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I. INTRODUCTION

1. This draft Concept Note describes a range of key concepts, principles and options relevant to examining and understanding more clearly the relationship between intellectual property (IP) and the protection of traditional knowledge (TK). The Note examines the role of existing IP rights, *sui generis* adaptations of IP rights systems, and distinct *sui generis* rights, as well as defensive protection against illegitimate IP rights, and the implications of documenting, recording and digitizing TK through inventories, databases, publications and audio and/or audiovisual recordings. It considers policymaking options and practical programs at four levels: local or community, national, (sub-) regional and international.

   The Note recognizes that IP protection is relevant to but is not a comprehensive or stand-alone solution for attainment of the all objectives concerning the promotion, preservation and protection of TK. The development and use of IP mechanisms have to recognize and work with various non-IP areas of law and policy, such as laws and programs for stimulation of economic activity, creation of market access, the safeguarding of intangible cultural heritage, the promotion of cultural diversity, the conservation of biodiversity and access and benefit-sharing regimes for genetic resources and associated TK.

2. This draft Concept Note does not seek to pre-empt policy choices which are for the countries to make.

3. The remainder of this Note comprises the following sections:

   (a) Section II – *A Policy Context and Survey of Key Concepts*

   (b) Section III – *Key Principles for Policy Development*

   (c) Section IV – *Practical Steps towards TK and TCE Protection*

   (d) Section V – *Regional and International Frameworks.*

4. “Traditional knowledge” (“TK”) is used in this Note in two senses. First, TK may refer holistically to both the content and substance of technical knowledge, such as medical knowledge and knowledge related to biodiversity, and also to “traditional cultural expressions” (“TCEs”), that is, forms in which culture is expressed, such as music, literature, dance, architecture, symbols and designs. However, in some cases, TK may be used more narrowly to refer only to the content and substance of technical knowledge. “TCEs” may be used to refer more narrowly only to tangible and intangible forms in which culture is manifested or expressed. TCEs are used synonymously with the term “expressions of folklore”. See further under “Survey of core concepts” below.

5. Several working documents, studies, reports and other materials have been drawn on in the preparation of this draft Note. A selected list is contained in Annex A.

II. A POLICY CONTEXT AND SURVEY OF CORE CONCEPTS

2.1 A policy context

6. TK and TCEs are important elements of the cultural heritage and identity of many local and indigenous communities, as well as many nations and regions with a shared history. They are recognized as key elements of the well-being and sustainable development, as well as the cultural vitality, of those communities. TK and TCEs are often seen as part of the "common heritage of humanity" in the sense that all humanity should share in their benefits.

7. In addition, TK and TCEs hold economic potential – they are a comparative advantage of the communities and countries which are their custodians and can, if so wished, establish a basis for community enterprises and cultural industries. The challenge, then, for policymakers, is to strengthen the cultural roots of TK and TCEs, so that the communities who are their custodians can benefit from them and continue to thrive, their fruits can be enjoyed by humanity at large and they can contribute to economic development, the improvement of livelihoods and poverty alleviation.

8. For example, traditional music, designs, rituals, performances, oral narratives, names, symbols and signs communicate a community's beliefs and values, embody skills and know-how, reflect a community's history, and define its cultural identity. TCEs such as these are, therefore, valuable cultural assets of the communities who maintain, practice and develop them. They can also be economic assets – they are creations and innovations that can, if so wished, be traded or licensed for income-generation. They may also serve as an inspiration to other creators and innovators who can adapt them and derive new creations and innovations. Unfortunately, however, too often cultural products have established significant market niches in industrialized countries, not benefiting adequately the countries of origin and their communities.

2.2 A survey of core concepts

What is traditional knowledge? What are traditional cultural expressions?

9. In international debate, "TK" has been used in a broad sense that includes knowledge as such as well as TCEs. The term "traditional knowledge" in its broad sense has been used in many contexts, and has no settled legal definition.[1]

10. For the purpose of the remainder of this document, however, "traditional knowledge" is used in a more focused way and refers to the *content* or *substance* of traditional know-how, skills and learning (TK *stricto sensu*).

