

African Group Comments on the Gap analysis document issued by the WIPO Secretariat on Traditional Knowledge

Aspects of protecting TK		(a) existing measures		(b) gaps identified		(c) and (d) considerations and options	
WIPO proposals	African Group Comments	WIPO proposals	African Group Comments	WIPO proposals	African Group Comments	WIPO proposals	African Group Comments
Objectives and principles of IP protection applied to TK	We propose the following objectives of TK protection which intend to include those that are else where in the document namely: Recognition of value and promotion of respect for traditional knowledge systems; Responsiveness to the actual needs of holders of TK; Protection against misappropriation of TK and other unfair and inequitable uses Protection of tradition-based creativity and innovation; Support of TK systems and empowerment of TK holders Promotion of fair equitable benefit-sharing from use of TK; Promotion of the use of TK for a bottom-up approach to development	Existing public international law (non-IP) instruments on indigenous peoples' rights, the environment (including biodiversity and genetic resources), agriculture.	1. Whilst this is true it seems it is seen as a challenge to harmonise these instruments on the protection of TK. 2. Many instruments remain partial in their scope of reference which accounts for apparently unusual misunderstanding.	Authoritative statement on the role of IP law and policy in addressing public policy issues relating to TK	1. we have no problem if these authoritative statements are also included in existing IP policies;	International treaty or declaration establishing framework for TK protection in IP system that: - expresses objectives of protection - articulates general principles of protection Considerations: - role of hard law and soft law instruments - political as against legal aspects of issues - coordinated international approach as against autonomous national initiatives - benefit of firmer policy basis and general settled principles for further work on legal protection	1. We agree however objectives of protection must include both positive and defensive protection; 2. Issues of prior informed consent and benefit sharing;
Definition of protectable TK	1. We prefer a simple and flexible definition of TK with a list to illustrate examples	TK covered in existing non-IP legal instruments without precise legal definition	1. Other instruments define TK from their perspective namely Human Rights Indigenous Peoples etc.	Working definition of TK: - in general - as precise object of legal protection	1. flexible definitions with illustrations. Definitions should not bar TK on the grounds of novelty and originality	Binding legal definition of TK - legal certainty and clarity, but may not capture full diversity of TK and knowledge systems, and TK holding communities - linked to question of scope of	1. We prefer a definition that departs from the individual styled rights contained in mainstream legislation; 2. Legal definitions should emphasise communal rights

		Working definition in IGC				protection and scope of beneficiaries Agreed international characterization of TK, without binding legal force - higher level of clarity, firmer basis for work - not prejudging deeper legal and policy questions	
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Positive patent protection	see comment on positive protection	Established patent system, including standards and procedures in TRIPS and PCT	1. TK falls outside the boundaries of these systems it would be preferable to deal with TK on its own terms	No protection for: (i) Collective, cumulative and intergenerational innovation (ii) TK systems as such	1. We propose that protection to include collective, cumulative and inter and intra generational innovation	Review or adapt patentability criteria and standards to recognize TK systems and collective interests: - internationally for coordinated approach - nationally/regionally for maximum flexibility Establish <i>sui generis</i> protection (see below)	1 African countries (South Africa) have already amended their patent law without solving the issue of novelty, inventiveness and collective ownership; 2. We support the establishment of a <i>sui generis</i> legislation
Defensive patent protection	1. We support this inclusion. We hold that defensive protection must aim at ensuring that existing TK is not patented by third parties, ideally, by ensuring that relevant TK is taken fully into account when a patent is examined for its novelty and inventiveness	Specific PCT, IPC, IGC measures to recognize TK	1. There is no empirical evidence that PCT and IPC will provide the necessary measure to provide defensive patent protection for TK. 2. not all countries in Africa manage their patent applications through the PCT, this will be a capacity nightmare	No agreed international norm for specific disclosure mechanism for TK and associated genetic resources - several proposals (CBD, WTO, WIPO)	Since, no instruments have been adopted internationally in the form of binding law we propose that a binding instrument be developed strengthening the defensive protection of TK.	Introduce disclosure mechanisms for TK - internationally for coordinated approach - nationally/regionally for maximum flexibility Strengthen framework of contractual obligations governing access to TK under national law to require disclosure and other conditions of access to TK	1. Disclosure mechanisms must be consistent with the proposal submitted by developing countries under the TRIPS Council; 2. This would solve the problems where user countries are involved
Undisclosed TK		TRIPS standards on the protection of undisclosed information in general	TRIPS standards are limited. We support the amendments proposed strengthening international patent law standards requiring	No explicit standards on: (i) TK disclosed within a defined community (ii) TK that	Since, no instruments have been adopted internationally in the form of binding law we propose that a binding instrument be developed strengthening	Clarify or adapt existing standards to ensure: (i) Restricted dissemination within a defined community does not amount to full public disclosure	

