

## **Comments on the List of Issues from Japan (Traditional Knowledge)**

### **[General Remarks]**

Japan recognizes that the issue of traditional knowledge is important for many member States. However, Japan believes that the depth of understanding among the member States on this issue is still insufficient for any kind of an agreement at the international level to be formed. Therefore, as the first step to deepening our understanding of traditional knowledge, we welcome fundamental discussions based on the List of Issues. In discussing the List of Issues, we believe that it is useful to discuss fundamental issues, such as the definition or the content of certain terms. We wish to point out that there are some issues that cannot be resolved because these fundamental issues are still unclear. Even before attempting to finalize the details of the wording of certain terminology, what is more problematic is the lack of formation common understanding or common perception as to what such words should mean. Arguing, however, that under these circumstances it is impossible to agree on the detailed wording of definitions or that the definitions should be left to the national laws of member States is a failure in facing up to the problem squarely.

The List of Issues contains words such as “rights“ and “protection,” but at this stage, there is no consensus on establishing any new rights or forms of protection. We may use and touch on these words in the course of discussing each individual issue, but such usage is not indicative of Japan’s position on the formulation of any new “rights” or “protection.” Of course, we are aware that there are some pre-existing rights under customary laws and that they should be respected. However, even in such cases, we must point out that rights recognized by customary law in certain states or regions are not necessarily recognized in other jurisdictions.

Japan submits the following comments on each issue. We will reserve further comments if necessary.

### **[Details]**

#### 1. Definition of traditional knowledge that should be protected

The expression “traditional knowledge” gives you a rough idea of what it means

in general, but from legal perspective, the expression is very vague. Before defining this expression, the meanings of “traditional,” “knowledge,” and “[traditional knowledge] that should be protected” should be made clear. The following is for illustrating issues necessary to deepen understanding.

(1) Meaning of “traditional”

The word “traditional” has the basic implication that “someone passes information down to someone else along a temporal dimension.”

Temporal dimension: For the passing down of information to future generations, it is not clear around how many generations would be sufficient to be deemed “traditional?” Nor is it clear whether information that has not been passed down to the current generation or one that has ceased to be passed down in the past could be seen as “traditional”?

From who to who: Information can be passed down through various relationships such as the relationships which exist between parents and children, among families/relatives (i.e., relationship by blood), within a local community, within an indigenous group, or within a country. Actors conveying information can also be changed. For example, a piece of information that had been passed down in Family A can be handed down to Family B or widely disseminated in Community C to which Family A has belonged for a certain period of time, or another piece of information that had been handed down in Community D can go out of style and may be only passed on from generation to generation in Family E.

(2) Meaning of “knowledge”

The word “knowledge” implies “value,” “state of management,” and “level of public ownership.”

Value

The value of knowledge ranges from “beneficial to all human beings” (e.g. beneficial effect of an herbal medicine) to “valuable only within a certain group”

(e.g. religious ceremony).

#### State of management

The expression “state of management” ranges from “something managed in secret” to “something that is publicly used and not particularly managed” or “something that is actively provided to outside parties.”

Level of public ownership: The expression “level of public ownership” covers “knowledge that is already in the public domain and used freely by the public,” “knowledge that is used only by interested parties and kept secret,” and “knowledge that is not secret but not yet commercially used.” The meaning of the word “commercially” may vary due to the scale of business and other factors.

The content of “knowledge” may be changeable in the course of passing down through improvements and other factors. In that case, how widely or through how many generations must the “knowledge” be passed down after undergoing such changes to be deemed traditional knowledge? If any improvement is added to a certain piece of knowledge by an actor other than the actor to whom the knowledge was passed, can the “improved” knowledge be defined as “traditional knowledge”?

As mentioned above, the concept of “traditional knowledge” covers a wide range of factors. Japan wishes to know what particular factors demander countries have in mind when they refer to “traditional knowledge.”