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[1] For a survey of terms and definitions, see document WIPO/GRTKF/IC/3/9.

11. TK and TCEs are often considered by communities as a single and indivisible part of their cultural heritage. TK holders therefore, prefer that policy and legislative activities reflect and maintain the indissoluble nature of TK and TCEs. On the other hand, conventional legal systems tend to distinguish between different forms of creativity and innovation, establishing in some cases distinct rules for them. For example, literary, artistic and musical works are protected by copyright law which is distinct from patent law which protects technical inventions; and which is in turn distinct from trademark law which protects marks. Public interest and policy differences that exist with regard to these different forms of human creativity have influenced the evolution of the IP system over many years. By extension, this approach might suggest that distinct public interest and policy considerations may also apply to TK and TCEs. Thus specific policies developed internationally for, for example, literary, artistic and musical works would form the point of reference for policies on TCEs, while those relating to inventions would extend to TK. Failure to adopt such an approach could possibly lead to having one system for literary, musical and artistic works (the copyright system) and another for "traditional" literary, musical and artistic works.

12. For its part, TK protection relates primarily to patent policy and the protection of confidential information. TK is also often associated with biological or genetic resources, and may in part be protected through the regulation of genetic resources. A comprehensive approach to TK should not presume this linkage, however. This draft concept Note does not deal directly with the IP aspects of access to and benefit-sharing in genetic resources.

13. The concept of TK and of TCEs have a potentially very wide scope. A very broad, inclusive definition of TK may be useful for general descriptive purposes, but may not, however, serve as an effective basis for a specific form of legal protection. For instance, some *sui generis* systems focus on traditional medical knowledge, or on TK associated with genetic resources. In short, simply being 'traditional' need not qualify knowledge for IP protection in a *sui generis* system. TCEs as a concept is generally better understood at this stage perhaps because work on IP and TCEs has been undertaken since the 1960s. Many *sui generis* systems address TCEs distinctly, within copyright and cultural heritage laws, providing a useful focus.

Protection or preservation of TK and TCEs?

14. TK and TCEs have cultural, scientific, environmental and economic importance, and this has led to calls for TK and TCEs to be *preserved* (safeguarded against loss or disparition and *protected* (safeguarded against inappropriate or unauthorized use by others).

15. There are, for example, many initiatives to document or record TK – this often aims at preserving the TK without necessarily protecting it against misuse. "Preservation" includes conserving the living context of TK and TCEs, so that the customary framework for developing, passing on and governing access to TK and TCEs is maintained; and it can also involve preserving TK and TCEs in a fixed form, such as when traditional technical know-how or medicinal knowledge is documented (this can also involve recording or documenting the TCEs that are traditionally used to convey and communicate TK). A major concern for TK holders is – can their TK be preserved for future generations of

their own communities, and even made available to a wider audience, without exposing it to misappropriation or misuse?

16. Similarly, many initiatives are underway to document, TCEs. These initiatives are valuable as part of cultural heritage safeguarding programs, but they also run the risk of making the TCEs available to the public and vulnerable to misappropriation and misuse. For example, traditional music recorded for preservation purposes has subsequently been sampled and commercialized without the knowledge of the tradition bearers.

17. IP policy concerns the *legal protection* of TK and TCEs, that is, their protection against unauthorized use (such as copying, adaptation and commercial use), and *not* directly their preservation or safeguarding.

18. TK and TCE holders have stressed that their TK and TCEs should be both preserved and protected in a way that respects the values of the communities. Preservation and protection can work together effectively, even though they have different aims.

"Positive" and "defensive" IP protection

19. "Positive" protection of TK and TCEs entails the active exercise of IP rights over TK and TCE subject matter. "Defensive" protection is a set of strategies to ensure that third parties do not gain IP rights over TK and TCE subject matter.