			specific forms of disclosure relating to traditional knowledge and genetic or biological resources.	community values culturally/ spiritually not commercially (iii) Disclosure of TK constrained by customary law	the defensive protection of TK.	(ii) Protected even if source community values for non-commercial reasons (iii) Constraints of customary law and practices deemed to be sufficient to preserve confidentiality/ 'secret' quality	
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TK-related signs and symbols		Law of trademarks (including collective and certification marks) and geographical indications	We take the position that it should be the choice of the indigenous and local communities whether to redefine TK that is in the public domain as their protected property given that trademarks are a Western example of protected IP that is in the public domain	Defensive protection of TK-related signs and symbols against third party appropriation	We support this proposal	Special registers of TK-related material Strengthened measures against TM registration contrary to morality (see TCE gap analysis)	
TK subject matter covered by conventional IP system	Any general approach to the IP protection of this subject matter, including its international dimension, necessarily entails consideration of what legal tools and mechanisms are required at the national level, how they should operate, and what legal and operational contributions the international dimension can make to protection at the national level. IP rights	Some TK or elements of TK are potentially covered: - <i>directly</i> by patents, undisclosed information, unfair competition law and - <i>indirectly</i> by copyright and related rights, TCE protection, TM and GI protection, design protection and unfair competition law.	Several measures, as well as conventional IP law, have recognized elements of such customary law within a broader framework of protection. Economic aspects of development need to be addressed and the effective participation by TK holders is also important, in line with the principle of prior informed consent holders. Even so, existing IP laws have been successfully used to protect against some forms of misuse and misappropriation of TK, including through the laws of	TK not covered by existing IP protection, e.g.: - non-novel TK; - not patentably inventive TK; - publicly disclosed TK or TK otherwise ineligible for trade secret/confidentiality	We agree with this proposal	<i>Sui generis</i> protection of subject matter not already covered: - internationally for coordinated approach - nationally/regionally for maximum flexibility Adaptation of existing IP measures, e.g. - interpretation or adaptation of existing international standards to address TK subject matter more appropriately - national legislative and administrative initiatives (and judicial evolution of law) to recognize distinct TK systems within IP system	The holistic nature of their knowledge and collective rights to own their knowledge; ii. Their right to control their natural resources and manage their knowledge; iii. Their human right to self-determination; iv. Their right to prior informed consent and to ensure that such a principle is guaranteed and protected, and must be reflected in any access and benefit sharing arrangements; and v. The role that customary laws and customary knowledge protection systems play in the protection and preservation knowledge, including the ability to enable the

	systems are not sufficient to cater to the holistic and unique character of TK subject-matter.		patents, trademarks, geographical indications, industrial designs, and trade secrets.				implementation and enforcement of such laws, protocols and practices
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Rights and interests of communities in their cumulative, collectively held and intergenerational TK, and their integrated traditional knowledge systems as such	Firstly, it is stressed that protection should reflect the aspirations and expectations of TK holders and should promote respect for indigenous and customary practices, protocols and laws as far as possible. Secondly, second, we raise the concern about the unauthorized acquisition by third parties of IP rights over TK.	Limited protection, mostly as confidential information	We are concerned that that international standards do not allow for protecting communities to prevent others from taking and using elements of this knowledge for industrial and commercial use without any acknowledgement and without providing equitable benefits in return	Direct recognition of collective rights and interests in cumulative, collectively held and intergenerational TK Protection of the integrity of traditional knowledge systems as such.	Currently there are no systems of recognizing collective or community ownership, custodianship or other forms of authority or entitlement over knowledge, or distinct elements of the knowledge. We support an internationally coordinated approach in this respect	Specific protection of collective rights and interests in traditional knowledge as such (rather than separately IP-protectable elements): - internationally for coordinated approach - nationally/regionally for maximum flexibility Specific protection of rights and interests of communities in traditional knowledge systems as such : - internationally for coordinated approach - nationally/regionally for maximum flexibility	We support international binding standards to protect the collective rights and interests in traditional knowledge