### (3) Traditional knowledge “that should be protected”

There is a view that the meaning of the expression “traditional knowledge” can be made clear if the requirements for protecting “traditional knowledge” are clearly established, even if the meaning of the expression “traditional knowledge” itself is vague. However, it should be noted that no consensus about “protection” has yet been reached. The following opinions about the List of Issues are just for the purpose of discussion and this does not mean that Japan agrees to start discussion on the listed issues for any other purpose than

for clarification.

The criteria for “[traditional knowledge] that should be protected” is inextricably linked with the criteria for judging what benefits society can enjoy by protecting traditional knowledge. Will “traditional knowledge” be made widely available to the public (as are patents and copyrights) with the aim of enhancing technology and culture for succeeding generations? Or will the maintenance of “traditional knowledge” itself be regarded as serving the public interest? Taking all these questions into account, discussions should focus on public interest and the benefit to society. Without discussing such public interest, it will not be made clear if any protection is necessary or what should be protected.

The subject matter of protection may vary by form/level of protection. The level of protection required to ensure that “traditional knowledge is respected” can cover a substantially wide range of traditional knowledge. If the level of protection is that of granting an exclusive right, the scope of the subject matter to be protected will be greatly narrowed. In addition, a level of protection such as granting a right to demand license fees or providing government subsidies is conceivable.

To clarify the expression “[traditional knowledge] that should be protected,” the discussion about public interest, identification of existing problems, and practical needs for protection is indispensable.

2. “Who should benefit from any such protection or who holds the rights to protectable traditional knowledge?”

As mentioned in the above item 1, there are various ways/relationships in which “traditional knowledge” is passed on, e.g., parent-child, families/relatives, communities, indigenous groups, and countries. However, the scope of a “community” or an indigenous group and so on -are not clearly enough for internationally common understanding.

Also, it is not clear if the succession of traditional knowledge over generations by such a community as a religious community, which is not founded on kinship, can be regarded as a beneficiary community. We cannot see any justifiable

grounds for an organization which is firmly united not be deemed as an eligible beneficiary just because the organization members are not biologically related while a loosely united community such as a country is regarded as an eligible beneficiary.

There are other forms of communities not founded on kinship such as Internet communities. Members of these communities do not live together. -The communities have not lasted for more than one generation;- The members of these communities gather for the same purpose or because of sharing the same idea. Certainly, these communities are not traditional communities and are not considered as beneficiary communities under the traditional definition. However, why these communities should be treated differently in comparison with traditional communities is not made clear.

If the traditional knowledge is just passed down within a limited circle in a community or an indigenous group, etc., how should these people be treated? For instance, how the following relationships should be treated from perspective of benefit has yet to be made clear: a) the relationship between Country A and Indigenous Group X when Indigenous Group X of Country A has been maintaining/passing on the traditional knowledge; b) the relationship between Country A, Country B, and Indigenous Group X when Indigenous Group X existing in both Country A and Country B has been maintaining/passing on the traditional knowledge; c) the relationship between Country A, Indigenous Group X, and Indigenous Group Y when Indigenous Groups X and Y both existing in Country A have respectively been maintaining/passing on the traditional knowledge; and d) the relationship between Country A, Country B, Indigenous Group X, and Indigenous Group Y when Indigenous Groups X and Y existing in both Country A and Country B have respectively been maintaining/passing on the traditional knowledge. These circumstances are not limited to countries and indigenous groups but also applicable to families and communities, etc.

There would be many cases where the community cannot exercise its rights against outside parties even when it tries to do so, due to lack of a clear decision making mechanism or representative in the community. Some have proposed that the State may exercise rights in proxy for its internal communities. When States are allowed to act as beneficiaries in proxy for indigenous peoples, there

might be a problem of whether the State will act to legitimately represent the welfare and benefit of the indigenous peoples.

If certain knowledge that existed as traditional knowledge in the past in an indigenous group is not passed on or used today, how should such knowledge be treated? This problem is linked with the basic problem of whether maintenance/succession in the present day is a precondition of traditional knowledge.