Positive protection

20. IP rights have been used in particular to provide positive protection against:

    (a) unauthorized commercial exploitation of TK and TCEs;
    (b) insulting, degrading or culturally offensive use of this material;
    (c) false or misleading indications that there is a relationship between the user of the TK and TCE and the communities in which the material originated;
    (d) failure to acknowledge the source of material in an appropriate way; and
    (e) unauthorized disclosure of confidential or secret TK and TCEs.

21. By giving a right to authorize uses of TK and TCEs, positive protection can enable holders to make commercial use of their TK and TCE. This may be through community-based enterprises and industrial activity, or through commercial partnerships based on the licensing of their IP rights.

22. Many TCEs are already protected by current IP systems. For example, the WIPO Performances and Phonograms Treaty of 1996 (WPPT) grants a right in the aural aspects of performances of TCEs. In Articles 5 to 10, the WPPT grants the right to the performer of an "expression of folklore" a range of moral and economic rights in respect of the aural component of his/her performances, whether fixed or unfixed ("live"). Furthermore, contemporary adaptations and interpretations of TCEs can qualify as copyright works, receiving positive rights as under copyright, and new audio and audio-visual recordings of pre-existing expressions of folklore can be protected as sound recordings under "related rights" ("neighboring rights") law. Collections and compilations of TCEs can

also be protected as copyright works or under *sui generis* forms of protection granted to databases in some jurisdictions. Finally, Article 15.4 of the Berne Convention for the Protection of Literary and Artistic Works, 1971 provides protection for unpublished works of which the author is unknown. Although this Article does not explicitly refer to TCEs, it is clear from the records of the Diplomatic Conference at which this Article was adopted that the delegates had TCEs in mind when they referred to this category of works. Geographical indications and trademarks, especially collective marks, have also been used by indigenous and local communities in several countries to protect their TCEs, such as creative arts and crafts, against passing off.

Defensive protection

23. Defensive protection, on the other hand, has included the use of documented TK to preclude or to oppose patent rights on claimed inventions that make direct use of TK (*e.g.*, a patent for a claimed invention which is an obvious use of publicly known TK). Documentation of TK can, therefore, also be a useful means for defensive protection, but if it is undertaken without an IP strategy, it can actually facilitate unauthorized use of TK, and thereby undercut the interests of TK holders.

24. In the area of TCEs, some national and regional laws prevent the acquisition of trade mark rights over indigenous signs and symbols, such as in the United States of America, New Zealand and the Andean Community countries.

25. As a rule, defensive measures which comprise making TK and TCEs publicly available should not be taken unless the TK and TCE holders are aware of the implications of making their TK and TCEs publicly available, and the consequences of doing so are consistent with their wishes. Where TK is already widely available to the public but is not available to patent searching authorities for technical reasons, for instance, a defensive strategy might include ensuring that information on TK is practically accessible during official patent searches. But the limitations on defensive strategies usually mean they should be undertaken with a view to developing and exercising positive rights as well. Some strategies have identified three tiers of the same underlying body of TK that are protected in different ways:

(a) secret or sacred TK that is closely protected and is only disclosed to certain members of the community, and is generally not used in economic activities;

(b) other valuable TK that is protected by IP rights or confidentiality and can be used for community economic activities or commercial partnerships; and

(c) general material about their TK that the community chooses to place in the public domain and to publish.

26. Of course, when TK is documented and published – whether for defensive protection or other purposes – the form in which it is written down or recorded can be protected by copyright. Community representatives may choose to hold and exercise copyright over published records of their TK/TCEs as part of a positive protection strategy, but copyright protection would only protect the form in which the TK was expressed and not necessarily the TK itself.

What does "traditional" mean: Protecting innovation or tradition?