Specific mechanisms of TK protection against certain prejudicial acts and acts of misappropriation		<p>None in conventional IP law.</p> <p>May be protected in part through contract and broader doctrine of unfair competition and unjust enrichment.</p>	While contractual agreements may be useful, though, they also have clear limitations, such as not being easily enforceable.	Norm against unjust enrichment, misappropriation, or acts contrary to honest commercial behaviour regarding TK		<p>Specific norm articulated at international level to promote coordinated approach:</p> <ul style="list-style-type: none"> - binding law if timely for precise international norm - political declaration if legal essence of norm is still being formulated <p>Specific norm articulated nationally/regionally for maximum flexibility and legal evolution and diversity.</p>	1. any norm setting must be consistent with the Development Agenda recommendations on clusters concerning norm setting and flexibilities
				Explicit statement of the principle of prior informed consent over TK held by a community	See earlier comments on PIC	<p>Specific norm articulated at international level to promote coordinated approach:</p> <ul style="list-style-type: none"> - binding law if timely for precise international norm - political declaration if legal essence of norm is still being formulated <p>Specific norm articulated nationally/regionally for maximum flexibility and legal evolution and diversity.</p>	Politically, the mandate of the IGC aims at excluding no outcome. Thus, the question of whether the outcome of the IGC will be a binding international instrument or a non-binding declaration or something else is still open to debate. The Objectives and Guidelines therefore take no position on this. However, the formulation of the framework suggests that the Objectives and Guidelines on the table can be the basis for a future treaty if necessary. Hence we propose that the Objectives and Guidelines be more specific on the matter.

				Norm requiring explicit acknowledgement of source community in use of TK distinctively associated with a community.		Specific norm articulated at international level to promote coordinated approach: <ul style="list-style-type: none"> - binding law if timely for precise international norm - political declaration if legal essence of norm is still being formulated <p>Specific norm articulated nationally/regionally for maximum flexibility and legal evolution and diversity.</p>	
				Norm against use that creates cultural or spiritual offence, or impairs integrity of TK	The spiritual and cultural value of knowledge must be considered a relevant factor	Specific norm articulated at international level to promote coordinated approach: <ul style="list-style-type: none"> - binding law if timely for precise international norm - political declaration if legal essence of norm is still being formulated <p>Specific norm articulated nationally/regionally for maximum flexibility and legal evolution and diversity.</p>	

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Illegitimate patenting of TK	We are concerned that there is no express norm specifically articulated against such illegitimate patenting, even though this is consistent with international principles	Existing patent law requires application based on true inventor(s) and genuine invention Paris Convention requires express mention of true inventor	The criteria imposed by the patent system is at odds with TK	Explicit norm against: - patenting of traditional knowledge as such without consent and involvement of TK holder - patenting of invention made possible by the misappropriation of traditional knowledge	We are of the position that the requirements under the Patent Act are clearly aimed primarily at facilitating economic exploitation of inventions, the rationale being that this promotes innovation and research. These requirements are at odds with the indigenous view that their genetic resources, and knowledge of these resources constitute communal property, which is incapable of being individually owned.	At international level: - Internationally binding norm - Authoritative interpretation of existing norms - Political declaration : Specific amendments to national patent law	We are of view that the greatest significance of these international instruments lies essentially in their norm-setting function. Whereas we propose a binding legal instrument. We are of view at national level that specific amendments to national patent laws are favoured the ability of patent offices in a national jurisdiction to prevent bio-piracy as well as to install informed consent mechanisms to ensure reward to TK holders, does not ipso facto lead to similar action on the patent application in other countries.
		Specific disclosure requirements for TK: - national/regional laws - proposals in CBD, WTO, WIPO	We are of the position that disclosure issues must be in concert with the proposed amendments of the TRIPS agreement	Prior informed consent over TK	See our comments under this subject	At international level: - Internationally binding norm - Authoritative interpretation or extension of existing norms - Political declaration At national level: Specific amendments to national patent law	See above See comments on illegitimate patenting of TK

A: EXISTING MEASURES

Obligations, provisions and possibilities that already exist at the international level to provide protection for TK

