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**REPORT OF THE UNCTAD-COMMONWEALTH SECRETARIAT WORKSHOP ON
ELEMENTS OF NATIONAL *SUI GENERIS* SYSTEMS FOR THE PRESERVATION,
PROTECTION AND PROMOTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS
AND PRACTICES AND OPTIONS FOR AN INTERNATIONAL FRAMEWORK**

Note by the Executive Secretary

1. The Secretariat is circulating herewith the report of a Workshop on elements of national *sui generis* systems for the protection of traditional knowledge organized by the Commonwealth and UNCTAD's Secretariat, at the latter's request.
2. This document is being circulated in the language and form in which it was received by the Secretariat.

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**Report of the UNCTAD-Commonwealth Secretariat Workshop* on
Elements of National *Sui Generis* Systems for the Preservation, Protection and
Promotion of Traditional Knowledge, Innovations and Practices
and Options for an International Framework**

Geneva, 4-6 February 2004

Executive Summary

Some 90 participants with a range of perspectives and expertise (trade, environment, intellectual property, indigenous issues, enterprise development, etc.) participated in the workshop in their personal capacities as experts. They brainstormed on actions that could be taken at the national and regional level to preserve, protect and promote for development traditional knowledge, innovations and practices (TK) as well as international dimensions. This report reflects the diversity of views and ideas expressed during this meeting.

To preserve TK, a number of actions were identified for the *ex situ* preservation, notably TK registries and museums, as well as for the *in-situ* preservation of TK in living diverse communities. National actions aimed at the latter included media transmissions in local languages, including TK in formal education, training youth, preservation of the natural environment, secure land rights, and enhancing livelihoods.

Both defensive and positive TK protection were discussed. Possible national level actions included disclosure of source of origin of genetic resources and related TK in patent applications, recognition of the ownership of TK-holding communities of their TK, recognition of customary law, contracts, prior informed consent, and use of conventional IP instruments such as geographical indications. Many felt that the current IPR instruments cannot adequately protect TK and that non-IPR options should also be explored.

To promote TK for development, the importance of sharing experiences among communities as well as countries was emphasized. Supporting community-based development requires actions that are similar to supporting any small enterprises, including capacity building in entrepreneurial skills, access to finance and markets, and facilitating partnerships with larger enterprises. Means of promoting and scaling up innovations were discussed. Benefit sharing with TK-holders was emphasized.

On international dimensions, a main concern was preventing misappropriate or unauthorized use or patenting. The disclosure of origin issue was debated, as were the relative merits of voluntary guidelines, MOUs and soft law approaches, versus binding international instruments. An international framework for mutual recognition of national *sui generis* systems received special attention. Establishing a Global Biocollecting Society that could deal with TK-related patent applications and using fairtrade channels to market TK-based products were two other avenues that could be further explored.

Discussion and background papers for the meeting are available on UNCTAD's Trade, Environment and Development Branch Web site, at www.unctad.org/trade_env/TK2.htm.

* The workshop was organized in collaboration with the Quaker United Nations Office (QUONO).

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I. Introduction

This workshop brought together some 90 experts with a broad range of perspectives and expertise to brainstorm in an informal setting on possible actions and policies that could be included in national *sui generis* systems for the preservation, protection and promotion of traditional knowledge, innovations and practices (TK) and options for an international framework. It was jointly organized by the Commonwealth and UNCTAD secretariats, in cooperation with the Quaker United Nations Office. Participants in the workshop took part in their individual capacities and discussed the topics as outlined in the programme (Annex 1).

The workshop intended to bring some clarity to the various TK-related objectives that policy makers might wish to pursue at national or other levels, and to match objectives with potential tools. The workshop focused in particular on the separate but inter-linked objectives of preserving TK, protecting TK, and promoting TK for development. For each of these objectives, a menu of possible actions was identified. It is envisaged that such a menu would be a useful input to national multi-stakeholder policy dialogues on TK.

Four draft discussions papers were prepared for the meeting¹. In addition, a number of documents were submitted by participants or invitees. These are available on the UNCTAD Trade, Environment and Development Branch Website at www.unctad.org/trade_env/TK2.htm.

This report summarizes the main points which arose during the workshop discussions and debate on these topics. It also incorporates some of the ideas contained in the above-mentioned documents. The report highlights in particular concrete actions which could be taken to in pursuit of one or more of the above-mentioned TK-related objectives. Participants also emphasized the importance of a holistic approach to the subject, as actions aimed at one objective (e.g. protection) may have unintended effects in other areas (e.g. preservation).

The report is structured to reflect the debates. The meeting was opened by representatives of the UNCTAD and Commonwealth Secretariats. The first day was then devoted to identifying national actions that could be considered by policy makers interested in designing and implementing *sui generis* systems for the preservation, protection and promotion of TK. Next a range of issues connected with the international dimensions of TK was discussed. A number of areas for future research were also mentioned in the course of the meeting.

This report is intended to reflect the diversity of experiences shared and views expressed during the workshop by the participants, who were participating solely in their personal capacity. Therefore, many of the following points may be inconsistent, or even directly conflict, with other views expressed. This is not a consensus document, but rather seeks to gather in one place a wide range of ideas and possible actions related to TK from a holistic, multi-dimensional perspective.

II. Opening of the Meeting

The meeting was opened by Ms. Lakshmi Puri, Director of the Division on International Trade in Goods and Services, and Commodities of UNCTAD and Mr. Roman Grynberg, Deputy Director, Economic Affairs Division, Commonwealth Secretariat.

¹ These are: 1) *Protecting Traditional Knowledge: Lessons from National Experiences*, Carlos M. Correa; 2) *Preserving, Protecting and Promoting Traditional Knowledge: National Actions and International Dimensions*, Sophia Twarog; 3) *Towards an International Framework for the Protection of Traditional Group Knowledge and Practice*, Peter Drahos; 4) *Towards an International Framework for the Protection of Traditional Knowledge*, Graeme B. Dinwoodie.

Ms. Puri stressed the timeliness of the meeting in light of UNCTAD XI in June, the Convention on Biodiversity (CBD) COP VII the following week, and the WIPO IGC (Intergovernmental Committee on Intellectual Property and Genetic Resources) and TRIPS Council meetings the following month (March). She also touched on the relationship between TK and the identification of benchmarks for development; the development of new and dynamic sectors like BioTrade; and the relationship between TK, trade and gender, trade and poverty and creative industries. She stressed the need for a holistic, coherent approach to national and international codification and broad-based consultations amongst all national stakeholders to develop national action plans to ensure successful implementation and operation of the systems devised.

Mr. Grynberg stated that the Commonwealth Secretariat had been working on TK for many years and that its Members, developing and developed countries alike, have an interest in this issue. He also noted the long history of cooperation between the UNCTAD and Commonwealth secretariats.

Ms. Sophia Twarog of the UNCTAD secretariat gave an overview presentation of the objectives of the meeting.