27. What lies at the heart of a "traditional" cultural expression or "traditional" knowledge? To be truly "traditional", a TCE or a form of TK may need to be distinctively linked with a community identifying with a traditional culture through a sense of custodianship, guardianship or cultural responsibility, such as a sense of obligation to preserve the knowledge, or a sense that to permit misappropriation or demeaning usage would be harmful or offensive. This relationship may often be defined by the community itself, formally or informally through customary laws or practices. In essence, it is suggested that "traditionality" is defined by the social processes by which TCEs and TK are created, developed and maintained, and that, due to these processes, they are regarded as collectively "owned", even if at some point an individual or individuals played a role in their development.

28. Developing appropriate protection mechanisms for TK and TCEs requires a close understanding of these special characteristics of TK and TCEs, and a clear understanding of how different forms of protection may overlap. As mentioned, TK is generally associated with a particular community and is considered the collective heritage of that community. A component of TK may be the innovation of an individual member of a local or indigenous community, but would build to some degree on a collective heritage. The traditional healer's or traditional farmer's sequential working out of solutions to technical problems is a form of innovation within a shared tradition of technological knowledge held in part by the community. An IP regime to protect TK may seek to protect this innovation of individual innovators, based on the cumulative know-how of the community; and it may also seek to protect the collective body of TK against misuse, misappropriation and unfair commercial practices.

29. To some extent, protection of TK innovations has been achieved through conventional IP rights, such as when a TK innovation is patentable or eligible for utility model protection. Secret-sacred material can be protected through laws on confidentiality and trade secret protection. Traditional innovations and TK in general should not be denied protection under conventional IP regimes. IP rights typically protect those aspects of protected material that are most liable to misappropriation or misuse, and different IP rights may apply to the same underlying subject matter. A single body of TK may include both innovations which can be protected through conventional IP rights and material that is considered under IP law to be in the public domain. New, exclusive rights in TK may have the effect of excluding certain material from the public domain, raising some fundamental policy issues.

III. KEY PRINCIPLES FOR POLICY DEVELOPMENT

30. The range of policy options for TK and TCE protection is wide, and diverse interests are engaged. This paper does not seek to set bounds on the policy debate concerning suitable models for protection of TK and TCEs. However, to facilitate discussion, the following principles are suggested as a basis for policy development:

(i) *The nature of intellectual property*: Legal protection of TK and TCEs as IP generally means recognizing and exercising exclusive rights in intangible property which is or is associated with TK and TCE subject matter. The basic function of IP rights is to exclude third parties from undertaking certain defined

acts. IP rights over TK and TCE might in practice only extend to those characteristics that need specific protection, and may not apply to TK and TCEs in their traditional customary context.

(ii) *A community focus:* Protection of TK and TCEs should be primarily undertaken for the benefit of TK holders and TCE bearers and practitioners; should respect their cultural and community values; and should be based on the consultation with the communities concerned; and be based, as far as possible, on their customary laws. One goal of TK and TCE protection might be to reinforce and to give practical meaning to the principle of "free, prior and informed consent" for TK and TCE holders over how their TK and TCEs are accessed, documented and used, at least in certain cases.

(iii) *Goals of protection:* Protection of TK and TCEs can be positive and/or defensive, as already mentioned. Protection is not undertaken as an end in itself, but as a means of achieving the goals and aspirations of traditional communities and promoting national policy objectives. A key issue to be clarified from an early stage is what the TK and TCEs are to be protected against.

(iv) *Effectiveness and accessibility of protection measures*: Protection should be practically feasible and enforceable, especially from the point of view of traditional communities, and not create excessive burdens for right holders or administrators alike.