Form of protection		Extent of coverage		Factors considered	
WIPO proposals	African Group Comments	WIPO proposals	African Group Comments	WIPO proposals	African Group Comments
Positive patent protection of TK	Our position is firm that TK holders must have the right to take action or seek remedies against certain forms of misuse and misappropriation of TK;	Some elements of TK potentially protected under existing patent principles, but not TK systems as such. Title needs to be obtained from true inventor(s), including TK holder(s) Valid protection requires active steps on part of true holders of patentable TK.	See comments regarding the subject else where in the document	Considerable flexibility exists in international standards relevant to patentability of TK, including: - defining 'invention' - interpretation of criteria for protection (novelty, inventiveness, utility) when applied to TK - public policy exclusions of patentable subject matter	We are of the view that flexibilities in the international legal system must take into account the development dimension of intellectual property as currently reflected in the ongoing discussions relating to a WIPO development agenda.
Defensive protection of TK within the patent system	Equally, we hold that safeguarding against illegitimate IP rights taken out by others over TK subject matter 1. We propose the following defensive mechanisms with the patent systems Disclosure of origin of genetic resources and associated traditional knowledge and compliance with ABS regulations 2. Certification of origin/prior informed consent 3. Misappropriation regimes; 4. databases	Much TK is protected in principle from illegitimate assertion of patents, e.g. when patent applicant seeks rights over TK developed by others Specific measures include: - improving access to TK as prior art during patent procedures without facilitating misappropriation of TK (e.g. including TK in PCT minimum documentation, TK documentation standards, IPC coverage of TK) - guidelines for examination of TK-related patents - portals, gateways and appropriate databases of TK and related genetic resources for use in patent procedures	Our concern is how to ensure prior art searches carried out by patent authorities take adequate consideration of traditional knowledge. Even though throughout the there is a large amount of documented traditional knowledge, there are current limitations as to how patent procedures can include broader and more comprehensive searches for prior art and thereby prevent misappropriation of traditional knowledge.	Concerns over making available TK for patent procedures may trigger unwanted misappropriation by third parties.	Hence, we propose an internationally agreed instrument that recognizes such national level protection. This would not only prevent misappropriation but also ensure that national level benefit sharing mechanisms prior informed consent and laws are respected.
		Specific patent disclosure mechanisms for TK and related GR, including: - disclosure of source or origin of TK - disclosure of prior informed consent - disclosure of equitable sharing of benefits	We support the proposal under the TRIPS Council	Considerable international discussion and analysis of specific disclosure requirements for TK - CBD Bonn Guidelines - proposals for new requirements in WTO, WIPO	We favour the discussion under the TRIPS Council
Undisclosed TK	We reiterate that not all undisclosed TK is of commercial value having	Protection is available for TK which is secret, has commercial value because it	We agree with this situation however the objectives of	Specific issues concern: - when disclosure within a	

	<p>culturally/ spiritually element; Undisclosed TK must be regarded within the ambits of customary law We would like to iterate that the purpose of databases is not to put TK into the public domain</p>	<p>is secret; and has been subject to reasonable steps to keep it secret.</p>	<p>databases must be; The prevention of misappropriation of TK; using of databases as valuable tools for carrying out advanced research; or the use of traditional knowledge for commercial purpose under prior informed consent and access and benefit sharing agreements</p>	<p>community is considered 'secret' - the role of the customary law or practices - protection of knowledge that has spiritual and cultural value to the community, but not commercial value for the community.</p>	
<p>Protection against unfair competition</p>	<p>We are of view that the prevention of false and misleading claims as to the authenticity or originality and failure to acknowledge source constitute the most extreme forms of unfair competition. We are of the view that using unfair competition law might make it possible to combine legal and policy tools in such a manner that:</p> <ul style="list-style-type: none"> • misappropriation of TK is repressed as an act of unfair competition; • equitable distribution of benefits arising from commercial or industrial uses of TK is fully ensured through multiple mechanisms (including compensatory liability as well as ABS models, based on PIC and MAT); • prior informed consent is applied to TK in harmony with existing legal systems at national and international levels; • TK holders retain full involvement and control in TK protection procedures; • full flexibility is retained for national authorities to give effect to the regime in a manner compatible with their own legal systems, national policies and stakeholder needs; • there is no prejudice to the application and availability of existing IP rights in the field of TK <p>Finally, we raise the concern about dishonest practices established in international trade</p>	<p>Protection against</p> <ul style="list-style-type: none"> • acts creating confusion • false allegations in the course of trade • indications or allegations liable to mislead the public. 	<p>We are of the view that competition rules should satisfy the following: PIC principles and mutually agreed terms (ABS mechanisms); Compensatory liability rules; References to customary laws and understandings of TK holders during the application of all the afore-mentioned tools; and Optional use of property rights, if and when chosen by TK holders and subject to national law and policy</p>	<p>Flexibility over interpreting measures against unfair competition to include broader rule against unjust enrichment and misappropriation</p>	<p>Several existing <i>sui generis</i> laws employ elements of unfair competition law to protect TK. We propose case studies to determine the best practice.</p>