III. Elements of National Systems

The need to take a holistic approach to the subject of TK was stressed by many participants. The three categories of operational objectives—to preserve TK, to protect it and to promote it for development—were deemed to be a useful way to proceed.

These objectives are interlinked. Pursuing one objective in isolation could work against another one. The example was given of TK documentation, which is often cited as a means to preserve and if made available to patent offices to prove prior art, but which could also facilitate unauthorized commercial use and thus run counter to the objective of positive protection. It would therefore be important to look for mechanisms that can be used for all three objectives.

It was pointed out that a key issue is to help traditional communities to use their knowledge at the local level and to their benefit.

Because of the cross-cutting nature of TK, at the national level, it is important to:

- involve all relevant government departments
- designate within the government a TK focal point or “champion”. This department would play a coordinating and catalytic role. It would help the other departments devise their policies; convene inter-ministerial meetings and multi-stakeholder consultations; and be the first point of contact for third parties.
- involve the TK-holders themselves (i.e. indigenous and local communities) in decisions on this matter, including as members of legislation drafting teams
- deal with the tribal authorities when approaching a community
- keep in mind the CBD principles of prior informed consent, and fair and equitable sharing of benefits
- coordinate research done by research institutions, individual researchers and TK-holders
- build capacity in all areas
- do things in a manner that builds trust.

It is also important to bear in mind the small size of public administrations in many countries and hence the limited expertise and human and financial resources available to design and implement national systems to preserve, protect and promote TK for development.

The problem of lack of trust between TK-holders and the State as well as between TK-holders and researchers needs to be recognized and addressed.

In taking stock of national and regional developments on TK regimes it appears that no single model is emerging. Each country has its own culture and legal systems. TK regimes need to be adapted to local conditions. There are big differences, for example, between Asia and Africa.

Elements related to TK are often embedded in other legislation, for example Access and Benefit Sharing (ABS) regimes and plant varieties protection laws. Some countries have drafted legislation particularly aimed at TK. For most regimes, it is too soon to assess the impact. It is also unclear whether these regimes were always developed with the effective participation of the intended beneficiaries, especially whether the beneficiaries had a large impact on the outcome. An interesting approach had been taken in South Africa where indigenous representatives comprised half of the team drafting the Traditional Health Practitioners Bill. It was mentioned that local regimes would need to define how communities would be represented to assert their rights. In South Africa, for example, recent legislation recognizes the role of Traditional Leaders.

It was pointed out that there are conflicting timescales. There is a need to do something now, whereas extensive consultations take many years.

The need for a research methodology to assess the impact of national policies and measures on beneficiaries was mentioned.

It is very important to be clear about the TK-related objectives that are to be achieved. These include preservation, protection and promotion for development of TK, but also the related objectives of equity, environmental conservation, promoting self-determination, and building trust. It was pointed out that the promotional element had been missing from many of the TK-related regimes. It is important to match tools with objectives.

Several participants felt that IPRs had been overstated as a tool to meet the full range of TK-related objectives. There was a need for IPR and non-IPR, legal and non-legal approaches. Moreover, drafting a law in isolation is not sufficient. Countries need to identify a strategy based on a broader, holistic approach.

When developing national holistic TK regimes, it was suggested that lessons could be drawn from WIPO's work related to traditional cultural expressions ('folklore'). This work has identified seven practical steps that national policymakers could take in developing effective policies and legal frameworks:

1. Set overall directions by determining national developmental objectives and the needs of indigenous and local communities, with their full and effective participation.
2. Determine relevant policy considerations, e.g. effects on cultural diversity and artistic and intellectual freedom, stimulation of creativity and innovation, fostering of a vibrant and multicultural public domain, preservation of cultural heritage, human rights, etc.
3. Determine to what extent IP is relevant to meeting national objectives and addressing policy issues, and, if so, determine how existing IP laws can be used (e.g. unfair competition law in Australia has been used to stop fake arts and crafts; certification and trademarks have been used in New Zealand to authenticate genuine art and handicrafts; performances of folklore are already protected internationally by an IP treaty; copyright and design can already protect contemporary adaptations and expressions of traditional cultures; the Andean Community prevents the registration of indigenous names as trademarks; etc.).
4. Determine which non-IPR tools, programs and measures can also be used to meet the objectives (e.g. cultural heritage laws and programs, marketing laws, customary laws, recordings and databases, laws on blasphemy, contracts, etc).
5. Where gaps are identified, adapt IP laws and develop *sui generis* measures, laws and systems to complement existing IP and non-IP tools and to fill the gaps and respond to the particular characteristics of traditional cultural expressions.

6. Take practical steps to make sure that existing and new measures and laws are easily accessible to and usable by intended beneficiaries (e.g. provision of legal advice, funding for court cases, appropriate institutions to help with rights management and enforcement).

7. Determine how the rights established in such a national system could be enforced by the rights holders in other countries (i.e. how to achieve international protection, as a question of law and practice).

It was also stressed that specific measures to preserve, protect and promote TK in certain sectors (e.g. traditional medicine, traditional agriculture, traditional cultural expressions and handicrafts) would be needed. For example, to preserve and promote further innovation in TK associated with plant genetic resources for food and agriculture (PGRFA), specific measures could include support of *in situ* conservation of PGRFA by traditional farmers, integration of traditional and modern knowledge, technical assistance and training, transfer of technology, improvement of access to credit, and participation of farmers.

A. Preservation of TK

Interest in the preservation of TK is largely driven by concerns over rapid global loss of TK and cultural diversity. 90% of traditional lifestyles could be lost within the next 100 years.

Modernization and the influence of western education erode support for TK. The rate of absorption of western culture can be higher in some countries than in others.

Actions to preserve TK fell into two broad categories, with a number of cross cutting issues also identified.

1. Actions aimed at Ex situ preservation

These are geared primarily to safeguard existing knowledge from erosion and loss, independent of the communities in which it is held. It may be particularly relevant for TK which is in imminent danger of being lost, for example when a particular culture is on the verge of extinction.

The main tool referred to was various forms of documentation of TK

- Within communities for their own use
- By outside agencies as record against loss
- In national registers for various reasons

Such documentation may also take the form of sectoral cataloguing - for medicine, agriculture, cultural expressions -- including in museums.

A number of existing TK documentation initiatives were mentioned. In the United States, for example, these include:

- The Smithsonian Center for Cultural Life and Heritage
- The Library of Congress
- The Database of Official Insignia of Native American Tribes (DONATI).

Some countries have established or charged Ministries with specific responsibilities for preservation in certain areas, like traditional medicine. Intellectual Property Offices are also intimately involved. Regional collaboration and participation in regional forums is also an important element.

Many of the owners of TK are situated in small, isolated communities far from capitals. They would need to be convinced of the benefits accruing to them from cooperating with others in activities such as providing data for TK databases. Trust building is therefore critical to the success of any national or international TK registries initiatives.