(v) *Different levels of operation.* A comprehensive policy needs to consider components at the community, national, regional and international levels. The stronger the coordination between these levels, the more useful the outcome will be. Community level initiatives may focus on practical capacity building tools. National laws are likely to be the prime mechanism for achieving practical benefits. An international strategy could focus on securing recognition for TK and TCE-related rights in foreign jurisdictions, leaving flexibility for diverse legal and cultural traditions at the national and community level and for local and national objectives to define key questions. Issues that might be best dealt with at the national level could include, for example, definitions of key terms, determination of beneficiaries and rights holders, specific exceptions and limitations and whether or not to require formalities. A regional strategy can reach into and guide the national level, by helping to define the specific nature of rights and how they are administered, and into the international level, by articulating general principles and illustrating how recognition of TK and TCE-related rights between jurisdictions could operate.

(vi) *Role of existing IP rights:* A comprehensive TK and TCE protection strategy would use the range of IP rights that have already been found useful by various TK and TCE holders in different countries, both for the immediate practical benefits that accrue (including international protection) and for the light this sheds on any gaps in the available rights, which could be the focus of norm-setting activities.

(vii) *Overall policy environment:* Protecting TK and TCEs plays a role in a broader policy framework that includes safeguarding of intangible cultural

heritage, promotion of cultural diversity, enhanced respect for and protection of the rights of indigenous peoples, the revitalization of traditional cultures, the conservation of biological diversity and sustainable development, the provision of primary health care, the promotion of community-based economic activity, the recognition of and equitable returns for traditional communities' contributions to the wealth of national and international knowledge and culture, managing the challenges of multiculturalism and the promotion of innovation and cultural exchange.

(viii) *Customary laws and protocols*: Many TK and TCE holders wish that their own customary laws form the basis of the legal protection of their TK and TCEs. A number of existing *sui generis* systems utilize references to customary laws and protocols as an alternative or as a supplement to the creation of conventional IP rights over TK and TCEs. One important function of customary law is to determine ownership of elements of TK and TCEs, other responsibilities and equitable interests associated with TK and TCEs, rights of customary use of TK and TCEs that should be permitted to continue (and indeed encouraged) under a protection regime, and entitlements to share benefits from the use of TK and TCEs. Customary law may help clarify how these various rights and entitlements are identified and distributed within traditional communities.

Elements of a comprehensive policy and strategy

Developing a policy and strategy for TK and TCE protection is not a stand-alone exercise in legislative development, nor a purely administrative matter. The development of a strategy for TK and TCE protection has to address at least the three complementary needs:

1) Better defining and articulating existing IP principles, rules and practices, and establishing new IP norms or standards where these are needed (the legal/policy need)
2) Making effective use of existing IP rights and creating operational systems so that IP rights relating to TK and TCEs can be recognized, administered and enforced for the benefit of TK and TCE holders (the practical need)
3) Creating awareness and skills among TK and TCE holders, their representatives, and policymakers concerned (the capacity-building need)

A comprehensive policy may also involve a clear articulation of core principles that would help shape both the strategy and any specific initiatives under the strategy.

Examples of objectives and principles for the protection of TCEs and of TK can be found in the draft provisions currently before the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Examples of how each of these principles have been implemented in practice are given in WIPO documents WIPO/GRTKF/IC/9/INF/4 and INF/5.

IV. PRACTICAL STEPS TOWARDS TK AND TCE PROTECTION

4.1 A review of TK and TCEs held in your country and/or region

31. This step aims to answer the following questions so that policy development is based on a clear understanding of the IP interests of TK and TCE holding communities:

(a) What forms of TK and TCEs are held by the communities, and what TK and TCEs in particular are considered in need of legal protection?
(b) Which particular examples are there of IP-related misappropriation and misuse of TK and/or TCEs?
(c) What does this information suggest for appropriate definitions of TK and TCEs?

32. This involves greater understanding of the nature and the general character of TK and TCEs, not undertaking detailed documentation or recording of the TK and TCEs. The necessary information may already be available through past surveys, consultations and other research and/or found in existing cultural heritage inventories, databases and other collections. The ongoing policy process could also commission further studies and surveys to update and extend available information.

4.2 Taking a decision on overall goals

33. On the basis of understanding the nature of TK and TCEs the next step would be to set general objectives for their protection. These objectives assist in the design of legal mechanisms, in assessing needs for capacity building, and in structuring regional and international strategies.