Protection of distinctive signs	See comments on TCEs We propose that distinctive signs be defensively protected through legal mechanisms	Applicable not to TK as such but to distinctive signs and symbols associated with TK-related products, in particular: - trademarks for goods and services with a TK component - collective or certification marks - geographical indications	See comments on TCEs		
Industrial design law	The Design law offers limited protection for indigenous cultural and intellectual property. The focus of design protection is to enable commercial interests to gain a competitive edge. A limited period of protection is offered, whereas traditional rights to indigenous designs exist in perpetuity. Protection is afforded to a registered owner, whereas Indigenous laws recognise communal rights.	Industrial designs that are new or original	We are of the view that no traditional designs are new in nature they have an indigenous origin	Possibility of excluding protection for designs dictated essentially by technical or functional considerations.	Not sure what this entails
Copyright and related law (including protection of databases and performances of expressions of folklore).	1. Communities and TK holders are rarely the ones responsible for compiling or holding the databases. 2. Control access to and use of the information held in the databases rather than the way this information is presented or expressed is concern. For this reasons, copyright and copyright law does not provide an adequate solution. Databases should not be a vehicle to facilitate the further commercialization and misappropriation of TK	No protection for knowledge as such but for means of recording and transmission of TK, especially protectable TCEs.	We are concerned that it seems clear that oral disclosure, use, exhibition or other means of disclosure will only be considered relevant during an international search if they are substantiated by <i>written</i> disclosure. The orality of TK must be considered.		See gap analysis on TCEs We propose mechanism be put in place that protects the content of knowledge as such, and it is therefore more relevant to the protection of traditional cultural expressions
Public international law	We guard against what could be simply a misrepresentation of international law to single out one right for example (sovereignty) that pertain to genetic resources, without any reference whatsoever to the competing rights that also apply to such resources. International. We would prefer that the international law accurately reflects the law on the area, i.e. references are included to all rights that compete with	CBD and Bonn Guidelines: Biodiversity-related TK FAO ITPGRFA: TK related to plant genetic resources for food and agriculture UNDRIP: indigenous and local rights relating to TK	The subject matter to be protected; Criteria for protection; Scope of protection: acts requiring the holder's prior authorization; Duration of protection; Relationship with other forms of protection in the national legislation; Additional elements taken		Africa supports the notion that TK, traditional cultural expressions and genetic resources be protected in perpetuity. The need to protect TK is quite obvious that they mean 'protection' in the sense of safeguarding the continued existence and development of TK. As repeatedly pointed out by the

	- and sometimes take precedent over		from International Law		African Group, this necessarily implies protecting the whole social, economic, cultural and spiritual context of that knowledge, something which simply is not possible to achieve within a confined period of time. Hence, we are proposing for an instrument that protects the holistic, inalienable, collective, and perpetual nature of TK for purposes far more expansive than economic benefits.
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B. GAPS EXISTING AT THE INTERNATIONAL LEVEL

Aspect of protection		Identification of gap in protection		Specific considerations	African Group Comments
WIPO proposals	African Group Comments	WIPO proposals	African Group Comments		
Identification or definition of TK eligible for protection	After all, most patent laws do not define what an invention is.	No formal definition of TK that should be protected, although TK is referred to in several international instruments (within particular domains of TK) Elements of a definition developed in IGC work	Our position is that no single definition would fully do justice to the diverse forms of knowledge that are held by traditional communities; and no form of legal protection system can replace the complex social and legal systems that sustain TK within the original communities.		
Gaps in the express objectives of protection	Our assertion is that for IP protection to transpire it should be compatible with and supportive of a wide range of policy objectives related to the protection and conservations of IK, including: a. the establishment of legal certainty regarding rights in , b. the survival of indigenous cultures - which translates into matter of survival as an Indigenous people and as a community, c. the recognition of customary law and practices governing , d. the recognition of customary laws and protocols that govern the creation, transmission, reproduction and utilisation of , e. the repatriation of cultural heritage, f. the recording, maintenance, protection and promotion of oral traditions; g. the recognition of oral exchange of knowledge innovation and practices according to customary rules and principles; and h. The existence of rules	Intrinsic value of TK systems TK systems as valuable forms of innovation Respect for TK systems and cultural and spiritual values of TK holders Respect rights of TK holders and custodians Conserving TK Strengthen TK systems, Support innovation within TK systems Support safeguarding and preservation of TK; Repress misappropriation and unfair and inequitable uses of TK, and promoting equitable benefit-sharing from TK; Ensure access and use of TK is subject to prior informed consent Promote sustainable community development and legitimate trading activities based on TK systems; Curtail the grant or exercise of improper IP rights over TK	We agree with this proposal, however this proposal; however, it is not exhaustive		

