

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

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LIST AND BRIEF TECHNICAL EXPLANATION OF VARIOUS FORMS IN WHICH TRADITIONAL KNOWLEDGE MAY BE FOUND

Document prepared by the Secretariat

1. At its sixteenth session, held from May 3 to 7, 2010, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') decided that the Secretariat should "prepare and make available [...] as an information document for the next session of the Committee, a list and brief technical explanation of various forms in which traditional knowledge may be found (such as 'codified'/'non-codified', 'disclosed'/'non-disclosed')".¹
2. By way of some background to this decision, the proposal for such a document had been made by a delegation during the session concerned. In introducing the proposal, the delegation stated that "traditional knowledge had different meanings for different people in different fora. For the purposes of the work of the Committee, the current definition of traditional knowledge and the criteria for eligibility would benefit from an in-depth debate aiming at a better qualification, drawing a line between what would fall under the scope of the international instrument and what will be left outside. As a first step towards reaching an internationally agreed working definition, the [delegation requested the Secretariat to] complement the gap analysis carried out with an analysis of categories of the different manifestations of traditional knowledge. Such categorization would respond to the different ways in which such traditional knowledge was maintained and transmitted, publicly available or publicly accessible, under the direct control of the indigenous and local communities or not, already in the public domain but not previously commercialized,

¹ Draft Report of the Sixteenth Session (WIPO/GRTKF/IC/16/8 Prov 2.)

among other issues. The one-size-fits-all model of protection for one type of traditional knowledge had to be abandoned. Each of those categories might require a different consideration in the kind of protection received as decided by each country.”²

3. Pursuant to the above decision, the Annex to the present document is a list and brief technical explanation of several forms in which traditional knowledge may be found. The preparation of the Annex presented several challenges for the WIPO Secretariat as it required an expertise going beyond the field of intellectual property. Moreover, traditional knowledge systems are inherently complex, varied and dynamic, and they find expression in diverse forms, some of which are relevant to an intellectual property analysis and others perhaps less so. Some of the terms used might have different meanings and connotations in law and in other disciplines, and in various languages. The Annex is, therefore, neither necessarily comprehensive nor exhaustive. To facilitate a reading of this document, the Appendix to the Annex comprises a brief glossary of certain of the terms as used in this document.
4. The terms “publicly disclosed”, “public domain”, “publicly available” and “publicly accessible” are referred to in this document. However, these terms are discussed in more detail in another document prepared for this session, namely the “Note on Meanings of the Term “Public Domain” in the Intellectual Property System with special reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore” (document WIPO/GRTKF/IC/17/INF/8), which is, therefore, also relevant to the present document.

5. *The Committee is invited to take note of this document and the Annex to it.*

[Annex follows]

² Intervention of the Delegation of Spain, on behalf of the European Union and its Member States. See Draft Report of the Sixteenth Session (WIPO/GRTKF/IC/16/8 Prov. 2)

ANNEX

LIST AND BRIEF TECHNICAL EXPLANATION OF VARIOUS FORMS IN WHICH TRADITIONAL KNOWLEDGE MAY BE FOUND

INTRODUCTION

What is “traditional knowledge”?

1. Provisions regarding traditional knowledge exist in some international treaties and other instruments. Article 8 (j) of the Convention on Biological Diversity (CBD) refers to “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”¹, the Nagoya Protocol (to the CBD) on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization refers to “traditional knowledge associated with genetic resources”², the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003 is related to intangible cultural heritage³, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005 is related to the protection and promotion of the diversity of cultural expressions⁴, whereas Article 9.2 of the International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agricultural Organization (FAO) deals with protection of traditional knowledge relevant to plant genetic resources for food and agriculture⁵. Several international declarations, such as the United Nations Declaration on

¹ Article 8 (j) of the CBD states that “[e]ach Contracting Party shall, as far as possible and as appropriate: ... (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; ...”

² The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity was adopted at the 10th Conference of Parties (COP) of the CBD. See Preamble 20-24 and Article 5 *bis*. Advance unedited text of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity is available at <http://www.cbd.int/cop/cop-10/doc/advance-final-unedited-texts/advance-unedited-version-ABS-Protocol-footnote-en.doc>

³ Article 2(1) of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003 defines “intangible cultural heritage” as “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”. It is available at http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html

⁴ Article 4(3) of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions defines “cultural expressions” as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content”. It recognizes the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion. It is available at <http://www.unesco.org/new/en/unesco/themes/2005-convention/the-convention/convention-text/#I>

⁵ Article 9.2 of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture provides that “[t]he Contracting Parties agree that the responsibility for realizing Farmers’ Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each

the Rights of Indigenous Peoples, and regional and national laws deal with the protection and promotion of traditional knowledge.⁶