34. Defining objectives for TK and TCE protection should clarify:

(a) What interests are involved? Is the aim to preserve TK and/or TCEs, to prevent their misuse, or to use them as the basis of community economic development? Is it to prevent access to TK and/or TCEs, or ensure their use on fair terms?
(b) Is it a true form of IP that is required, or is the aim closer to conserving and preserving TK and/or TCEs?
(c) What kind of IP protection is intended (positive, defensive or both)?

4.3 Surveying the options: policy, legal and practical

35. This stage would involve planning specific initiatives to protect TK and TCEs. The options would include:

(a) Policy initiatives – including political decisions to give greater attention and value to TK and TCEs and their protection, and policy statements that set overall directions;
(b) Legal initiatives – including strengthening existing legal tools, and creating new ones; and
(c) Practical initiatives – including capacity-building and awareness, documentation, inventories and databases, if and when appropriate.

4.3.1 Assessing legal and policy options

36. This assessment includes a comprehensive study and assessment of legal and policy options for TK and TCE protection based on the following questions:

(a) What legal and policy options are available under conventional IP systems? If there are gaps, as a matter of policy should those gaps be filled? If so, what options exist for adaptations to be made to existing IP rights to protect TK and TCEs?

(b) What existing non-IP policy programs (*e.g.*, those concerning cultural diversity and cultural heritage, regional development, promoting use of traditional medicine, and the collection of ecological TK) should be taken into account and coordinated with as necessary?

(c) Is there a combination of unprotected TK and TCE subject matter, public policy objectives and community needs that would require the exploration and establishment of new *sui generis* options?

37. The assessment of options may lead to the conclusion that a distinct *sui generis* approach is required. In that case, an analysis of options would clarify:

(a) the precise gaps in the scope of IP protection that the *sui generis* system or systems are intended to fill;

(b) the scope and definition of the TK and TCEs that should be protected;

(c) mechanisms that exist in other national systems, and the lessons that can be learned from practical experience in this area;

(d) how protection under new distinct national systems could be enforced regionally and internationally.

38. Once the objectives and general character of a *sui generis* protection system are established, there are still important choices to be made. These concern such policy, technical and legal issues as:

(a) what form of protection is intended and what rights should be granted?

(b) who owns the rights?

(c) what are the exceptions and limitations attached to these rights?

(d) how are the rights acquired? Should there be formalities?

(e) for how long should the rights last and how are they lost? Should they operate retroactively?

(f) how to administer and enforce the rights? What forms of legal proceedings and dispute resolution mechanisms should there be? and

(g) how should foreign rights be treated?

What is the reasoning behind calls for sui generis protection?

The call for *sui generis* protection of TK and TCEs generally arises from shortcomings of existing IP rights. Surveys of national experience with the IP protection of TK and TCEs have mentioned the following shortcomings in the conventional IP system in relation to TK and TCEs:

(i) difficulty meeting formal requirements such as novelty, inventive step or non-obviousness, or originality (for TCEs) (this may be due at least in part to the fact that TK and TCEs often date back prior to the time periods associated with conventional IP systems, or are developed in a more diffuse, cumulative and collective manner, making specific steps such as invention or authorship difficult to establish at a fixed time);

(ii) requirements in many IP laws for protected subject matter to be fixed in material form (given that TK and TCEs are often preserved and transmitted by oral narrative and other non-material forms);

(iii) the frequently informal nature of TK and TCEs and the customary laws and protocols that define ownership (or other relationship such as custody and guardianship) and that form the basis of claims of custodianship, cultural affinity and community responsibility;

(iv) the concern that protection systems should correspond to a positive duty to preserve and maintain TK and TCEs, and not merely provide the means to prevent others from making unauthorized use (the characteristic function of IP rights);

(v) the perceived tension between individualistic notions of IP rights (the single author or inventor), as against the tendency for TK and TCEs to be originated, held and managed in a collective environment, often making it difficult to identify the specific author, inventor or analogous creator that IP law is assumed to require); and

(vi) limitations on the term of protection in IP systems (calls for better recognition of TK and TCEs often highlight the inappropriate nature of relatively brief terms of protection in conventional IP systems, as interests and need for protection are seen as enduring beyond individual life spans for TK and TCEs subject matter).