	regarding secrecy and sacredness which govern the management of knowledge				

WIPO proposals	African Group Comments	WIPO proposals	African Group Comments	WIPO proposals	African Group Comments
<i>Gaps in existing legal mechanisms</i>					
Subject matter not covered	Issues of subject matter will be resolve once a clear definition has been determined.	TK not covered by existing forms of IP protection, such as: - TK that is not novel; - TK that is non-inventive; - TK that is publicly disclosed or otherwise not eligible for protection as undisclosed information.	Agree with the comment	See Item A above	
		Cumulative, collectively held and intergenerational TK that does not meet criteria for undisclosed or confidential information.	Hence we propose an alternate system of protection vis sui generis legislation		
		Integrated traditional knowledge system as such			
Beneficiaries or right holders not recognized	Our stance is that the current system of protecting IPRs is limited to private monopoly rights and therefore incompatible with the protection of TK. We proceed on the premise that TK is held as part of a community's heritage passed down from generation to generation, and should not be allowed either to be privatized or commercially exploited for individual gain; or to slip into the "public domain." Hence, our assertion is that the first beneficiary of indigenous knowledge must be the community directly connected with the knowledge accessed and to be protected	collective rights, interests and entitlements within a TK system	See earlier comments. On the whole protection of TK relates to the protection of cumulative knowledge that is collectively held, unless it is considered undisclosed or confidential information		
Forms of use and other actions that cannot be prevented under existing law	We propose an alternate system vis a vis sui generis	express norm against illegitimate patenting of TK			
		Specific disclosure requirement relating to TK	Whilst such a requirement has not been established under international law, we align ourselves with the proposal		

			currently under discussion in the TRIPS Council		
		Protection against unjust enrichment or misappropriation of TK			

WIPO proposals	African Group Comments	WIPO proposals	African Group Comments	WIPO proposals	Afrioup Comments
A right of acknowledgement and integrity	We support the right to object to the use of TK when the use creates cultural or spiritual offence, or otherwise impairs its integrity. We also support the notion that users of TK should be acknowledge. Hence we support the right to object to the use of TK without explicit acknowledgement of the community which is the source of the knowledge	Prevention against the use of TK without explicit acknowledgement of the source community.			
		Prevention against the use that creates cultural or spiritual offence, or impairs integrity of TK	we support the right to object to the use of TK that creates cultural or spiritual offence, or impairs integrity of TK		
Prior informed consent over TK	Our position is that prior informed consent is the foundation for matters relating to access to biological resources, both at the level of the State and of indigenous s and local communities. An essential feature of PIC is the right to say No. It is within this context any attempts must be mutually supportive of the initiatives undertaken within Ad Hoc Open-ended Working Group on Access and Benefit-sharing (CBD)	No express recognition that TK holders have prior informed consent over access to certain forms of TK. Clarification of protection of undisclosed information as a means of implementing right of prior informed consent	We are steadfast in our stance that any person who without the prior informed consent of the community uses knowledge, an innovation or a practice in a manner inconsistent with our proposed access and benefit sharing regulations commits an illegal action. In addition we further support that no willful representation of the traditional cultural expression; That no distortion of the expression in a manner prejudicial to honour, dignity or cultural interest of the indigenous and local community	Need to clarify principle of prior informed consent for knowledge that is shared with other TK holders, and that has been already disclosed beyond the community with the (tacit or express) consent of the community, or without consent.	Our position is consistent with developments undertaken within Ad Hoc Open-ended Working Group on Access and Benefit-sharing (CBD)
Right of equitable benefit sharing	The central focus of an international instrument must be fair and equitable benefit sharing, including the establishment of principles, standards and implementing mechanisms (international, regional and national). It is within this context any attempts must be mutually supportive of the initiatives undertaken within Ad Hoc Open-ended Working Group on Access and Benefit-sharing (CBD)	Absence of entitlement to obtain equitable remuneration or other benefits (including culturally appropriate and other non-financial benefits).		Potential role of customary law in determining what benefits are equitable and appropriate	While specific customary laws vary considerably, underlying customary principles are quite similar across different ethnic groups and ecological contexts. A focus on customary principles or values may therefore be better for developing policy frameworks at national and international level which can

					accommodate diverse issues of benefit sharing. Our position is consistent with developments undertaken within Ad Hoc Open-ended Working Group on Access and Benefit-sharing (CBD)
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C. CONSIDERATIONS RELEVANT TO DETERMINING WHETHER THOSE GAPS NEED TO BE ADDRESSED