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A major concern with databases revolves around the protection of the information contained therein. TK-holders have little incentive to put their data into databases not controlled directly by them, unless they can be assured that they do not forfeit any of their rights to the TK. There is concern that disclosure of TK in patents and databases could facilitate misappropriate use by third parties.

Some felt that indigenous community-created and -controlled databases are better than creating national level registers. Indigenous peoples would find it very difficult to buy into national or global level registries that would actually hold TK.

The specific need for capacity building in the design and maintenance of appropriate databases as well as in the provision of data for the databases was mentioned. There are opportunities for South-South technical cooperation here.

It was mentioned that TK databases have the drawback that they may involve taking elements of TK out of their natural holistic context and preserving them in a static state.

2. Actions aimed at In situ preservation of TK

These actions are geared to ensuring survival of TK-holding groups as living, economically, socially and culturally viable communities.

Many participants pointed out that it is impossible to separate TK from TK-holding communities. To preserve TK as a living, evolving body of knowledge, it is necessary to preserve the cultural and economic integrity of the communities themselves. *In-situ* preservation should therefore be given more attention than *ex-situ* preservation.

These actions fall into two main categories:

- 1) Actions aimed at preserving and strengthening the TK-holding communities themselves
- 2) Actions aimed at strengthening inter-generational transmission of knowledge

These include the following:

Measures to strengthen cultural integrity, for example:

- Recognition and strengthening of customary law and practices
- Recognition and use of languages, including having media in local languages (for example radio transmissions of stories in indigenous/tribal languages)
- Recognition of land rights and other traditional resource usage and management rights
- Simple obligation by the State to protect the cultural identity of indigenous (and local) communities

Many participants stressed the link with land rights, as TK is inextricably linked with the land. One expert made the analogy that TK is a code and land is the master key. If you separate the code from the master key, you are left with an object in a museum. It should be borne in mind that this is a difficult issue for states as the land claimed by indigenous peoples can account for a large part of national territory--two thirds in one case cited.

Measures to enhancing the economic base of communities, including through community based economic development (see section on “Promoting TK for Development” below)

Measures to preserve the natural environment of the community, around which much of their cultural integrity and subsistence revolves.

Recognition (including, where applicable, professional accreditation) and support (financial and institutional) for TK specialists e.g. practitioners of traditional medicine

Measures to strengthen the intergenerational transmission of TK, for example

- Promoting awareness of the value of TK through the media and public relations campaigns, thus encouraging renewed interest and pride in TK by community youth
- Including TK in formal school curriculums
- Creating tribal educational institutions, from pre-school to university levels
- Training youth in TK, as being done for example by the Honey Bee Network
- Measures to support women and older segments of the populations
- Community-based and -controlled TK databases
- Use of modern technologies such as the Internet to improve transmission among regionally disperse communities and stimulate interest by youth

Regarding the latter, two interesting cases were presented where the Internet was being used by certain tribes in North America to create decentralized databases of TK which can communicate with each other through the use of standard information exchange protocols. Access to the databases is in keeping with customary practices of knowledge keeping and sharing. The Internet platform allows full use of multimedia and interactive technologies.

The Tulalip tribes in the United States, for example, are creating a database where the individual or community entering in the data can determine which user groups have access to which subsets of the information. User groups could be defined, for example, as traditional healers, tribal elders, tribal youth, outside researchers, outside entities with potential commercial interest, patent examiners, and the general public.

The Kaska Nation in Canada is using their TK database to enhance inter-generational transmission of TK by having the community youth interview the elders on their TK to be included in the database.

It was also pointed out that for many indigenous and local communities, TK is connected with rights but also obligations. Elders may in some cases be reluctant to fully share their knowledge with youth if they feel that the latter will not use the knowledge in the proper way.

It was further pointed out that concerns about misappropriation of TK can also lead to less inclination to share knowledge, and thus reduce inter-generational transmission.

Gender and age issues play an important role here. In many countries, women and elders are the first dropped from the priority list for education and support when resources are short, but these groups play a critical role in the transmission of TK.

Establishing a model of bio-cultural conservation was proposed by one expert. This refers to conserving cultural landscapes where biological and cultural diversity interact in a strong manner. This model should articulate/integrate

- biodiversity conservation, including agrobiodiversity
- intergenerational transmission, by including TK into educational curricula
- integrating customary laws into management plans, local protocols, and MOUs.
- local registers (also using non-written media such as video).

3. Cross-cutting issues

A number of cross cutting issues requiring action were also identified, including:

- Mechanism and procedures for effective and extensive consultation
- Capacity building - for both *ex-situ* and *in situ* activities

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- Recognition of the value of TK in a holistic way – economic, social, cultural and spiritual
- Need to overcome disconnection with formal institutions
- Value and place of sharing knowledge, genetic resources
- Nature of legal practice and role of customary laws

B. Protection of TK

Several participants pointed out that cultural heritage is indivisible. TK is an integral part of the life of communities. Protection of TK is linked therefore with territorial rights, resource rights and human rights.

Therefore, some felt that to protect TK, the first requirement is that communities have the right and power to make the crucial decisions over their livelihood resources and management systems. The local context and grassroots level are the most important in this regard.

A number of participants felt that the IPR system as it currently stands by itself is not fully suitable for the protection of TK. IPRs aim at commoditizing/commercializing certain pieces of TK. Moreover, the system is expensive, complicated and very far from the world view of the communities themselves. The cost of overturning a misappropriate patent is prohibitive.

Concern was expressed that exclusivity (along the lines of conventional IPRs) may limit the diffusion of knowledge and its further development while seriously disrupting the customs and practices of local and indigenous communities.

One participant pointed out that some countries have a long history, systematic theory and extensive documentation of their TK, as well as a large professional body of practitioners and industrial support sector. In this kind of situation it can be important to encourage innovations based on this documentation using the IP system and regulations.

One submission to the meeting stated that IPRs, as private monopoly rights were inherently incompatible with the protection of TK. It maintained that the idea of creating an additional IPR system specifically for TK should be "buried for good".

Another participant felt that requirements in IP law, such as disclosure of origin, is the wrong approach, and, instead, there is a need for effective access and benefit sharing (ABS) regimes lying entirely outside of IP laws that are enforced by civil and criminal penalties, for example as in the National Parks legislation in some countries.

Many participants felt that customary law should be the basis of TK protection regimes. Recognition of customary law is essential. The main difficulty here is uncertainty, given the variety of customary law systems around the world. Under customary law, there is no time limit on rights and obligations related to knowledge.

Respect for customary laws and protocols in a broader legal context could be a way to resolve tensions regarding preservation and protection of TK. It was mentioned that under the Canadian constitution, in First Nation (indigenous tribes)-related cases, the court is required to first ask what is the existing customary law and what is common law. This is one way of recognizing customary law beyond tribal territories. Native tribunals and courts also deal with aspects relating to customary law in many countries.