2. “Traditional knowledge”, as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (traditional knowledge in a general sense or *lato sensu*).⁷ In other words, traditional knowledge in a general sense embraces the content of knowledge itself as well as traditional cultural expressions/expressions of folklore (TCEs), including distinctive signs and symbols associated with traditional knowledge⁸.
3. In line with the Committee’s practice, “traditional knowledge” is used in this Annex in a narrower sense (traditional knowledge *stricto sensu*) to refer to knowledge as such, in particular the “content or substance of knowledge resulting from intellectual activity in a traditional context, [including] the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations”⁹. The acronym “TK” will be used in the rest of this Annex to denote this term.
4. While this Annex refers to TK in this narrower sense and not directly to TCEs, TCEs are themselves a form of TK: for example, as some of the examples below illustrate, TK related to the production of a traditional creative artifact is embodied and manifested in the design, appearance and artistic form of the artifact. This points to the close relationship between TK and TCEs. TCEs are, therefore, a “form” in which some TK is embodied. TCEs are, however, addressed distinctly but in a complementary manner by the Committee.
5. TK can be found in a wide variety of contexts, including, but not limited to¹⁰:
 - dispute-settlement processes and methods of governance, including traditional formal and informal conflict management systems, and traditional customary law related to authorities, norms and institutions concerned with property rights of TK, and traditional indigenous and local and customary systems of decision-making;
 - TK related to traditional architecture and traditional building techniques;
 - TK related to TCEs, but not TCEs themselves, such as TK related to traditional designs, icons, and symbols that are representative of specific indigenous and local communities or of groups within these; TK related to traditional music, arts, performances, rituals and traditional fabrication and use of instruments or products

[Footnote continued from previous page]

Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers’ Rights, including: (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture; ...”

⁶ A selection of national and regional laws, regulations and model laws on the protection of traditional knowledge is available at <http://www.wipo.int/tk/en/laws/tk.html>

⁷ The Protection of Traditional Knowledge: Draft Gap Analysis: Revision (WIPO/GRTKF/IC/13/5(b) Rev.), page 23 of Annex I

⁸ Traditional Knowledge: Policy And Legal Options (WIPO/GRTKF/IC/6/4), page 28

⁹ Article 3 of the Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/17/5)

¹⁰ See WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge”. The entire report is available at <http://www.wipo.int/tk/en/tk/ffm/report/index.html>

that are identified to particular indigenous and local communities; TK related to traditional dress, customs, and corporeal accessories identified to particular indigenous and local communities; TK related to material culture and handicrafts production; and TK related to artifacts;

- traditional methods of hairstyling and body decoration and modification, and traditional designs and methods in jewelry, stonework, metalwork, woodwork, etc;
- food preservation, processing and conservation methods, such as traditional methods of preparing food and drinks, meat-cutting techniques, and traditional recipes;
- medicine and health, such as medicinal knowledge and knowledge related to the use of plants, herbs, minerals, animals; traditional birthing methods; traditional bone setting techniques and spiritual healing;
- traditional cosmetics and other related products for body use, and TK and materials related to perfumes, incenses and aromatics;
- traditional animal tracking and hunting skills and traditional fishing and gathering;
- traditional modes of environmental and biodiversity conservation and sustainability, such as knowledge of landscape/seascape management, knowledge of domesticated and wild species, knowledge of weather patterns, knowledge relating to the conservation and sustainable use of genetic resources and traditional ecological knowledge (TEK)¹¹;
- sustainable natural resource management, such as sustainable water management and sustainable soil management;
- cloth weaving and cloth dyeing techniques, and TK and materials related to dyes, paints, gums, glues, etc; and,
- farming and agricultural knowledge.

6. For purposes of this Annex, the term “indigenous and local communities” will be used as this term is used in several of the Committee’s documents. This does not mean that the Committee has yet agreed on this term or on its precise meaning.

FORMS IN WHICH TK MAY BE FOUND

7. TK systems are inherently complex, varied and dynamic, and they find expression in diverse forms. An identification of the various forms in which TK may be found is relevant for an analysis of the relationship between TK and intellectual property (IP). For example, it has often been argued by some that TK is “informal”, “oral” and “unrecorded” and, therefore, unprotected by conventional IP systems. Not all the forms in which TK may be

¹¹ The experts and TK holders in Canada, based on the relevance and characteristics of the TEK, classify it into three kinds: “(1) empirical data, which anyone can in principle obtain in a short time; (2) historical data, which are maintained in oral traditions and historical records; and (3) some conceptual data, without which (1) and (2) cannot be understood and analyzed”. Based on the different source of TEK, it can also be identified three kinds: “some derived from individual experience; some derived from contemporary and modern concepts; and some ‘traditional knowledge’ *strictu sensu*, in that it has been passed on for generations within the TK holder’s community”. “TEK is a mixture of (i) individual experimentation and innovation, (ii) the public domain of modern society, and (iii) the exclusive traditional knowledge base of a community.” See WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge”, page 116

found are necessarily directly relevant to an IP analysis. This document lists and explains, in a technical manner, several of the forms in which TK can be found which are specifically relevant to an IP analysis.