<i>Substantive considerations</i>	Nature of consideration		Details	
	WIPO proposals	African Group Comments	WIPO proposals	African Group Comments
	International law and policy	We once again reiterate our view that the objective under such protection mechanism should be to recognise existing rights under international law and international human rights law.	Including legal obligations and policy settings relating to: - conservation of biodiversity and the combat against desertification - rights of indigenous peoples - sustainable health policy and access to medicines	From a public health perspective, however, the early entry of genetic resource is also considered as an important policy objective, whose realization is facilitated by regulations that allow health authorities to rely on existing test data to approve subsequent applications for generic products
	Social, cultural, political and economic considerations	We welcome this insertion however, we prefer the inclusion of spiritual and development consideration	<ul style="list-style-type: none"> • Emphasis on claims of inequity arising from misappropriation and misuse of TK • role of TK in sustainable, grass roots development • link between protecting TK and cultural and social identity of communities • industrial and commercial uptake of TK • value of TK in dealing with environmental and climate change • reference to TK in a range of regulatory contexts 	Our earlier comments have covered this issue
	Role of TK protection in broader policymaking contexts	We hold that TK protection involves important policy issues beyond the domain of IP. In addition, we hold that policy is not as an end in itself, but one of a range of possible tools that should work to promote innovation, creativity and technological capacity in African countries and contribute to their competitiveness in the global economy	<ul style="list-style-type: none"> • Protection of biodiversity, and equitable use of its benefits; • Recognition of the rights of indigenous peoples; • Promoting food security and promoting diversity of food crops; • Ensuring culturally appropriate access to health; • Sustainable grass roots development; • Climate change abatement and mitigation; • The increasing overlap between traditional knowledge as such and formal disciplines of biotechnology; • The contribution of traditional knowledge systems to innovation and cultural diversity. 	Our position is that intellectual property policies should respond to national stages of development and that developing countries should not be forced to adopt standards of protection incommensurate with their development needs and priorities
	Specific legal and policy considerations		- The fact that many national or regional processes are already developing stronger protection of TK, suggesting that there may be difficulties, impediments or other obstacles if there is no development on an	1. this approach is favoured because the decisions and proposals on many international instruments are not legally binding and it is unlikely that the parties will adopt any binding norms on TK. This is because the IPR-

			<p>international dimension to provide a common platform for otherwise diverse national or regional TK protection systems;</p> <ul style="list-style-type: none"> - The possible systemic implications from lack of clarity in the international law of IP in areas where it is relevant to TK and traditional knowledge and innovation systems; - The possible gains from a reduction in legal uncertainty associated with concerns about possible ownership or custodial responsibilities relating to TK; - The costs and benefits arising from a common international approach towards TK protection issues. 	<p>relatedness of the subject renders the instruments inappropriate platforms to negotiate norms, at least as far as the developed countries are concerned</p>
	<p>Considerations specifically weighing against addressing gaps</p>	<ul style="list-style-type: none"> • A clear definition of TK • A clear definition of indigenous peoples and local communities and other traditional knowledge holders are; • The fundamental gap difference is the mainstream concepts of property, grounded in individual ownership, and indigenous concepts of property, rooted in more communal concepts, suggest that current developed system of intellectual property is not an appropriate mechanism of protection for TK 	<ul style="list-style-type: none"> - The possibility that it is premature to fill certain gaps at international level, even when gaps are clearly identified, in view of the need for more national experience to be developed and shared as a precondition for clearer international outcomes; - The diversity of TK and the communities holding, which may set limits to the international dimension of norm-setting - Uncertainty over rights and entitlements of foreign right holders, such as TK holding communities in dramatically different cultural and social contexts; - The possible need for stronger, more diverse consultative processes before moving towards high profile political and legal outcomes that would be difficult and costly to revisit once concluded. 	<ul style="list-style-type: none"> • If a norm or standard setting body is still an objective of some members of the IGC, the current extended mandate should provide a reasonable period within which to establish its modalities and scope with a view to it commencing activities reasonably soon after the expiry of said extended mandate. • Ensure that the main objectives and principles of the text of an agreement can be broadly adopted, however, it is likely that there will be sufficient momentum to carry negotiations to their conclusion •

