/TCEs overrides certain concerns about the public domain, and that robust protection against misappropriation and misuse is essential.</p> <p>The definition of “public domain” in the TCE text makes reference to “tangible and intangible material,” whereas the TK text only makes reference to intangible material. The IGC could consider aligning the definition in both texts.</p> <p>This concept links to understandings of the related concepts of “publicly available” and “prior art”, as discussed notably in document WIPO/GRTKF/IC/17/INF/8 (Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore).</p> <p>The IGC could reflect upon whether the definition of “publicly available” is relevant in the TCE context. Note that in the definition of this term in the Use of Terms, the reference to “traditional knowledge” should be changed to “traditional cultural expressions.”</p> <p>The IGC is invited to consider those concepts more attentively, as this is directly linked with the “tiered approach” deployed under Article 3 of the TK and the TCE texts (see</p>

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			<p><i>Use of Terms TK</i> <i>List of Terms GRs</i></p> <p><i>Use of Terms and Article 1 TK</i> <i>List of Terms GRs</i></p> <p><i>Use of terms TK</i> <i>Use of terms TCEs</i></p>	<p>below the discussion on "Scope").</p> <p>While the "public domain" concept is relevant to understanding the IP/TK/TCEs interface and to the design of a balanced IP-like system of protection for TK and TCEs, the IGC is not required to define the term. Indeed, defining the "public domain" would be a challenging exercise with significant and wide-reaching policy ramifications going beyond the scope of the IGC.</p> <p><u>Misappropriation</u></p> <p>All three texts make reference to the concept of "misappropriation". The TK and GRs texts both carry proposed definitions of misappropriation in their Use/List of Terms sections, whereas the TCEs text does not carry such definition. The IGC could consider the possibility of providing an appropriate definition of misappropriation in the TCEs context in the Use of Terms section of the TCEs text.</p> <p><u>Associated traditional knowledge/traditional knowledge associated with genetic resources</u></p> <p>The GRs text contains definitions of "associated traditional knowledge" (ATK) and "traditional knowledge associated with genetic resources" (TKA). The TK text contains a definition of "traditional knowledge" in the Use of Terms part and further elements linked to that definition in Article 1. For the sake of consistency and clarity, the IGC is encouraged to examine the definitions of traditional knowledge in both texts and formulate a common definition of traditional knowledge.</p> <p><u>Use/utilization</u></p> <p>The GRs text defines Utilization, while the TK text defines Use/Utilization. The TCEs text includes two different definitions of the term Use: one in the Use of terms section (Use/Utilization) and the other one in footnote 5 (Use). The definition of Utilization in the GRs text is quite distinct from the definitions included in the Use of Terms section of the TK and TCEs texts.</p>

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				<p>The definitions of Use/Utilization included in that section in the other texts share some elements. However, the definition in the Use of Terms section of the TCEs text was imported from the TK text and it seems unclear whether that definition would really be applicable to TCEs.</p> <p>The definition of "Use" in footnote 5 of the TCEs text is quite distinct from the others. The IGC might wish to consider the different definitions that the TCEs text includes and decide on which one would be more applicable to TCEs.</p> <p>As pointed out by a delegation during IGC 27, the definition of "Use/Utilization" refers to uses outside the traditional context. However, the word "use" in Article 2.1 of the TCEs text refers to use by the beneficiaries. Moreover, Article 2.1 of the TK text also refers to use by the beneficiaries. Indeed, the same word is not used in the same sense in separate instances. The IGC might wish to consider this comment and find a way to avoid confusion.</p>
3	Criteria for eligibility	TK/TCEs	<i>Articles 1 and 3</i> <i>TK</i> <i>Articles 1 and 3</i> <i>TCEs</i>	<p>The TK text includes the criteria for eligibility in Article 1. The second paragraph (Criteria for eligibility) of Article 1 in the TK text repeats most of the elements already included in the first paragraph.</p> <p>Alternative 3.3 in the TK text refers to TK that would not be protected and could also be relevant when considering criteria for eligibility.</p> <p>The TCEs text includes most of the elements included in the TK text, with some differences, in one single paragraph.</p> <p>Paragraph 3.2 of Option 2 in the TCEs text refers to TCEs that would not be protected and could also be relevant when considering criteria for eligibility.</p> <p>It seems that it would be more orderly to include all the criteria for eligibility in the same place, instead of having some in Article 1 and others in Article 3. The IGC may wish to consider the appropriate place to deal with the criteria for eligibility in the TK text and in the TCEs text, and whether to consolidate all the criteria for eligibility. There is also the debate whether criteria for eligibility are necessary at all, since in the view of some</p>