8. In preparing this list, it became clear that many of the forms in which TK may be found are closely related and even overlapping. Some forms are sub-sets of other forms. For example, the distinction between “unfixed” TK and TK that is “fixed” in some more permanent or explicit manner is significant from an IP perspective. This distinction has several consequences in IP law. Further, within “fixed” TK, one might find “documented” and “non-documented” TK, and, in each case, TK may be fixed “verbally” and “non-verbally”. TK may also be fixed in “written” or “non-written” forms. TK, whether “unfixed” or “fixed”, may be “codified” or “non-codified”. By way of another example, in the case of disclosed TK and non-disclosed TK, some “disclosed” TK may be “publicly available” and no longer in the control of indigenous and local communities. Especially “non-disclosed” TK might be said to be “held by” indigenous and local communities. Hence, many of the forms of TK discussed in this document cannot be considered in isolation. Further, not all of these distinctions are necessarily equally relevant to an IP analysis. The distinction between “disclosed” and “undisclosed TK” is also especially relevant for IP, as is the distinction, albeit in practice perhaps an unclear one, between “TK as such” and “TK-based innovations and creations”.
9. The document briefly discusses the following forms of TK, and, where possible, endeavors to identify some of the IP implications thereof:
 - unfixed TK and fixed TK, to which are related: (a) documented TK and non-documented TK and (b) codified TK and non-codified TK;
 - disclosed TK and non-disclosed TK, to which are related: (a) TK directly controlled by indigenous and local communities and TK no longer in the control of indigenous and local communities and (b) TK held by indigenous and local communities;
 - sacred TK and secular TK;
 - TK “as such” and TK-based innovations and creations;
 - indigenous knowledge and traditional knowledge;
 - individual TK and collective TK; and,
 - commercialized TK and non-commercialized TK.

(1) Unfixed TK and Fixed TK

10. This document uses the term “fixed” in an IP sense, especially in the sense used in copyright and related rights law. For example, “fixation” is defined in the WIPO Performances and Phonograms Treaty (WPPT), 1996 as “the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device”¹². Some TK is “fixed”, meaning that it is recorded in “a sufficiently stable”¹³ material or tangible form. Fixed TK can be either verbal” (such as TK recorded in a song, a book or film; and traditional norms and recipes) or “non-verbal”

¹² Article 2(c) of the WIPO Performances and Phonograms Treaty (WPPT), which is available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html#P69_4021

¹³ WIPO Guide to the Copyright and related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, page 290

(such as TK embodied in traditional architecture or rock art). “Verbal” means “finding expression in words only, without being manifested in action”¹⁴ Fixed TK could be either written (such as a written document) or non-written (such as a sound recording). “Written” means “composed, recorded, preserved, or mentioned in writing”¹⁵. Some TK is recorded and preserved in writing, while some TK is fixed in video, audio and in some other kinds of non-written forms. For example, *quipus* were recording devices used in the Inca Empire and its predecessor societies in the Andean region. *Quipus* could be made of cotton cords, which contained numeric and other values encoded by knots in a base ten positional system. It is shown that most information on the *quipu* is numeric, and that these numbers could be read.¹⁶ TK was, therefore, encoded in a *quipu*, in a fixed, non-verbal and non-written form.

11. “Unfixed” TK refers to TK which is not recorded in tangible form. Unfixed TK could be found orally (such as in the form of “oral history”) and in other non-written forms (such as music, performance and actions). Unfixed TK can be either verbal or non-verbal. Healing skills and techniques which might be transmitted orally could be unfixed “verbal” TK, while TK embodied in traditional performances or music (without songs or other verbal forms) would be unfixed “non-verbal” TK.
12. From an IP perspective, and the work of the IGC in particular, the following observations may be made:
 - one particular issue concerns the recognition by IP systems of orally disclosed information. To the extent that any patent law system specifically recognizes documented or written TK when determining the validity of patent claims, there is the possibility of claimed inventions being deemed valid, even when they may involve the appropriation of orally disclosed TK. The concern for some is that this would prejudice the interests of those communities with a stronger oral tradition. One question would be whether orally disclosed TK is recognized as prior art in the patent law system when determining the validity of patent claims¹⁷. This issue could also apply to other forms of unfixed TK;
 - TK that is “fixed” in some or other form might be protected by copyright or related rights (the protection vesting not in the content of the TK itself but rather in the form in which it has been expressed or in the recording itself);
 - the distinction between “fixed” and “unfixed” might not always be certain. For example, traditional body-painting and sand sculptures are arguably not “fixed” (these examples are drawn from TCEs to illustrate this point).

(a) Documented TK and Non-Documented TK

13. Fixed TK can be either documented or non-documented. To document is to record¹⁸, for purposes of furnishing evidence¹⁹. Documented TK can take many forms, such as text, video, audio, etc., or a combination thereof. Documented TK can be either verbal or non-

¹⁴ Oxford English Dictionary (Second Edition 1989)

¹⁵ Oxford English Dictionary (Second Edition 1989)

¹⁶ See Wikipedia entry on “Quipu”, which is available at <http://en.wikipedia.org/wiki/Quipu>

¹⁷ Recognition of Traditional Knowledge in the Patent System (WIPO/GRTKF/IC/11/7), paragraph 37 of Annex

¹⁸ Black’s Law Dictionary (8th edition 2004)

¹⁹ Oxford English Dictionary (Second Edition 1989)

verbal, and can be either written or non-written. However, most TK remains largely non-documented in this sense of the term.²⁰