It would also be possible to "hardwire" customary law into prior informed consent (PIC) conditions and benefit sharing in ABS regimes. The challenge is that customary law is inherently bound to the community. They are the "ultimate *sui generis* systems". Geneva-based processes should not attempt

to harmonize these diverse systems. The question was asked whether it is possible to draw broad principles without squeezing it into someone else's template?

Recognition of customary law was highlighted as an area that needed further research and attention.

A couple of participants emphasized the role of treaties between indigenous groups and States to address TK protection. Treaties between the State and indigenous groups exist mainly in a few developed countries with sizable indigenous populations (e.g. Canada, USA, New Zealand), but are much less prevalent in developing countries.

In Canada, for example, the Kaska Nation has a treaty with the government of Canada as well as internal protocols between the seven Kaska communities so that there is consistency in collection and protection. The Kaska Nation is also entering into treaties with other First Nations. Treaties can embody legal and non-legal approaches. In New Zealand, which has a holistic approach, there are 1000 outstanding treaty claims. It was pointed out that a simple obligation by the State to protect the cultural identity of tribes could be a good first step. This could then kick off a treaty negotiation process which would acknowledge that TK is local and site specific.

Many participants spoke of the need for defensive measures to prevent misappropriation of TK.

One of the papers submitted for the meeting argued that the term "misappropriation" is a misnomer. It clarified that what actually takes place is that something which was never private property at all is made into private property, i.e. an appropriation. It argued that the damage persists also after the term of IPR protection expires, as whatever was appropriated does not revert to community management but passes into a public domain status, something which is equally foreign to traditional communities as is private property. Whether as private property or as public domain, whatever was appropriated was irreversibly lost to the community concerned, as its heritage status could never be restored.

The term "public domain" generated considerable discussion among participants. There were several calls for a re-evaluation or redefinition of the "public domain" as concerns traditional knowledge. Several pointed out that this does not fit with the views and customary systems of indigenous peoples. From their perspective, public domain along the lines of western concepts of IPRs, is an alien concept. An indigenous representative explained that from the indigenous perspective, it makes no sense to talk about rights without also taking about obligations for the use of knowledge and resources, and this view is common, if not universal, among indigenous peoples. Although individuals might hold knowledge, their right is collectively determined, and it is rare that individuals have the right to use knowledge in a free and unconstrained manner. They are bound by the laws of their tribe and of the Creator.

It was pointed out that, from an indigenous perspective, the idea of "already disclosed" and "non-disclosed" knowledge is also a false distinction. In indigenous communities, some knowledge is held in secret and other knowledge is shared openly. Open sharing, however, does not automatically confer a right to use the knowledge. Many songs or stories, for example, are held by individuals or families. These songs or stories are performed in public, and may be known by all members of a community. However, the right to sing these songs or tell these stories falls only to the individuals or families who are the caretakers of the Creator's gifts. Even knowledge shared and used widely does not fall into the public domain. When knowledge is shared, it is shared among those who are trusted to know their roles and responsibilities in using the knowledge. Misuse of this knowledge, even when used by others outside of the tribe, can cause severe physical or spiritual harm to the individual caretakers of the knowledge or their entire tribe from their failure to ensure that the Creator's gifts are properly used.

It is for this reason that indigenous peoples have generally called for the protection of knowledge that the Western system has considered to be in the "public domain", as it is their position that this knowledge has been, is, and will be regulated by customary law. Its existence in the "public domain"

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has not been caused by their failing to take the steps necessary to protect the knowledge in the Western IP system, but from a failure of governments and citizens to recognize and respect the customary law regulating its use.

The idea of the "paying public domain" as exists in copyright law was also deemed worthy of further exploration. It was mentioned that Peru had incorporated such a provision in its *sui generis* TK legislation.

One submission indicated that the protection of collective rights should not curtail the rights of individuals.

It was pointed out that 30-40 countries had already embarked on establishing *sui generis* protection of folklore, which is a component of TK as broadly defined. There are a number of lessons to be learned from these endeavors. In many countries, existing provisions, for example for copyright, are not effectively used. There was a need for a comprehensive approach, encompassing both legal and non-legal measures.

One participant felt that TK protection legislation would need to include:

- Criteria for protection
- Conditions
- Scope of rights and exemptions
- Identification of rights holders
- Expiration or loss conditions
- Enforcement mechanisms

A number of possible national level actions that could be taken to protect TK were mentioned by participants, including the following:

1. Actions aimed at the defensive IP protection of TK.

Defensive IP protection of TK refers to preventing inappropriate IPR's being granted to third parties.

- Making information on TK available to patent and trademark examining offices.

For example, in the United States the database of the official insignia of tribes is used by trademark examiners. The Indian Traditional Knowledge Digital Library provides patent examiners with information on traditional Indian medicine which has been extensively documented for many years.

- TK registries and documentation, in support of the above
- Legal requirement to disclose the source of origin of genetic resources and associated traditional knowledge in relevant patent and other IPR applications. Evidence of PIC and BS could also be requested.

It was mentioned that this requirement had already been implemented in at least one region, and there had been no problems reported to date. Another participant thought that this was the wrong approach. (See further discussion in "International Dimensions" below).

- Development and adoption of voluntary guidelines, protocols and best practices on disclosure of TK used in inventions.
- Redefinition of the "public domain" as concerns traditional knowledge

- Establishment of an IP Information System

This could allow communities to access existing IP information in their own language and in a manner that is accessible to them close to their place of residence. They could scan databases for unauthorized use of their TK.

- Legal assistance to local communities to file objections
- Development of a low transaction cost IPR system (possibly revolving around a registry), which provides incentives to individuals and communities to disclose their TK
- Ban on patenting of living organisms

One participant stressed that this would tackle the root problem at the source where inappropriate IPRs are granted.

- Declaration of TK and derivatives as non-patentable matter

2. Actions aimed at positive IP protection of TK, including:

Positive IP protection can serve to prevent the unauthorized or inappropriate use of TK, particularly by third parties

- Recognition in national legislation or governmental decree that local and indigenous communities are the owners of their TK
- Recognition of customary law in the broader legal context
- For TK associated with genetic resources, inclusion of provisions in ABS legislation requiring the PIC of the TK-holding communities in accordance with their customary laws
- Truth in advertising laws to prevent misrepresentation

The Indian Arts and Crafts Act of the United States was mentioned, whereby those selling unauthentic products that claim to be made by American Indians or particular tribes can be fined or sent to jail.

- Tort of misappropriation

With this, remedies can be sought for the unauthorized, improper or unlawful use of property for purposes other than that for which it was originally intended. Such a tort exists, for example, in the United States.

- Use of conventional IPR instruments by the communities, including as preventive measures (e.g. patents, geographical indications, trademarks, copyright, design, etc.)
- Adaptions of conventional IPR instruments to better meet the needs of TK-holders, for example:
 - Collective rights
 - "Secret patents", whereby TK could be protected without being fully disclosed

This could follow, for example, the lines of IPRs in military matters which due to national security concerns are not fully publicly disclosed, or software patenting, where the source codes are not revealed but full positive protection is provided.