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				delegations, in elaborating rights it could be left to scope of protection and exceptions and limitations to define what is ultimately to be protected.
4	Beneficiaries	TK/TCEs	<i>Articles 2 and 5 TK Articles 2 and 4 TCEs</i>	<p>Paragraph 2.2 (d) in the TK text is a repetition of a phrase already included in the chapeau of that paragraph.</p> <p>The TCEs text does not include such a repetition.</p> <p>Paragraph 2.1 in the TCEs text includes additional elements, with respect to paragraph 2.1 in the TK text: “Beneficiaries [of protection] are ... [... nations that are custodians for the beneficiaries as provided for in Paragraph 3]”</p> <p>“[as part of their collective cultural or social identity]”</p> <p>“[... or as determined by national law]”</p> <p>This last additional element, which is also included in the Alternative 2.1 in the TCEs text, is not included at all in the TK text, and could be considered in the TK context.</p> <p>Paragraph 2.2 in the TCEs text is not included in the TK text and could also be considered in the TK context. However, the IGC may wish to consider whether this paragraph could fit better in Article 4 in the TCEs text, which deals with Administration of [rights]/[interests].</p> <p>The IGC might wish to consider whether paragraphs 2.2 and 2.3 in the TK text and paragraphs 2.3 and 2.4 in the TCEs text could also fit better in Article 5 in the TK text, which deals with Administration [of rights]/[of interests], and in Article 4 in the TCEs text, respectively.</p>

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				<p>Some of the comments included in the non-paper prepared by the Chair for IGC 27 remain current, in particular paragraph 35, which could be taken into account when considering the right placement for paragraph 2.2 in the TCEs text. For convenience, para 35 reads as follows: "This should be distinguished from an entity (such as a "competent authority") that might be tasked under national law with exercising rights in cases where the beneficiaries cannot be identified (which we could perhaps refer to as "orphan TK" and "orphan TCEs"). Paragraph 2.2 in the TK text and paragraph 2 of Option 1 in the TCE text leave to national legislation the option of considering a national entity as beneficiary, when the TK or TCE is not specifically attributable or confined to an indigenous or local community, and/or it is not possible to identify the community that generated them. A national entity might also play a role where the beneficiaries seek assistance with the management and enforcement of their rights. These "national entities" are not, in my mind, "beneficiaries" as such, and are dealt with in the articles in the two texts dealing with the administration and management of rights"</p>
5	Scope	TK/TCEs	<i>Article 3 TK</i> <i>Article 3 TCEs</i>	<p>IGC 27 introduced for discussion a tiered approach, whereby different kinds or levels of rights or measures would be available to rights holders depending on the nature and characteristics of the subject matter and based on how, by whom, why and where it is used. In regard to the nature of TK, document WIPO/GRTKF/IC/17/INF/9 ("List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found") identifies the various forms in which TK may be found. It applies to some degree to TCEs as well (however, see comment below).</p> <p>The tiered approach proposes differentiated protection for already publicly available TK or TCEs, i.e. TK or TCEs that are widely diffused, available, without restriction, to the general public, widely known or used outside the community, on the one hand, and secret /or of particular cultural or spiritual significance, or access- and use-restricted TK</p>