14. A number of TK documentation projects have been and are being conducted the world over. Just as one example, the Honeybee Network and the Society for Research into Sustainable Technologies and Institutions (SRISTI), which were established to strengthen the creativity of grassroots inventors and innovators and TK holders engaged in conserving biodiversity, have documented more than 22,000 grassroots innovations and other TK elements in the Honeybee Database and other mechanisms.²¹
15. From an IP perspective, and the work of the IGC in particular, the following observations may be made:
 - the documentation of TK is not a form of protection in and of itself. TK is usually documented for reasons other than legal protection, such as to preserve or disseminate it, or to use it in relation to environmental management, cultural heritage, or other classification purposes. In fact, if documentation of TK means that it is more widely available to the general public, it can increase the need for legal protection, particularly when wider availability is made possible by means of the internet; documentation in the absence of adequate legal protection could mean the originating community unwittingly loses control over its TK. There are concerns, therefore, that documentation of TK could lead to misappropriation of TK, and use of it in ways that were not anticipated and were not intended by the TK holders when they contributed their knowledge to the documentation project.²² Documentation of TK might, therefore, undermine the IP interests of affected indigenous and local communities;
 - documentation of TK can, however, serve a range of IP-related functions, including as a confidential or secret record of TK reserved for the relevant community only. In addition, formal documentation and registries of TK support some *sui generis* protection systems, and TK databases play a role in “defensive” protection;
 - documented TK might not necessarily be made available to the general public and it could still be kept confidential or restricted. Some documentation projects are intended just to preserve traditional knowledge for the community itself, and to keep it secret.²³ The TK holders can determine the precise conditions of its disclosure, including the decision to disclose it in confidence;²⁴
 - copyright and related law, including protection of databases, might be used to protect TK documentation. However, there would only be protection for means of recording and transmission of TK, but not for the knowledge itself.²⁵

(b) *Codified TK and Non-Codified TK*

16. TK can be either codified or non-codified. Codified TK is that which is in some systematic and structured form, in which the knowledge is ordered, organized, classified and

²⁰ See supra note 10, page 212

²¹ Report on the Toolkit for Managing Intellectual Property when Documenting Traditional Knowledge and Genetic Resources (WIPO/GRTKF/IC/5/5), page 5

²² Draft Outline of an Intellectual Property Management Toolkit for Documentation of Traditional Knowledge (WIPO/GRTKF/IC/4/5), page 2

²³ See supra note 21, page 4 of Annex

²⁴ See supra note 22, page 3

²⁵ See supra note 7, page 20 of Annex II

categorized in some manner. Codified TK may be imbued with some “authority” or legitimacy.

17. In this respect, a previous Committee document has stated as follows:
 “In the field of traditional medicine, for example, the Traditional Medicine Team of the World Health Organization (WHO) distinguishes between (a) *codified* systems of traditional medicine, which have been disclosed in writing in ancient scriptures and are fully in the public domain, e.g. Ayurveda disclosed in ancient Sanskrit scriptures²⁶ or Traditional Chinese Medicine (TCM) disclosed in ancient Chinese medical texts²⁷; and (b) *non-codified* traditional medicinal knowledge which has not been fixed in writing, often remains undisclosed by traditional knowledge holders, and is passed on in oral traditions from generation to generation. In South Asia, for example, the codified knowledge systems include the Ayurvedic system of medicine, which is codified in the 54 authoritative books of the Ayurvedic System, the Siddha system, as codified in 29 authoritative books, and the Unani Tibb tradition, as codified in 13 authoritative books.²⁸ As pointed out by Committee members, this distinction may have important intellectual property implications for the compilation and use of traditional knowledge databases.”²⁹
18. Furthermore, at the second session of IGC, in December 2001, the Delegation of Canada stated that TK falls in two main categories, namely (i) TK which has been codified, i.e., TK which appears in written form, and which is in the public domain; and (ii) TK which is not codified and which forms part of the oral traditions of indigenous communities. The Delegation included in the second category TK which is kept secret by TK holders at the community, group and individual levels.³⁰
19. During the sixteenth session of the IGC, in May 2010, a delegation noted that codified knowledge systems often included traditional medicinal, agricultural and environmental knowledge systems which had been codified in ancient scriptures and had been passed on from generation to generation on the basis of those scriptures or through recognized courses of study.³¹ Such is the case of the traditional medicine system Ayurveda of India.³²
20. One concern raised by a delegation during an IGC session is that TK is essentially oral and therefore making reference to codified knowledge system effectively excluded a great body of heritage.³³

²⁶ Ayurveda is a codified system of traditional medicine which was disclosed in writing in the Vedic period when the Aryans compiled the four Vedas (1500-1800 B.C.) with maximum references in the *Rigveda* and the *Atharvaveda*

²⁷ Traditional Chinese Medicine was initially codified and disclosed in writing in the *Yellow Emperor's Canon of Medicine*, the first monumental classic establishing TCM. The Canon was compiled over several hundred years and appeared between 300 and 100 B.C.