D. OPTIONS THAT EXIST OR MIGHT BE DEVELOPED TO ADDRESS ANY IDENTIFIED GAPS:

Options at different levels		Specific considerations that apply	
WIPO proposals	African Group Comments	WIPO proposals	African Group Comments
International level			
(i) a binding international instrument or instruments;	We support the adoption of a binding instrument addressing the gaps in protection would oblige member states to apply the prescribed standards in their national law, as an obligation under international law.	What specific norms are sufficiently established in substance and timely to express as binding international law? - regarding the protection of TK directly; - regarding recognition of TK in the patent system and other areas of IP law	Norm requiring explicit acknowledgement of source community in use of TK associated with a community, that is consistent with the amendments to the TRIPS
(ii) authoritative or persuasive interpretations or elaborations of existing legal instruments;	We support this option which may create binding law but need not be binding in itself. It may nonetheless be influential in interpreting treaty standards and in giving practical guidance to domestic policymakers on the basis of agreed international standards. The adaptation of existing international general rules against unfair competition explicitly to include acts of misappropriation may be possible but difficult to achieve.	What existing provisions and legal principles may be suitable for authoritative interpretations vis-à-vis TK? For example: - unfair competition; - patent law standards and other areas of IP law; - undisclosed information or law of confidentiality.	See our comments on unfair competition, patent ; Regarding patent law we suggest that subject matter be covered under existing IP law; that beneficiaries or right holders recognized; of entitlement to communities to obtain remuneration or other benefits be included .
(iii) a non-binding normative international instrument or instruments;	In general we do not support the notions of a non binding normative instrument. A case in point is that a number of non binding instruments do exist under the UN banner, yet there is rampant biopiracy and misappropriation of TK and TCE's	What norms, standards and political priorities may be agreed in the form of a non-binding instrument at the international level?	We do not support a non binding instrument
(iv) a high level political resolution, declaration or decision,	We are of the view that for any binding international instrument there needs to be firstly a high-level resolution, declaration or joint declaration by relevant member states. We are guided by past WIPO and other UN treaties and conventions which required a high level political resolution, declaration or decision	What norms, standards and political priorities may be agreed in the form of a political resolution at the international level?	We support an international political declaration espousing core principles, stating a norm against misappropriation and misuse. Such an approach need not preclude the subsequent development of binding international law
(v) strengthened international coordination through guidelines or model laws	Whilst several guidelines, frameworks and model laws already exist in areas of direct relevance to the work of the IGC we are not convinced of its effectiveness and efficacy. The former AOU Model Law will be used by the the African Union to lay the groundwork for more a formal international instrument		
(vi) coordination of national legislative developments.	Many countries in Africa have already begun developing or amending policies and legislation to protect TK and TCEs. We are of the view that the effect of international materials on may be to encourage and support such coordination of national and regional initiatives,		
(vii) international cooperation on practical measures	We support international cooperation on practical measures to included infrastructure support and capacity building	Existence of programs, materials and initiatives already aimed at: - capacity building and substantive materials for legal	

		and policy processes - strengthening practical capacity of TK holders - building and guiding institutions - interagency cooperation and coordination within UN system - awareness and capacity-building for the general public	
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Regional level			
WIPO proposals	African Group Comments		
<ul style="list-style-type: none"> • Legal instruments concluded at the regional, subregional or bilateral level, including <i>sui generis</i> instruments and conventional IP law • Political or policy-level declarations proclaimed at the regional, subregional or bilateral level • Model laws and other forms of legislative guidance adopted at the regional level • Model protocols, guidelines and best practice recommendations adopted at the regional or subregional levels • Regional, subregional and bilateral initiatives and programs to support community capacity building relating to TK 	<ul style="list-style-type: none"> • A number of regional organizations in Africa already play active roles both in developing new legal instruments and in undertaking practical capacity building work to strengthen the protection of TK. 	<ul style="list-style-type: none"> • 	<ul style="list-style-type: none"> •

National level	
WIPO proposals	African Group Comments
<ul style="list-style-type: none"> • Legislation to protect TK, including <i>sui generis</i> instruments and conventional IP law • Policy frameworks and administrative mechanisms to promote and protect TK, including within specific domains such as medicine and public health, the environment, and agriculture • Model protocols, guidelines and best practice recommendations adopted either by national authorities or other institutions • National initiatives and programs to support community capacity building relating to TK 	<ul style="list-style-type: none"> • A <i>sui generis</i> system within the IPR framework is still IPRs. By definition, <i>sui generis</i> regimes should be adapted to the object to be protected and to the context where it should be applied •