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				<p>or TCEs, on the other.</p> <p>This approach suggests that exclusive economic rights could be appropriate for some forms of TK/TCEs (for instance, for sacred and secret TK/TCEs, and TK/TCEs uniquely attributable to specific indigenous peoples and local communities), whereas a moral rights-based model could, for example, be appropriate for TK/TCEs that are disclosed, secular and already publicly available or not attributable to specific indigenous peoples and local communities..</p> <p>This is for the IGC to decide, but I wish to draw attention to the fact that the selection of options could affect the balance that many delegations refer to and the relationship with the public domain (see above), as well as the rights and interests of users, which some delegations identified as a cross-cutting issues at IGC 27. It could be considered as a means by which a balancing of interests or trade-offs could be explored with a view to unblocking some of the most difficult issues, especially those concerning the nature of the claimed TK/TCEs and current access thereto.</p> <p>In both texts, the tiers are marked according to the degree of diffusion of the TK/TCEs. Where the diffusion criterion might be appropriate in the TK area, it may not be the case in the area of TCEs, which could possibly be classified under a different scheme. Indeed, while this approach may be novel in the TK area, a tiered approach was followed in earlier versions of the TCE text, going back to document "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles" (WIPO/GRTKF/IC/9/4), first issued in 2006. The categories of TCEs in that document were: TCEs of particular spiritual or cultural value or significance; other TCEs (the negative of the first category, so to speak), and secret TCEs. In other words, the main question to be addressed by the IGC is whether the tiered approach is relevant for TCEs, and, if so, whether the same categories as in the TK document can also apply to TCEs.</p> <p>In informal discussions, IGC 27 had seen the tiered approach as a pyramid and then a matrix, and these visual representations could constitute valuable tools to refine the structure of both texts.</p>

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				If this tiered approach is agreed upon as a means of better securing the right balances between protection and access, the IGC should move quickly to find convergence on core elements that will define each tier.
6	Databases and information systems	TK/GRs	<i>Article 3BIS TK</i> <i>Articles 8-9 GRs</i>	<p>The TK and GRs texts provide for the possibility of establishing databases of respectively TK, and GRs/their derivatives/ATK/TKA. The TK text also makes reference to databases of genetic resources and TKA.</p> <p>The IGC is encouraged to further consider the aims/objectives of such databases as well as their modalities of operation. In particular, what role would databases play <i>vis-à-vis</i> the disclosure requirement (for example, should they be used to complement and/or implement a disclosure requirement)? Who should have responsibility for compiling and maintaining these databases? What would be the minimum standards used to harmonize their structure and content? To whom should the databases be accessible? What should be the content of the databases? In what form should the content be expressed? Should there be accompanying guidelines?</p> <p>These questions are relevant and important for both sets of databases and the IGC is encouraged to examine them together.</p>
7	Sanctions, remedies and exercise of rights	TK/TCEs	<i>Article 4 TK</i> <i>Article 8 TCEs</i>	<p>This issue was identified as an important cross-cutting issue by many delegations at IGC 27, who saw value in putting emphasis on enforcement and respect for rights.</p> <p>The TK and TCE texts contain several different concepts. They also contain similar concepts which are expressed quite differently. As this procedural provision would likely be applicable both in the TK and the TCE contexts, the IGC could re-look at both versions, simplify them and see where cross-pollination could improve both texts.</p> <p>In order to simplify, perhaps the article could provide a general framework at the international level, leaving the details to national legislation. In this context some</p>