²⁸ In India the First Schedule of the Drugs and Cosmetics Act, No. 23 of 1940, as amended by the Drugs and Cosmetics (Amendment) Act No. 71 of 1986, specifies the authoritative books of the Ayurvedic, Siddha and Unani Tibb Systems

²⁹ WIPO/GRTKF/IC/3/6, para. 8

³⁰ WIPO/GRTKF/IC/2/16, para. 131

³¹ Intervention of the Delegation of India during the sixteenth session of the Committee. See Draft Report of the Sixteenth Session (WIPO/GRTKF/IC/16/8 Prov.), paragraph 171

³² Intervention of the Delegation of India during the eleventh session of the Committee. See Adopted Report of the Eleventh Session (WIPO/GRTKF/IC/11/15), paragraph 295

³³ Intervention of the Delegation of Ethiopia during the eleventh session of the Committee. See Adopted Report of the Eleventh Session (WIPO/GRTKF/IC/11/15), paragraph 293

21. However, it may also be considered whether “codified” TK may also be “unfixed” or, at least, unwritten. For example, codified TK may also include systematized, organized information embedded in languages, cultural practices, skills and experience, such as know-how, which remains unfixed and resides in a person or the community.
22. Regarding the work of the IGC in particular, draft Article 3(2) of the Revised Objectives and Principles on the Protection of Traditional Knowledge (document WIPO/GRTKF/IC/17/5) provides that TK “includes the know-how, skills, innovations, practices and learning [...] contained in codified knowledge systems passed between generations”³⁴.

(2) Disclosed TK and Undisclosed TK

23. This distinction is significant for IP. TK can be disclosed through use, orally or through its documentation and the dissemination of that documentation.
24. Certain national laws for the protection of TK refer to or deal explicitly with “disclosed” TK, such as the Peruvian Law N° 27811 “Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources”.³⁵
25. TK might be disclosed to third parties or to non-members of the indigenous and local communities from which TK originates, with or without the authorization of the indigenous and local communities. On many occasions, indigenous and local communities have, due to their economic circumstances, disclosed TK to outside researchers and others, often for immediate “once off” financial compensation.³⁶ However, TK has also been disclosed without proper consultation and authorization or due compensation. For example, in 1976, the Pitjantjatjara people of Australia brought a successful breach of confidence action against an anthropologist who had without authorization disclosed information given to him in confidence by the Pitjantjatjara.³⁷
26. Depending on the different degrees and types of disclosure, there are many classifications that could be made. It is difficult to make a complete list. Some typical examples of disclosed and non-disclosed TK are as follows:
 - publicly disclosed TK, which can be accessed through physical documentation, the internet and other kinds of telecommunication or recording. Such TK is widely open to the public. Any individual can easily find and access such information on TK, for example, by searching on the internet or by accessing publications. In these cases, “publicly disclosed”, “public domain”, “publicly available” and “publicly accessible” are sometimes used as synonyms, although “public domain” has a technical meaning in IP discourse and is, in fact, not synonymous with the terms “publicly disclosed” or “publicly accessible” (see further “Note on Meanings of the Term “Public Domain” in the Intellectual Property System, with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore”, document WIPO/GRTKF/IC/17/INF/8);

³⁴ See supra note 9

³⁵ Article 13 of Law N° 27811, Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources states that “collective knowledge is in the public domain when it has been made accessible to persons other than the indigenous peoples by mass communication media such as publication or, when the properties, uses or characteristics of a biological resource are concerned, where it has become extensively known outside the confines of the indigenous peoples and communities.” The law is available at <http://www.wipo.int/wipolex/en/details.jsp?id=3420>

³⁶ See supra note 10, page 96

³⁷ Id, page 75

- publicly available TK with limited accessibility. For example, some records on TK are only kept in a specific library, archive or other repository. Even though these records are publicly disclosed, they can be accessed only by those with access to the repository;
- TK held within indigenous and local communities, which is disclosed and known within such communities. Within indigenous and local communities, the disclosure may be made by specific persons to specific individuals or groups in specific times, spaces, manners, and for special purposes; and
- secret and confidential TK held by specific individuals or a class of individuals within indigenous and local communities who are their traditional custodians. Such TK cannot even be accessed by the other members of the indigenous and local communities.

27. From an IP perspective, and the work of the IGC in particular, the following observations may be made:

- publicly disclosed TK might not necessarily be accessible by patent examiners as part of the “prior art”. For this reason, some initiatives have sought to document TK as prior art to prevent subsequent inventions that build upon this knowledge from satisfying the novelty requirement of patent law;³⁸
- a gap identified in “Protection of Traditional Knowledge: Draft Gap Analysis: Revision” (WIPO/GRTKF/IC/13/5(b)Rev.) is that publicly disclosed TK might not be covered by existing IP protection³⁹ On the other hand, as indicated in the same document (WIPO/GRTKF/IC/13/5(b)Rev.), non-disclosed TK might be protected by international IP law as undisclosed information in general. However, there are no explicit standards on: (i) TK disclosed in the local communities and among the indigenous peoples; and (ii) disclosure of TK constrained by customary law;⁴⁰
- a delegation to the IGC has stated that some knowledge which could be considered traditional may already be diffused widely throughout the world as either common knowledge or widely used knowledge and that at least some of such knowledge is available for use by the public without restriction. Attempts to take existing public information and reassert a private ownership right retrospectively would need to be considered;⁴¹
- Article 8.2 of the “Protection of Traditional Knowledge: Revised Objectives and Principles” (WIPO/GRTKF/IC/17/5) states that “[i]n particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is already *readily available to the general public*, provided that users of that traditional knowledge provide equitable compensation for industrial and commercial uses of that traditional knowledge”⁴² (emphasis provided);
- Article 11 of the same document states that registers of TK “should not compromise the status of hitherto undisclosed traditional knowledge or the