If Community X has been passing on Traditional Knowledge A and Community Y has been passing on Traditional Knowledge A+ $\alpha$ , which was derived from Traditional Knowledge A, how should the relationship between Community X and Community Y be treated? Are there any differences in the treatment of the case in which Community Y developed Traditional Knowledge A+ $\alpha$  from Traditional Knowledge A of Community X and the case in which Community Y has independently been passing down Traditional Knowledge A+ $\alpha$ ?

As mentioned above, there might be plural beneficiaries/right-holders of Traditional Knowledge. Therefore, the scope of a community etc. should be clarified, and it would be necessary to set guideline in order to clarify relations between the interested parties.

3. “What objective is sought to be achieved through the granting of intellectual property protection (economic rights, moral rights)?”

There is an opinion that IP right protection should be extended to traditional knowledge considering its industrial value. This opinion, however, does not clearly contain or identify any justifiable reason why traditional knowledge is eligible for such protection. If the purpose of the protection of traditional knowledge is to correct the inequities in economic development to ensure sustainable development of certain communities by providing a new financial resource, discussion should be conducted as to whether the protection of traditional knowledge is an appropriate way to achieve these purposes.

Currently, the main purposes of an IP protection system are to (i) give incentive to creators by protecting their creations and (ii) vitalize industries and society.

In this context, the right for protection should be valid for only a limited period of time to encourage use by third parties for further development and to secure the balance between the interests of right holders and public interests. However, it might be problematic to enable only a certain generation to enjoy the benefits derived from traditional knowledge that has long been passed down. Moreover, there will be no financial incentive for the generations after the expiration of the IP right to maintain and pass down the traditional knowledge. On the other hand, from the viewpoint of public interests, it is also inappropriate to grant an IP right that will stay valid forever.

There is another opinion that traditional knowledge should be protected as a moral right, in consideration of values that have long been fostered in an indigenous population or local community. If moral rights protection is made applicable to traditional knowledge, right holders should be protected against any acts infringing their moral rights. However, the scope of such acts has yet to be clearly defined. For serious moral right infringements, protection under the Civil Code or other general laws may be applicable even if no IP right protection is available.

4. “What forms of behavior in relation to protectable traditional knowledge should be considered unacceptable/illegal?”

Unacceptable/illegal acts may vary depending on the form of protection for traditional knowledge. As mentioned in the above item 3, there is no clear justifiable reason why traditional knowledge is eligible for IP right protection. Japan is greatly concerned about extending IP right protection to traditional knowledge. If the protection of traditional knowledge provides incentive for further creation that will lead to industrial development and if traditional knowledge is accorded IP right protection for that reason, as mentioned in the above item 3, the term of IP right for traditional knowledge should be limited in consideration of the balance between the interests of inventors and public interests. In that case, upon the expiration of the term of an IP right, acts prohibited under the above mentioned protection system will no longer be illegal. Moreover, when defining illegal acts, a fact finding survey should be conducted to find out what damage is incurred by what acts.

5. “Should there be any exceptions or limitations to rights attached to protectable traditional knowledge?”

As mentioned in the above item 3, any justifiable reasons for IP right protection to be extended to traditional knowledge are not clearly identified and sufficiently explained. In this respect, Japan has a serious concern. Japan is not in a position to enter discussion based on right or protection, but in discussing exceptions and limitations, consideration should be given to the balance between the interests of inventors and public interests although such balance may vary by the form of protection and the scope of illegal acts.

6. “For how long should protection be accorded?”

The term of protection may vary depending on the form of protection for traditional knowledge. If the protection of traditional knowledge gives incentive for further creation that will lead to industrial development and if traditional knowledge is accorded IP right protection for that reason, as mentioned in the above item 3, the term of IP right for traditional knowledge should be limited in consideration of the balance between the interests of inventors and public interests. If IP protection is granted to traditional knowledge for a certain period of time, a problem will arise in that only a certain generation will be able to enjoy the benefits.