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				<p>delegations have suggested that agreeing to certain common or harmonized principles for sanctions and remedies at the international level could be of benefit to key stakeholders; on the other hand some delegations feel that substantially circumscribing sanctions could undermine the deterrence of abuse that they wish the instrument to facilitate.</p> <p>There may be value in trying to reach agreement on whether States should be obliged to provide parties to a dispute the possibility to use alternative dispute resolution mechanisms. This provision could be cleaned up and streamlined.</p>
8	The disclosure requirement	TK/GRs	<i>Article 4BIS TK Articles 3-7 GRs</i>	<p>Both the TK and GRs texts propose the development of disclosure requirements, in other words, provisions which require patent (and perhaps also other IP) applications to provide information related to TK and GRs, respectively.</p> <p>The IGC is invited to further consider the modalities of a disclosure requirement in the TK and GRs texts, including, in particular, the nature and content of the disclosure, the trigger for disclosure, the measures to address non-compliance, and any exceptions and limitations.</p> <p>These questions are relevant and important for both the disclosure requirements of the TK and GRs texts and the IGC is encouraged to examine them together.</p>
9	Exceptions and limitations	TK/TCEs	<i>Article 6 TK Article 5 TCEs</i>	<p>In both texts this provision is divided into General Exceptions and Specific Exceptions.</p> <p>What the texts actually provide under General Exceptions is the articulation of a test (conditions to be fulfilled) that would be applied at the national level when developing limitations and exceptions (paragraphs 6.1 and 5.1). There seems to be an understanding that the test could include elements of the “classic” three-step test and moral-rights components (concepts of acknowledgement, non-offensive use and compatibility with fair practice). While paragraphs 6.1 and 5.1 are fairly identical, the TCE text contains an alternative set of conditions. Could the IGC choose between the</p>

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				<p>two alternatives in the TCE text? It would be good to have focused discussions aimed at reconciling both views.</p> <p>Under the heading “Specific Exceptions,” efforts were made at IGC 27 to align the TK and TCE texts. This resulted in some redundancies in both texts, for example, the creation of an original work inspired by or borrowed from TK/TCEs appears twice, and so does the reference to the preservation and safeguarding functions of cultural institutions. The IGC could study carefully paragraphs 6.3 of the TK text (there are two paragraphs 6.3 in the TK text, are these alternatives?), and 5.3 and 5.4 of the TCE text and streamline them.</p> <p>Based on IGC 27’s introduction of a tiered approach to defining the scope of protection, some delegations asked whether the provisions on exceptions and limitations should not also follow this approach, i.e., that various degrees of excepted acts would mirror the various kinds of subject matter and the tiered rights applied to them.</p> <p>Furthermore at IGC 27, the concept of “incidental use” was introduced in the provision dealing with sanctions in the TCE text. As this may be considered to fall within exceptions and limitations, could the IGC consider moving it to the appropriate article and see where the TK and TCE texts could benefit from including such a concept?</p> <p>Finally, at IGC 27, as already mentioned, a delegation, supported by others, stated that the rights and interests of third parties, including users, should also be considered as a cross-cutting issue. That issue is addressed in paragraph 6.3 of the TK text and paragraph 5.4 of the TCEs text. The content of both texts is quite similar, as very minor differences exist between them. The IGC could examine and reflect upon the most desirable formulation for this issue.</p>
10	Term of protection/rights	TK/TCEs	Article 7 TK Article 6 TCEs	The only related paragraph of the TK text includes most of the elements of paragraph 6.1 in the TCEs text.