³⁸ Elizabeth Longacre, Advancing Science while Protecting Developing Countries from Exploitation of Their Resources and Knowledge, 13 Fordham Intell. Prop. Media & Ent. L. J. 963, 1003 (2003)

³⁹ See supra note 7, page 5 of Annex II

⁴⁰ See supra note 7, page 4 of Annex II

⁴¹ Intervention of the Delegation of the United States of America during the eleventh session of the Committee. See Report of the Eleventh Session (WIPO/GRTKF/IC/11/15), paragraph 299

⁴² Article 8.2 of the Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/17/5)

interests of traditional knowledge holders in relation to undisclosed elements of their knowledge.”⁴³

(a) TK Directly Controlled by Indigenous and Local Communities and TK No Longer in the Control of Indigenous and Local Communities

28. This distinction might be said to be related to the concepts of “disclosed” and “undisclosed” TK.
29. Some TK is still directly controlled exclusively by indigenous and local communities. Such TK can be directly accessed through the indigenous and local communities who hold the knowledge and observe it in their practices.
30. On the other hand, some TK is no longer in the control of indigenous and local communities. Such TK can be obtained indirectly from TK documentation or other information sources rather than directly from the indigenous and local communities.
31. From an IP perspective, and the work of the IGC in particular, a delegation to the IGC has enquired whether TK which was no longer in the control of indigenous and local communities would be taken into account when defining TK.⁴⁴

(b) TK Held by Indigenous and Local Communities

32. The notion “holder” and “held by” are used in the CBD and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization⁴⁵. Article 8 (j) of the CBD states that “[e]ach Contracting Party shall, as far as possible and as appropriate: ... (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; ...”. In the Nagoya Protocol, paragraph 22 of the Preamble states that “[t]he Parties to this protocol ... [r]ecognizing the diversity of circumstances in which traditional knowledge associated with genetic resources is held or owned by indigenous and local communities...”. Paragraph 23 of the Preamble states that “[t]he Parties to this protocol ... mindful that it is the right of indigenous and local communities to identify the rightful holders of their traditional knowledge associated with genetic resources, within their communities...”. Paragraph 1 of Article 5 *bis* states that “[i]n accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.”.

(3) Sacred TK and Secular TK

33. “Sacred” refers to “any expression of TK that symbolizes or pertains to religious and spiritual beliefs, practices or customs. It is used as the opposite of profane or secular, the

⁴³ Article 11 of the Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/17/5)

⁴⁴ Intervention of the Delegation of Switzerland during the eleventh session of the Committee. See Adopted Report of the Eleventh Session (WIPO/GRTKF/IC/11/15), paragraph 294

⁴⁵ Advance unedited text of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity is available at <http://www.cbd.int/cop/cop-10/doc/advance-final-unedited-texts/advance-unedited-version-ABS-Protocol-footnote-en.doc>

extreme forms of which are commercially exploited forms of TK.”⁴⁶ Sacred TK refers to the TK which includes religious and spiritual elements, such as totems, special ceremonies, sacred objects, sacred knowledge, prayers, chants, and performances and also sacred symbols, and also refers to sacred TK associated with sacred species of plants, animals, microorganisms, minerals, and refers to sacred sites. Whether TK is sacred or not depends on whether it has sacred significance to the relevant community. Much sacred TK is by definition not commercialized, but some sacred objects and sites are being commercialized by religious, faith-based and spiritual communities themselves, or by outsiders to these, and for different purposes.

34. It is mentioned in the WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (cited above) that several subject areas, such as traditional ways of problem-solving and medicinal knowledge, are interrelated in a spiritual way. The spiritual aspects of healing which precede the actual administration of some traditional medicines are considered very important, for instance, in every country in West Africa although it is recognized that they cannot come under scientific scrutiny.⁴⁷ In certain TK systems, non-material beliefs and cultural codes are supposed to explain or guide the consequences of material transactions.⁴⁸ In Peru, some “knowledge was transmitted from generation to generation in a sacred, unwritten ‘book’.”⁴⁹ The core of sacred and secret TK is considered in indigenous and local communities in different ways, and is stored, transmitted and recorded in diverse ways.
35. From an IP perspective, and the work of the IGC in particular, the following observations may be made:
 - a delegation has enquired whether sacred TK would be taken into account when discussing IP protection of TK.⁵⁰ In this regard, another delegation raised the question in three aspects: what was “traditional”, what was “knowledge”, and what should be protected? For example, there were views that spirituality or religions should be included in TK, on the other hand, there were views that TK should be restricted to technical knowledge⁵¹;
 - generally, sacred TK is non-disclosed or is disclosed in particular contexts and conditions to members of indigenous and local communities, though some may be disclosed to external members of indigenous and local communities in special conditions. As indicated above and in “Protection of Traditional Knowledge: Draft Gap Analysis: Revision” (document WIPO/GRTKF/IC/13/5(b) Rev.), non-disclosed TK might be protected by international IP law as undisclosed information in general. However, special considerations might apply to knowledge that has a spiritual and cultural value, but not commercial value, to the community.⁵²