- Criminalization of biopiracy
- Use of contracts, including clauses on TK and its use

One participant strongly supported this approach. Another mentioned that in one region indigenous communities currently had the right to license their knowledge to third parties, but that this was not working particularly well. A third participant stressed the need for capacity building of and legal assistance to communities to negotiate contracts.

- Requiring the PIC of TK-holding communities for publishing their TK
- Enforcement mechanisms
- Requirement to seek permission to export folklore/traditional cultural expressions products

This is a requirement in Kenya, for example.

- Direct regulation outside the IPR system
- *Sui generis* TK database, where putting TK into the database actually constitutes establishing a legal claim over the TK
- New *sui generis* systems, to be explored

3. Actions aimed at promoting benefit sharing with TK-holders
(discussed further under section on promoting TK for development)

- Use of contracts
- For TK associated with genetic resources, inclusion of provisions in ABS legislation requiring the benefit sharing with TK-holding communities for commercialization of products derived from their TK.
- Paying public domain

The need for capacity building for both states and communities was emphasized by many. The shortage of legal draftsmen in many developing countries was particularly highlighted.

C. Promoting TK for Development

As stated in one submission, TK is used at the local level by communities as the basis for decisions pertaining to food security, human and animal health, education, natural resources management, and other vital activities. It is a key element of the social capital of the poor and constitutes their main asset in their efforts to gain control of their own lives. For these reasons, the potential contribution of TK to locally managed, sustainable and cost effective survival strategies should be promoted in the development process.

TK can play an important role in achieving the Millennium Development Goals, including those related to poverty and hunger eradication, improving health, ensuring environmental sustainability, promoting the empowerment of women, and building a global partnership for development.

It is important to raise awareness at all levels, from local to international, of the vital role that TK plays in development.

It is also important to integrate TK into national strategies. In Uganda, for example, TK has been integrated into Uganda's Poverty Eradication and Action Plan. Having a national champion can be important here.

Incorporating TK into development project design, implementation, monitoring and evaluation can greatly increase project impact, effectiveness and sustainability. Participation of communities can increase their sense of empowerment, a key objective of many development projects. Incorporating existing community institutions and appropriate indigenous technology increase cost-effectiveness and sustainability. A number of examples of this were presented. There were some calls for establishing more development projects using TK (e.g. nutraceuticals, designs) and to include TK into environmental impact assessments.

It was also stressed that actions in this arena should be based on respect of the communities as well as their knowledge and world views.

1. Actions aimed at promoting the use and further development of TK, including TK-based innovations

Actions to promote the use and further development of TK include actions aimed at:

- supporting TK-holding communities (addressed under *in situ* preservation of TK, above)
- promoting TK-based innovations
- facilitating communication and sharing of TK among TK-holders
- enhancing interaction between TK and other knowledge systems
- encouraging research on TK-related matter and involving TK-holders

It was pointed out that any *sui generis* regime for the protection of TK should stimulate the diffusion of TK-based innovations and the access thereto by the population, especially the poor.

It is accordingly important that measures aimed at the protection of TK and other forms of IPRs do not stifle information sharing, innovation and research.

A number of measures to stimulate innovation were mentioned.

It is important to give incentives both to communities as well as individuals.

In one case, the use of prizes for grassroots innovators has created both monetary and non-monetary (e.g. recognition) incentives.

The education system can help to create an innovation ethic among youth.

It was pointed out that indigenous innovation, while sometimes associated with a profit motive, more commonly comes as an expression of a deep interrelationship between tribal members, their Creator and their homelands.

In countries such as China, with a well-documented body of TK, conventional IPRs such as patents have been used successfully to stimulate further TK-based inventions, particularly in the area of traditional medicine.

Many participants stressed the importance of increased communication among TK-holders, lateral learning and sharing of experiences.

As stated in one submission, isolation of communities from one another has meant an increase in their cost of learning. The possibility of pooling best practices to generate optimal solutions to common problems is a kind of benefit which local communities might cherish a great deal.

Such lateral learning can take place

- Between communities (community-to-community exchanges, as facilitated successfully by the World Bank Indigenous Knowledge Programme)
- Through networks of practitioners (at national, regional and international levels)
- Among NGOs
- Among countries, within and across regions

Communication can take place face-to-face and/or through modern communication technologies including the Internet and e-mail. The latter can be important in creating the links between global and local knowledge.

Institutional linkages and multistakeholder dialogues at the national level were also identified as important for improved communication.

In several countries, TK practitioners are setting up schools to share and further develop their knowledge (e.g. traditional medical practitioners' school in Kenya; traditional farmers school in India)

Several participants stressed the importance of research on TK. Scientific validation of TK could be one aim of such research. This is particularly important in the case of traditional medicinal products. Funding for such research is of key importance. In South Africa, for example, the Department of Science and Technology has been providing funding of R10 million per annum for research in indigenous knowledge systems since the year 2000.

It is important that the results of any research and development on TK are shared with the TK-providing communities, so that they too can benefit from any new knowledge created. The PIC of the TK-holders should be sought prior to conducting research on their TK.

Collaborative research provides particularly interesting possibilities. The interface between TK systems and other knowledge systems (e.g. "western science") is fertile ground for innovation. In Ethiopia, for example, collaboration between traditional farmers and research institutes produced a series of "elite landraces" which outperformed their high input variety agricultural counterparts. In other cases, interaction between traditional healers and medical doctors has led to new cost-effective solutions to health concerns. Including TK into collaborative research on ecosystem assessment and pollinators was also mentioned.

2. Actions aimed at enhancing community livelihoods through sales of TK-based products

Registries of TK can provide a means to assess TK of potential commercial value as well as to interest potential investors and partners.

Innovation incubators can help to scale up innovations into viable commercial products.

One submission pointed out that the value chain of innovations beginning from scouting, validating, value addition, product and enterprise development, IPR protection, licensing and dissemination requires a whole range of institutional innovations which are absent in most of the developing countries.

This submission called for the development of a low cost IPR protection system which would provide incentives to individuals and communities to disclose and share their TK. It further states that in a globalizing economy, grassroots innovations, if properly supported by formal science and technology

and financial institutions, can provide a basis for achieving competitiveness and excellence as a means of dignified survival.

Several pointed out that the benefits to communities from sales of TK-derived products would be greater the more they are involved in the production of these products and the more they move up the value-added chain. Thus, community-based development is key.

One participant pointed out that since indigenous communities are tied to their land, it is important to bring economic development opportunities to them there, as opposed to forcing them to migrate and thus eroding their cultural identity.

Increasing the value-added that stays in the community or country requires development of local productive capacity and support to indigenous and other community-based enterprises. The need for capacity building to build productive or supply capacity was emphasized.