7. “To what extent do existing IPRs already afford protection? What gaps need to be filled?”

To date, there has been no IP system in the world which extends direct protection to traditional knowledge. In certain limited cases, however, traditional knowledge can be protected under such existing systems as patent law, trademark law, or unfair competition prevention law systems. To seek protection under such systems, traditional knowledge will have to be met certain requirements (similar to other forms of inventions). Still, the following problems will remain.

Protection under patent law

Certain traditional knowledge has already been in the public domain. Thus, such traditional knowledge is not regarded as having novelty. To satisfy the novelty requirement, traditional knowledge, at the very least, should be maintained and passed on by persons who have a duty to keep the traditional knowledge confidential. Basically, inventors have the right to seek a patent. In the case of traditional knowledge, on the other hand, it is often difficult to specify to whom the right to seek a patent belongs because traditional knowledge is maintained/developed over generations in indigenous groups or local communities, etc. As mentioned in the above item 2, similar problems might arise in cases involving two or more communities or countries.

#### Protection under a trademark law

A trademark right is aimed at protecting signs used for goods and services by entrepreneur but not traditional knowledge or other forms of art. Indirect protection of traditional knowledge under a trademark right might be possible. More specifically, if a trademark right might be able to be granted to a mark of group to which the traditional knowledge belongs, a brand can be established using the mark of the group.

#### Protection as a trade secret

To seek protection as a trade secret, the information subject to protection must satisfy the requirements of nondisclosure, utility, and maintenance of secrecy. Problems similar to those in the case of protection under a patent law will arise in terms of nondisclosure and the maintenance of secrecy.

As regards the protection of traditional knowledge as a human right, traditional knowledge can be protected under a civil code or other general laws against serious human right infringements.

In conclusion, a fair balance has been kept between the protection of traditional knowledge and the protection of public domain under the IP systems and other laws. At this stage there is no perceivable gap between the current system and the necessary forms/level of protection.

8. “What sanctions or penalties should apply to behavior or acts considered unacceptable/illegal?”

Sanctions/penalties against unacceptable/illegal acts may vary depending on the level of protection for traditional knowledge or the level of illegality. As mentioned in the above item 3, there is no clear justifiable reason why traditional knowledge is eligible for IP right protection. Japan is greatly concerned about extending IP right protection to traditional knowledge. A fair balance has been kept between the protection of traditional knowledge and the protection of public domain under the IP systems and other laws. Japan sees no need to introduce any other sanctions/penalties than those that have been already adopted under the existing systems. Japan does not believe that such a discussion is necessary, but when discussing what sanctions/penalties should be introduced, consideration should be given as to the form of protection for traditional knowledge and the scope of illegal acts. Discussion based on factual information about what damage has been caused by what illegal acts is essential.

9. “Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?”

As mentioned in the above item 3, justifiable reasons for IP right protection to be extended to traditional knowledge have not been clearly identified and sufficiently explained. Japan has a serious concern about establishing a new type of intellectual property right or a sui-generis right for protection of TK as well as about creating a legally binding international instrument that obligates member States to establish such a regime.

Before discussing ways of internationally addressing this issue, discussions must be conducted on what domestic solutions exist and where their limits lie and the extent to which contracts, etc. are incapable of addressing this issue. Discussion based on factual information about what damage has been caused by what illegal acts is essential.

10. “How should foreign rights holders/beneficiaries be treated?”

As mentioned in the above item 3, any justifiable reasons why IP right protection should be extended to traditional knowledge have not been clearly identified and sufficiently explained. Japan has a serious concern about establishing a new type of intellectual property right or a sui-generis right for protection of TK, as well as about creating a legally binding international instrument that obligates member States to establish such a regime. Treatment of foreign right holders and beneficiaries would depend on the type of protection TK would be granted and the corresponding international regulations.

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