⁴⁶ Daniel J. Gervais, *Spiritual but not Intellectual: the Protection of Sacred Intangible Traditional Knowledge*, 11 *Cardozo J. Int'l & Comp. L.* 467, 469-490 (2003)

⁴⁷ See *supra* note 10, pages 146 and 157

⁴⁸ Gupta, A., “Rewarding Traditional Knowledge and Contemporary Grassroots Creativity: The Role of Intellectual Property Protection”, on file with the Secretariat

⁴⁹ See *supra* note 10, page 171

⁵⁰ Intervention of the Delegation of New Zealand during the eleventh session of the Committee. See Adopted Report of the Eleventh Session (WIPO/GRTKF/IC/11/15), paragraph 220

⁵¹ Intervention of the Delegation of Japan during the eleventh session of the Committee. See Adopted Report of the Eleventh Session (WIPO/GRTKF/IC/11/15), paragraph 296

⁵² See *supra* note 7, pages 11 and 16 of Annex II

(4) TK “as such” and TK-based Innovations and Creations

36. This distinction is especially relevant for an IP analysis. TK “as such” refers to knowledge systems, creations and innovations which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment.⁵³ While it is often thought that tradition is only about imitation and reproduction, it is also about innovation and creation within the traditional framework.⁵⁴ Tradition is not immutable.⁵⁵ TK itself is the result of intellectual creativity and creations within a “traditional context”.
37. “TK-based innovations and creations” refer to innovations and creations based on TK “as such”, developed and innovated beyond a “*traditional context*”. Such innovations and creations may be done by indigenous and local communities, or certain members thereof, but they can also be done by third parties beyond such communities. TK-based innovations and creations do not arise within a “traditional context”, in other words, they are not: “(i) generated, preserved and transmitted in a traditional and intergenerational context; (ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and (iii) integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility.”⁵⁶
38. In a similar vein, a delegation to the IGC has noted that a distinction could be drawn between the “traditional knowledge base” and “traditional knowledge-based innovations and creations”. “Traditional knowledge base” means TK itself while “traditional knowledge based innovations and creations” build upon or are inspired by the “traditional knowledge base”.⁵⁷
39. However, in practice, the distinction between TK “as such” and TK-based innovations and creations can be vague and uncertain.
40. From an IP perspective, and the work of the IGC in particular, the following observations may be made:
- conventional IP systems might well protect innovations and creations based on TK, but not the underlying TK itself⁵⁸;
 - as indicated in the “Protection of Traditional Knowledge: Draft Gap Analysis: Revision” (WIPO/GRTKF/IC/13/5(b) Rev.), there may be legal uncertainty over how to apply the standards of novelty, inventive step and utility for claimed inventions that are TK as such, or derived from TK, or developed within a TK system. Further, there may be uncertainty as to how the appropriate applicant should be determined,

⁵³ See supra note 10, page 25

⁵⁴ Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions (WIPO/GRTKF/IC/5/3), paragraph 8 of Annex

⁵⁵ Id

⁵⁶ Article 4 of the Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/17/5)

⁵⁷ Intervention of the Delegation of New Zealand during the eleventh session of the Committee. See Adopted Report of the Eleventh Session (WIPO/GRTKF/IC/11/15), paragraph 309, also see The Protection of Traditional Knowledge. Addendum to Collation of Written Comments on the List of Issues (WIPO/GRTKF/IC/11/5(a) Add.), page 10 of Annex

⁵⁸ Intervention of the Delegation of New Zealand during the eleventh session of the Committee. See Adopted Report of the Eleventh Session (WIPO/GRTKF/IC/11/15), paragraph 309

for instance when patentable TK is developed within a traditional community or other collective.⁵⁹

(5) Indigenous Knowledge and Traditional Knowledge

41. As indicated in the WIPO Report on the Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), cited above, “indigenous knowledge” may be used to describe knowledge held and used by communities, peoples and nations that are “indigenous”.⁶⁰ In this sense, “indigenous knowledge” would be the TK of indigenous peoples. Indigenous knowledge is, therefore, a part of the TK category, but TK is not necessarily indigenous.⁶¹
42. In Committee documents, it has been proposed that “traditional” means “(i) generated, preserved and transmitted in a traditional and intergenerational context; (ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and (iii) integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility”.⁶²

(6) Individual TK and Collective TK

43. TK is, in general, developed collectively and/or regarded as belonged collectively to an indigenous or local community or to groups of individuals within such a community. National legislations in some countries have provisions recognizing collective ownership or custodians of TK, especially for indigenous and local communities and specifically regarding biodiversity or genetic resources. For instance, in Peru, Article 2(b) of Law N° 27811 “Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources” defines “collective knowledge” as “the accumulated, trans-generational knowledge evolved by indigenous peoples and communities concerning the properties, uses and characteristics of biological diversity”.⁶³ Furthermore, Article 10 states that the collective knowledge protected under that regime shall be that which belongs to an indigenous people but not to particular individuals forming part of that people. Such collective knowledge may belong to two or more indigenous peoples.⁶⁴ Some TK might be shared by different indigenous and local communities, even by different indigenous and local communities in different countries.
44. Nonetheless, a particular individual member of a community, such as a certain traditional healer or individual farmer, might hold specific knowledge.⁶⁵ This is recognized in some national and regional laws. For example, the recently adopted ARIPO’s Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore makes provision on both communal and individual TK.