39. Should it be decided to supplement existing IP laws with a *sui generis* framework for the protection of TK and/or TCEs? There are divergent views on this question and this is a high-level policy decision rather than a matter of technical legal advice. The creation of a *sui generis* legal mechanism is not an end in itself, however, and would need to provide practical and effective protection of the interests of TK and TCE holders, as well as fit into the broader policy and legal framework. There is already a range of options within the existing IP system that are available to TCE and TK holders, and there is no guarantee that a new *sui generis* right would yield tangible benefits to them on a scale comparable with the investment of resources in its creation. Even so, there is wide interest in the creation of specific rights, and this policy option is under active consideration in a number of countries and regions.

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

40. The development of new international legal instruments in relation to TK and TCEs is under discussion in the WIPO IGC. Under its mandate for the 2010-2011 biennium, the IGC is engaged in "text-based negotiations" with the objective of reaching an agreement on a text of an international legal instrument (or instruments), taking into consideration WIPO's Development Agenda recommendations and without prejudice to work being pursued at other fora.

41. Countries are encouraged to participate actively in these negotiations, and to take them into account in developing national and regional systems.

42. The current texts on TCEs and TK before the IGC comprise draft principles and objectives that could shape *sui generis* instruments on TK and TCEs. This approach to protection could recognize, amongst other things, collective interests in TK and TCEs which are "characteristic" of a distinct cultural identity. These interests would be respected for as long as a traditional community continues to be associated with the TK or TCE. These drafts include compliance in certain circumstances with the "free, prior and informed consent" (FPIC) principle and the recognition of customary laws and practices. In line with the views of many indigenous and traditional communities, the draft provisions do not require the assertion of new exclusive property rights over TK or TCEs, but accommodate this option should communities wish to take it up. Similarly, prior registration or documentation of TK and TCEs is not a precondition for protection.

43. The drafts draw upon a wide range of community, national and regional experiences, and have been developed over several years by and in consultation with Member States, indigenous peoples and other traditional and cultural communities, civil society organizations and a range of other interested parties. Successive drafts of the objectives and principles have been and are the subject of open commenting processes by the IGC. The drafts directly incorporate proposals made by many participants in the commentary processes, including indigenous communities. Details of the background to these documents, and the wide range of materials and perspectives that shaped them, can be found on WIPO's website.[2]

44. These draft materials are being used as points of reference in a range of national, regional and international policy discussions and standard-setting processes. Several processes in other policy areas are drawing directly from the draft WIPO provisions.

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[2] See http://www.wipo.int/tk/en/index.html.

45. The draft provisions are complemented by discussions on certain key policy issues (the "Lists of Issues", which are attached to this Note as Annexes B and C) and "gap analyses" prepared in 2008. These analyses (a) described what obligations, provisions and possibilities already exist at the international level to provide protection for TCEs/TK respectively; (b) described what gaps exist at the international level, illustrating those gaps, to the extent possible, with specific examples; (c) set out considerations relevant to determining whether those gaps need to be addressed; (d) described what options exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level; and, (e) contained an annex with a matrix corresponding to the items mentioned in sub-paragraphs (a) to (d) above.

4.3.2 Assessing practical options

46. To support the overall policy objectives and to complement the development of legal measures, the necessary practical steps should be assessed and determined. This would include considering the options for:

    (a) capacity-building and awareness activities, making optimal use of existing programs and consultative processes;

    (b) community consultations; and

    (c) knowing customary law and practices, documenting TK and TCEs, and preparing inventories or databases (with a clear analysis of the costs and benefits of these options, including IP costs and benefits).