There are a number of policies and measures that governments can take to support this, including:

- Business development support programmes (most countries have support programmes for small and medium sized enterprises (SMEs), but very few have a specialty in indigenous and community based SMEs) that include training and business services (accounting, marketing, etc)
- Access to finance (small businesses with new products face increased challenges in finding finance)
- Technical assistance in new product development and meeting international product standards
- Assistance with scientific validation of TK-based products
- Technology transfer
- Accreditation of traditional practitioners
- Market access, information and creation for primary, semi-processed and processed products
 - The Internet offers new opportunities for promoting TK-based products.
 - It was noted that in the United States, for example, the Indian Arts and Crafts Board assists in indigenous product promotion.
 - Another example: in Thailand the product promotional campaign of "one province, one product" has proven quite successful for TK-based products.
 - The role of fairtrade markets should be further explored.
- Facilitating partnerships among community-based SMEs, thus allowing for economies of scale, joint marketing and sales, etc.
- Facilitating partnerships between SMEs and TNCs (foreign direct investors)
On partnerships, it was noted that it is very important to choose the right TNC, one that is committed to technology transfer and knowledge sharing. There also must be mechanisms in place to protect the SMEs given their unequal bargaining power.

It was suggested by some that UNCTAD produce a handbook of good practices on how the government or meso institutions can take a proactive role in establishing policies and programmes for the development of TK based products and services. Policies and support programmes in Brazil, Canada, China, Costa Rica, Guatemala, South Africa and Thailand deserve further investigation.

Regarding ABS issues, several stressed the importance of national ABS regimes. Benefit sharing with TK-holding communities could be included in these regimes. Other voices warned that ABS regimes must be carefully designed and not too heavy and cumbersome; otherwise they might stifle research and investor interest.

Dispute settlement mechanisms and procedures are also needed.

The role of contracts in benefit sharing was highlighted by some. In some cases the State could negotiate with prospective users, particularly when the TK-holding communities lack the capacity to

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do this or when the owners of the TK are not easily identified. Benefit sharing with the TK-holders could then be a separate but linked process. This has the advantage of speeding up the contract negotiation process. Another participant felt that high levels of trust between indigenous and local communities and the State would be a precondition for this approach to work well.

It was pointed out that for indigenous peoples, commercialization of TK is a controversial topic. Some are keen to use their TK to enhance livelihoods. Others are not interested in commercialization at all. Sacred knowledge is universally off-limits for commercialization. There is currently no mechanism for them to work out these controversial issues. New indigenous institutions were needed.

It is also important to avoid over-harvesting and depletion of natural resources.

The link with protection was stressed by several. Some felt that TK must be protected prior to commercialization.

One emphasized the risks involved in commercialization without

a. legal protection and

b. a support system that will promote community or indigenous based commercialization.

Otherwise the TK will suffer the same fate as oil, gas, and other natural resource development in developing countries. The foreign investors come, exploit and "leave a big hole in the ground", the expert argued. In the meantime, the local communities are completely disrupted. The indigenous/local communities have to be fully involved in any commercialization activities.

Improper IPRs claimed by third parties, both domestically and internationally, can have a negative impact on the development prospects of TK-holding communities. The example was given of Cupuaçu, an Amazonian fruit used in Brazil to make a number of fruit products. A firm in a developed country registered the name of the fruit in IP offices as a trademark. As a result, some exporters of Cupuaçu jam have had difficulties in exporting to those markets. This poses a threat to the well-being and preservation of the native communities who could benefit from the sustainable use of this resource.

IV. International Dimensions

There were a number of interesting ideas discussed relating to the international dimensions of TK protection.

Several pointed out that there was an urgent need to act in this area as TK is disappearing at a rapid rate. Soon, there would not be much, if anything, left to protect. It was pointed out that 5,000 languages in Africa currently risk extinction.

Many participants felt that it is important to have international measures in place. The main reasons for this include:

- National legislation cannot be implemented outside the country unless there is an international agreement to support it.
- Countries face constraints from Article 27.3(b) of TRIPS
- Countries may be allowing patenting of other countries knowledge
- It is difficult to track and enforce agreements with third parties in foreign countries.

As mentioned above, there is considerable diversity in national TK systems. No one suggested harmonization of these systems. It was emphasized that national systems need to be adapted to local conditions and priority aspirations. For example, there is considerable difference between Asian and African countries.

One submission stated that given the diversity of possible approaches and the need to respond to different cultural and ethnic realities, a unique model for the protection of TK is unlikely to emerge in the near future. This may make it more difficult to develop international rules on the matter, unless they focus on very specific objectives and issues, such as preventing misappropriation.

One participant felt that the fear of misappropriation might have been driven by recent patenting activity. To remedy this, he suggested the possibility of excluding patenting of life, including micro-organisms. He felt there was a need for this to be addressed at the international level because existing international agreements like TRIPS have constrained countries' flexibility in implementing these solutions.

The importance of opening dialogue and building trust within and among States was stressed by some.

The fundamental principles of most favored nation, national treatment, reciprocity and mutual recognition were raised.

One submission to the meeting succinctly defined these principles as follows:

- *National treatment*: an eligible foreign right holder should enjoy the same rights as domestic national
- *Reciprocity*: whether a country grants protection to nationals of a foreign country depends on whether that country in turn extends protection to nationals of the first country; the duration or nature of protection may also be determined by the same principle.
- *Mutual recognition*: a right recognized in one country would be recognized in a foreign country by virtue of an agreement between the two countries
- *Most favored nation*: a key element of international trade law, whereby any advantage, favor, privilege or immunity granted by a [WTO] Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

On national treatment, it was pointed out that it allows diversity to flourish but doesn't recognize diversity everywhere.

One stressed that reciprocity, as in the WIPO-UNESCO model provisions on folklore of 1982, is the best way forward. Another felt that reciprocity, as established in some regulations, may provide the basis for extra-territorial recognition of TK protection, but only to a limited extent given the diversity of modes of protection and the nature and scope of rights. A third participant pointed out that from the indigenous perspective, reciprocity may apply between their tribe and national systems or among tribes.

Several felt that an international system may be more realistically based, at least in the short term, on a basic agreement on some essential elements of TK protection and the mutual recognition of the regimes in force at the national or regional level.

Various views were expressed on mutual recognition. One expert thought it worked well in investment treaties and sales of goods and services where it does not advantage an outside player, but rather gives access to markets. It is different in the case of "rights". If national rights regimes are different, it could be divisive and the systems with stronger rights regimes would benefit more.

It was further proposed that states should proceed on the basis of memorandums of understanding (MOUs) because they allow a gentle probe of other countries' sovereignty concerns and have been successful in other contexts. Others pointed out the limitations of such an approach, as MOUs are generally bilateral and thus costly to negotiate. It can take as much effort to try to make sure that an MOU is non-binding as to negotiate a binding arrangement.