⁵⁹ See supra note 7, Page 9 of Annex I

⁶⁰ It is also mentioned that “indigenous knowledge” is also used to refer to knowledge that is itself “indigenous”. In this sense, the terms “TK” and “indigenous knowledge” may be interchangeable. See WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge”, page 23-24

⁶¹ See supra note 10, page 23

⁶² See supra note 56

⁶³ Article 2(b) of Law N° 27811 Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources, which is available at <http://www.wipo.int/wipolex/en/details.jsp?id=3420>

⁶⁴ Article 10 of Law N° 27811 Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources, which is available at <http://www.wipo.int/wipolex/en/details.jsp?id=3420>

⁶⁵ Commentary on Article 5 of Draft Provision of Traditional Knowledge (WIPO/GRTKF/IC/17/5)

45. From an IP perspective, and the work of the IGC in particular, the following observations may be made:
- customary laws and practices might play an important role in recognizing whether and if so which individuals hold TK⁶⁶;
 - a gap identified in Protection of Traditional Knowledge: Draft Gap Analysis: Revision (WIPO/GRTKF/IC/13/5(b) Rev.) is that current legal mechanisms typically base the entitlement of IP rights on an individual or small group of individuals (such as a recognized inventor or inventors). To some extent, some forms of IP can recognize a collective entity as being entitled to exercise and benefit from rights over protected subject matter. But, in general, there are no IP systems for recognizing collective or community ownership, custodianship or other forms of authority or entitlement over knowledge, or distinct elements of the knowledge.⁶⁷

(7) Commercialized TK and Non-Commercialized TK

46. Some TK has already been commercialized. To “commercialize” may be defined as to “exchange goods and services from the point of production to the point of consumption”.⁶⁸ Commercialization is done within a commercial or monetary system. TK might be commercialized as part of local industrial traditions or community enterprises, or as part of a business agreement with a third party.⁶⁹ However, much TK has not been commercialized.
47. From an IP perspective, and the work of the IGC in particular, a delegation to the IGC has enquired whether TK already in the public domain but not previously commercialized would be taken into account when discussing IP protection of TK?⁷⁰
48. An indigenous representative stated that putting indigenous knowledge into IP terms changes its nature, and offers a context in which it can only be protected as commercial knowledge. This facilitates its commoditization and only provides short-term protections rather than protection in perpetuity under customary law.⁷¹

[Appendix follows]

⁶⁶ Id

⁶⁷ See supra note 7, Page 28 of Annex I

⁶⁸ See Wikipedia entry on “Commerce”, which is available at <http://en.wikipedia.org/wiki/Commerce>

⁶⁹ See supra note 22, Page 8 of Annex

⁷⁰ Intervention of the Delegation of Spain, on behalf of the European Union and its Member States, during the sixteenth session of the Committee. See Draft Report of the Sixteenth Session (WIPO/GRTKF/IC/16/8 Prov.), paragraph 153

⁷¹ Dr. Harry made a presentation at the panel of the fifteenth session of the Committee. See Report of the Fifteenth Session (WIPO/GRTKF/IC/15/7), page 29

APPENDIX

GLOSSARY OF TERMS AS USED IN PRESENT DOCUMENT

This short glossary is intended to assist Committee participants in understanding certain of the terms as used in this document. The definitions below are without prejudice to any other glossary or definitions contained in previous documents of this Committee or in any other international, regional or national instrument or fora. The definitions are not agreed or exhaustive, and are the subject of ongoing discussion, and are simply intended to facilitate the reading of this document.

For purposes of this document only:

1. “Codified TK” refers to TK which is in some systematic and structured form, in which the knowledge is ordered, organized, classified and categorized in some manner.
2. “Collective TK” refers to TK developed collectively and/or regarded as belonging collectively to an indigenous or local community or to groups of individuals within such a community.
3. “Fixed TK” is TK recorded in some sufficiently stable material or tangible form.
4. “Disclosed TK” refers to TK which is accessible to persons beyond the indigenous or local community which is regarded as the “holder” of the TK. Such TK might be widely accessible to the public and might be accessed through physical documentation, the internet and other kinds of telecommunication or recording. TK might be disclosed to third parties or to non-members of the indigenous and local communities from which TK originates, with or without the authorization of the indigenous and local communities.
5. “TK ‘as such’” refers to knowledge systems, creations and innovations which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment.
6. “TK-based innovations and creations” refer to innovations and creations based on TK as such, developed and innovated beyond a “traditional context”.
7. To “document” is to record for purposes of furnishing evidence.
8. “Verbal” means “finding expression in words only, without being manifested in action”.
9. “Written” means “composed, recorded, preserved, or mentioned in writing”.

[End of Appendix and of document]