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				<p>Paragraph 6.2 in the TCEs text refers to the term of protection for moral rights and Option 3 - 6.1 in the TCEs text refers to the term of protection for economic rights. They seem to reflect the different type of rights included in Article 3 in the TCEs text.</p> <p>The IGC might wish to consider a similar approach in the TK context.</p> <p>Option 2 - Paragraph 6.1 in the TCEs text, which has not been included in the TK text, could be revisited to make it clearer.</p>
11	Formalities	TK/TCEs	<i>Article 8 TK Article 7 TCEs</i>	<p>The TK text and the TCEs text share a couple of paragraphs and include some additional elements.</p> <p>The Alternative in the TK text and paragraph 7.2 in the TCEs text deal specifically with secret TK and with secret TCEs, respectively.</p> <p>Following those lines, the IGC could consider the tiered approach included in Article 3 in the TK text and in Article 3 in the TCEs text when discussing formalities. It might be envisaged not to establish formalities for some kinds of TK or TCEs, and to establish some formalities for other kinds of TK and TCEs. Formalities could also differ according to the type of rights to be granted.</p>
12	Transitional measures	TK/TCEs	<i>Article 9 TK Article 9 TCEs</i>	<p>Paragraph 9.1 of both texts seems to reflect consensus that the instrument should apply to all TK/TCEs which, at the moment of entry into force, fulfill the criteria of protection. The drafting of this paragraph is not identical in both texts; the IGC might consider examining the wording in more detail and opt for the clearer expression of where agreement lies.</p> <p>On the question of the acquired rights of third parties, paragraph 9.2 presents three options in the TK text, and two options in the TCE text. More discussion is needed to reconcile the different views, this could be achieved by redrafting the text into a clearer</p>

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				and simpler expression of this important concept. The IGC is invited to look at both texts side by side and make the changes that it considers appropriate.
13	Relationship with other agreements and the non-diminishment clause	TK/TCEs/GRs	<i>Article 10 TK</i> <i>Preamble</i> <i>paragraph 13</i> <i>TCEs</i> <i>Article 10 TCEs</i> <i>Article 10 GRs</i>	<p>While Article 10 in all three texts contains a first paragraph providing for mutual supportiveness between the instrument and other international agreements and treaties, albeit using different wording, the TCEs text contains a second paragraph establishing a non-diminishment clause (note that the non-diminishment principle is also present in para 13 of the preamble of the TCEs text). The GRs text also contains a second paragraph providing that the instrument should support, in particular, Article 31 of the UN Declaration on the Rights of Indigenous Peoples.</p> <p>The non-diminishment clause was raised as a cross-cutting issue by the Indigenous Consultative Forum at IGC 27. According to that clause, where indigenous peoples' rights have already been recognized and are contained in treaties, agreements and other constructive arrangements, the instruments on TK, TCEs and GRs should not nullify or diminish those rights.</p> <p>The IGC could consider whether a non-diminishment clause should be included in all three texts and whether such a clause should be placed in the Preamble or in the article on Relationship with Other Agreements.</p>
14	National treatment	TK/TCEs	<i>Article 11 TK</i> <i>Article 11 TCEs</i>	<p>The TK text and the TCEs text differ significantly.</p> <p>The TK text includes two paragraphs (first and third) whose wording is different but whose content seems close to the TCEs text.</p> <p>However, the TK text also includes a different option: to grant nationals of other Member States/Contracting Parties (only) protection equivalent to that contemplated in the instrument, while nationals could have more extensive protection.</p>
15	Transboundary cooperation	TK/TCEs/GRs	<i>Article 12</i>	This provision deals with the important issue of TK/TCEs that are shared across cultures and territories.

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				Although the language is more or less similar at first glance, there are some variations in terminology, which the IGC might wish to pay close attention to in order to find the most suitable formulation in both texts. I also note that the GRs text makes reference to customary laws and protocols while the others do not.
16	Capacity building	TK/TCEs/GRs	<i>Article 13 TCEs</i> <i>Article 13 GRs</i>	Both the TCEs and GRs texts provide provisions for "Capacity Building and Awareness Raising", and "Technical Assistance, Cooperation and Capacity Building", respectively. The IGC could consider including an article on capacity building in the TK text as well, or, at least, adopt a uniform approach to this issue.
17	Structure of text and headings of articles	TK/TCEs/GRs		For the sake of clarity and ease of reference, it is recommended that as far as possible, a similar structure be used in the TK, TCEs and GRs texts and that the titles of the articles be reviewed and standardized across the three texts, where applicable and possible.