Some proposed starting with guidelines, protocols and soft law and building towards hard law. The paradigm of an enforcement pyramid was suggested, starting first with soft law and guidelines, building trust and acting out of mutual respect; if that does not work, one moves to the second step of legally binding provisions with threats; and finally with penalties. One participant remarked that empirical data show that with enforcement pyramids, guidelines become more effective.

It was also pointed out that patent offices regularly develop guidelines. It would be possible for them to meet and develop guidelines on what to look for as regards declarations of origin. These guidelines could be made available to the biotech industry and others so that they would know what is expected.

Others felt strongly that there was a need for a legally binding international instrument now, and that guidelines and similar instruments do not work, particularly with "non-virtuous" actors.

Participants self-declared themselves to be "treaty people" or "non-treaty people". Some felt treaties can trigger important evolution for a set of principles. Some existing treaties seem disappointing in the beginning, but later had increasing impact. One participant stressed that for a treaty to be effective, it is important to create an enforcement agency right away.

Several pointed out that it is possible to develop international treaties before national systems are in place. When the TRIPS agreement was adopted, many countries did not have full-fledged IP legislation. TRIPS has spurred WTO members to develop legislation to meet their obligations. Similarly, an international TK treaty could spur and guide national TK systems.

One expert noted the vast differences of opinion that exist between governments, but also among indigenous peoples. It may not be possible to enter into a treaty incorporating a more uniform agreement at the international level at this time. He thought that it would be better to take the time to find the right areas of agreement.

Another expert pointed out that the IP system itself has always been willing to accommodate different interpretations of general principles.

One stated that it was unlikely that an international framework would result in levels of protection that would be regarded as ideal by TK-holders, but it could provide incremental progress.

One submission outlined some core elements of the international dimension of current IP law. These are recognition of national treatment; overall independence of rights granted under different national laws; national discretion to implement international standards through a variety of legal doctrines and mechanisms; a focus on practical hurdles faced by foreign right holders; and a need for administrative coordination.

This submission also identified a range of options related to norm-building at the international level, including

- a binding international instrument or instruments
- a non-binding statement or recommendation
- guidelines or model provisions
- authoritative or persuasive interpretations of existing legal instruments
- an international political declaration espousing core principles and establishing the needs and expectations of TK holders as a political priority.

One expert remarked that national patent offices are overloaded with patent applications, particularly biotech patents.

As a solution to this, one called for a moratorium on biotech applications. Another called for the creation of a Global Biocollecting Society, which could help with guidelines, track patents, and help

patent offices by taking over TK-related patents. It could be self-funding. Another expert pointed out, however, that this would be difficult when compared to collecting societies in the area of artistic works since the musical works have relatively lower production costs and shorter production cycles.

Some thought that a Global Biocollecting Society could buttress a legally binding disclosure mechanisms.

The disclosure idea naturally generated quite a bit of debate. One expert suggested that disclosure would unnecessarily burden the patent system, negatively impact innovation and undermine development and benefit sharing. Another asked, whose development? One participant thought this could add uncertainties and increase conjectural costs. Another pointed out that many countries have this already in their national legislation and there have been no problems reported to date. It has proven to be an affordable and feasible solution and has not created conflicts. The disclosure requirement puts the burden to state the origin on the patentee, as he knows best where he acquired it. It is not so difficult for patent offices to do this. It makes the legal link between the requirement and enforcement that is missing at the international level.

One participant stated that the proposal for disclosure/certificate of origin would provide a set of rights and obligations to applicants, both ceilings and floors. A key question is whether countries would be willing to enforce foreign rights. There are precedents in the IP system. The IP law principle of territoriality has exceptions, for example, in the area of geographical indications and trademarks. Under the Paris convention, trademarks duly registered in one country shall be accepted for filing in other countries, and well-known marks should be protected even if not registered. There are also exceptions/conditions where the accepting country can say no (i.e. derogation from extra-territoriality). These exceptions allow a safety valve, as there are some rules in other countries that might be very difficult for another to accept because they are so far from what is acceptable value-wise. On the other hand, there may be some types of rules in other countries that would be fairly easy to accept.

The case of marriage contracts was brought up as an illustrative example. Most states recognize contracts of marriage even where they don't comply with their own laws. But recently, there was a case where one state (sub-national jurisdiction) in a large country decided to recognize same-sex marriages, but other states in the same country declared that they would not recognize them.

In the case of TK, it is important to ask, what are the common values and what are the values that are so far apart that they cannot be accepted?

Some participants felt it would be important to identify and agree upon a set of core principles. One participant suggested a number of principles that could be included in this set. These included the need to recognize ownership and control over TK; that TK should benefit the rights holders and communities; that individual innovation should also be encouraged; prior informed consent; and equitable distribution of benefits.

Several emphasized the need for an enforcement agency, coupled with enforcement capacity. For international arrangements to work, there must be enforcement agencies at national level acting as their custodians. Without a clearly identified national champion, enforcement "falls through the cracks". Thus enforcement should be part of the system itself.

The need for formal and/or alternative dispute settlement mechanisms or procedures was also mentioned.

There was some reflection and various views expressed about whether to continue to try to take a global consensus approach or whether interested countries should move ahead on their own. It was pointed out that historically it was rather unusual for the *demandeurs* to sit and discuss at length with those who have no interest in the issue. It was also mentioned that some countries currently favor

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bilateral approaches to IP in general. Some felt that as the *demandeurs* are weak, having a consensus treaty may not be worth having.

It was clarified that in WIPO the texts of past treaties have been worked out in committees and then adopted in diplomatic conferences. It was also observed that in WIPO a consensus approach is favored, although WIPO treaties themselves are generally plurilateral (i.e. not all WIPO members sign and ratify them).

Another participant stated that some indigenous groups would view an international treaty that only dealt with access to TK and ownership with some concern. TK is critical for the daily survival of indigenous people and others living in rural areas, 70% of whom live on less than one US dollar per day. There is a big gap between customary law at the local level, and the international level.

Some felt that the TK issued had been "hijacked by IP lawyers" and that the nature of TK and how indigenous people protect TK had been left out. Indigenous communities valued free access, free flow and the livelihoods of their peoples. Without protection of the land, the knowledge cannot be protected. It is important to protect the practices and social structure of the communities. It is vital that protocols contain customary law. Otherwise communities do not really invest in it. There is currently no declaration that indigenous people are owners of their knowledge and this needs to be rectified. A country case was cited where it was only after constitutional recognition of this ownership right that the government took the issue seriously. Some felt that a number of countries pay rhetorical lip service to this idea, but do not really implement it domestically. Any international treaty needs to affirm and recognize that such a right to ownership exists.

On land rights, the idea was floated to set up a review mechanism where every year a number of states would go before a review panel of "the great and the good" and indicate what they have done as regards indigenous people and land. This would give indigenous people a window of transparency on the land issue. Treaty review exists, for example, in the WTO and the ILO.

One participant stressed the need to include TK in the minimum documentation for patent and trademark searches. Progress on this was being made at WIPO.

It was pointed out that various groups of indigenous peoples are documenting their knowledge for their own purposes. These registries have multiple layers – public, private and so forth. It was suggested that a patent prior art layer could be added to these databases. These would be accessible only to patent offices and possibly registered corporations, whose movements through the databases could be tracked. This layer could contain just enough information to trigger a further search.

One submission called for the creation of a registry of sacred marks at the international level coupled with a general agreement that names and signs associated with God and goddesses venerated by any culture would not be allowed to be used in a disrespectful manner by another.

The same submission called for the creation of an international registry of sustainable technological innovations (INSTAR). The purpose would be to provide a low transaction cost system to innovators and TK holders to obtain worldwide protection and have incentives for disclosure.

One expert asked whether existing TK-holding organizations that manage and enforce rights over TK, such as the Honey Bee network, could offer lessons on where the bottlenecks and advantages are.

As discussed above, many participants felt there was a need for a re-evaluation and redefinition of the public domain in relation to TK.

Some participants also stressed the need for a universal novelty concept. This was a gap in WIPO's work. The patent laws of certain countries legally allow the appropriation of TK in use elsewhere in the world. Universal novelty standards could reduce tensions regarding "biopiracy".

It was further highlighted that much information acts as an input in innovation processes. So its value is conjectural and difficult to assess. Demand for that information will be sub-optimal due to the uncertainties.

Some suggested the creation of regional patent offices, where national patent offices would become branch offices. Europe is moving toward this approach. Some pointed out that this would make a lot of sense for smaller economies, where the relative costs of setting up IP offices, for example to implement TRIPS agreement obligations, are very high. (Think, for example, of a country with a population of 15,000) It would make more sense for such countries to invest those resources in health and education. On the other hand, some pointed out that some countries would find it hard to give up jurisdiction over patent examinations, particularly when it might imply jobs being lost.

The idea of extending fair trade-type labeling to TK-based products was suggested for further exploration. It could build on people's concern to "do the right thing".

The question of forums was raised. It was pointed out that most small island states were CBD members but not so many were WTO members.

It was suggested that an international protocol could be set up under the CBD to prevent misappropriation or the breaking of national laws.

At the WTO, it had also been suggested by some that the TRIPS Agreement could be amended to require disclosure in patent applications of the source of origin of genetic resources and traditional knowledge, as well as evidence of PIC and benefit sharing. Removing the requirement to patent micro-organisms was also suggested by one participant.

WIPO's work and role were also discussed. The new mandate of the IGC was presented, which requires the IGC to accelerate its work, and to focus in particular on the international dimension of intellectual property and genetic resources, TK and folklore. The new mandate excludes no outcome for the IGC's work, including the possible development of an international instrument or instruments in this field.

The presenter pointed out that the IGC had done a lot of work to understand the existing situation. As a result of the IGC's work, major patent offices are undertaking revisions to take TK into account in patent examinations, he said. Its work had also generated reflection upon the core principles of IP law, such as the public domain. Now the challenge is to distill this down to key decision-making points. Challenges for coordination include making progress on substance, procedure and political consensus.

One submission argued that the WIPO IGC should focus on reviewing current national IPR systems and international IPR treaties with a view to identifying what changes are needed to eliminate damage caused by these systems, so as to stop their interference with customary law systems and farmers inherent rights.

One participant stressed the importance of avoiding duplication across forums. Others felt that each forum addresses the issue from different and equally valid perspectives. In UNCTAD, for example, the trade and development aspects can be addressed and a holistic approach taken. Another participant highlighted the good working relations between the secretariats of WIPO, CBD, UNCTAD, UNESCO and FAO and pointed out that this is a very practical way to avoid duplication and harness potential synergies.

V. Areas for Further Research

A number of key areas for future research were suggested by individual participants, both in the course of the meeting and in participant evaluations forms. These included the following clusters of issues:

- Redefinition of the concepts of public domain, prior art, novelty, etc. in relation to TK
- Further work on elements of national *sui generis* systems for the preservation, protection and promotion of TK
- Exchange of experiences and compilation of case studies on success stories related to these objectives
- Means of recognizing and strengthening customary law
- Sustainable usage and commercialization of TK, such as traditional medicines
- Deeper analysis of the implications of trying to derive rewards for the benefit of TK-holders (commercialization versus monopoly and depletion)
- Potential role of fair trade labels in promoting trade in community-produced TK-derived products
- Best means for TK-holders to use existing IPR and other measures to their benefit
- Analysis of issues related to an international framework
- Cross-border territoriality
- How to formalize the legal relationship between national and international systems
- Erosion of TK and cultural heritage
- Land rights within the context of indigenous peoples
- Disclosure requirement: pros and cons
- Development dimension in IPRs, in particular as regards TK protection
- How to move forward expeditiously in an effective manner
- How to ensure the effective participation of small States in the various activities and systems/institutions that may evolve.

ANNEX 1: Programme²

UNCTAD-Commonwealth Secretariat Workshop³ on Elements of National *Sui Generis* Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework

Room XXV, *Palais des Nations*, Geneva

	Wednesday, 4 February 2004	Thursday, 5 February 2004	Friday, 6 February 2004
10.00 - 13.00	<p>Opening by Lakshmi Puri, Director, International Trade Division, UNCTAD, and Roman Grynberg, Deputy Director, Economic Affairs Division, Commonwealth Secretariat</p> <p><i>Tour de table</i> of participants</p> <p><i>Overview presentation</i> by Sophia Twarog, UNCTAD</p> <p>Chairman: Geoff Tansey, QUNO</p> <ul style="list-style-type: none"> • Actions to Preserve TK • Actions to Protect TK 	<p>Chairman: Debrata Saha, Permanent Mission of India to the U.N.</p> <p><i>Presentation:</i> Peter Drahos, Australian National University</p> <p>Discussion</p> <p><i>Presentation:</i> Graeme Dinwoodie, Chicago-Kent College of Law</p>	<p>9:30 - 10:30</p> <p><i>Breakout groups</i></p> <ul style="list-style-type: none"> • Preservation and Promotion for Development • Protection <p><i>Wrap up</i> Chairman: Geoff Tansey, QUNO</p> <p>Reporting back to the plenary of the break out groups Initial comments on draft meeting reports Concluding remarks Close of meeting</p>
15.00 - 18.00	<ul style="list-style-type: none"> • Actions to Protect TK, continued • Actions to Promote TK for Development <p><i>Presentations:</i> Siddhartha Prakash, Indigenous Knowledge Programme, World Bank Perumal Vivekanandan, SEVA & Honey Bee Network</p>	<p><i>Presentation:</i> Antony Taubman, WIPO Secretariat</p> <p>Discussion</p> <p><i>National Actions, cont'd</i> <i>Presentation:</i> Carlos Correa, University of Buenos Aires</p>	

² This programme has been adjusted to reflect the actual timing.

³ The workshop was organized in collaboration with the Quaker United Nations Office (QUNO).