4.4 Setting out a comprehensive strategy

47. On the basis of these assessments, one could prepare a comprehensive strategy document, covering legal and policy measures and practical steps in an integrated way. The strategy could comprise a legal and policy development program, and a program of practical measures.

Policy options: clarifying policy directions

The suggested approach to preparing a TK and TCE protection strategy would involve:

a) A review of TK and TCEs held in the country and/or region; Taking a decision on overall goals;
b) Surveying the options: policy, legal and practical;
c) Creating a comprehensive program for TK and TCEs protection,
d) comprising:
e) A legal and policy development program, and a program of practical and capacity-building measures.

A TK and TCEs protection strategy would need to make decisions on basic policy directions such as:

a) What TK and TCEs are to be protected, what are they to be protected against, and for what policy reasons? Is protection desired to promote the use of TK and/or TCEs as economic assets for the community, simply to guard against misappropriation, or both?
b) To what extent is IP the general kind of protection required; should policy

initiatives in other areas be taken into account (*e.g.* biodiversity, cultural diversity and cultural heritage, forestry, desertification)?

c) Should the protection be undertaken by the positive exercise of IP rights in the TK and TCEs, or simply to defend against illegitimate IP rights taken out by others?

d) How can the existing IP system be used to its full effectiveness to protect TK and TCE-related interests?

e) Are there gaps in available protection that would be better protected by a distinct new *sui generis* system?

f) If so, should this protection:
   i. be based on registration, or be free of formalities?
   ii. provide for absolute rights in TK and/or TCEs as such?
   iii. provide rights against illicit access to or copying of TK and TCEs?
   iv. allow for compensation or remuneration when the TK and TCEs are used?, or
   v. suppress use that amounts to unfair competition or misleading behavior?

g) Should protection vest rights in traditional communities collectively;
   i. if so, how should they be defined and managed,
   ii. and how should benefits be distributed?

(h) Should protection take account of customary laws and TK and TCE management protocols?

(i) Should newly recognized rights in TK and TCEs have retrospective effect?

(j) How should any national or regional initiative on TK and TCE protection interact with the broader international legal system, especially through the operation of the national treatment principle or reciprocity arrangements?

Documenting, recording and digitizing TCEs and TK

Documentation of TK and the creation of inventories or databases of TK are not forms of protection in themselves. TK is usually documented for reasons other than legal protection, such to preserve or disseminate it, or to use it in relation to environmental management or for classification purposes. In fact, when 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. But documentation of TK can serve a range of functions, including as a confidential or secret record of TK reserved for the TK holder community only. Formal documentation and registries of TK support some *sui generis* protection systems, similar to patent documentation.

Similarly, the recording and digitization of TCEs is valuable for cultural heritage safeguarding and promotion programs, but can unwittingly make the TCEs vulnerable to unauthorized use and exploitation. Strategic management of IP, during TCEs recording, digitization and dissemination projects, is therefore advisable. This is the focus of WIPO's Creative Heritage Project.

TK documentation and inventories for positive protection

Documented TK and inventories of TK may be linked with positive protection of TK. For example, one database of traditional medical knowledge is in fact a database of patent rights over traditional innovations. In other cases, *sui generis* TK rights are based on formal registration. But documenting TK does not always mean publishing or disclosing it to third parties. Some documentation initiatives create tiered levels of access – some TK is closely protected and only made available to certain community members (such as elders, or those entrusted with particular elements of TK); other TK is still held

confidentially but may be selectively made available to third parties on the basis of a confidentiality agreement, similar to trade secrets or confidential know-how; and some TK is made available publicly when the community chooses to do so (this may be TK of a more general nature, with no particular sensitivity or perceived value, which the community wishes to disseminate).

TK documentation and inventories for <u>defensive</u> protection

Defensive protection of TK has so far been concentrated on TK that is unambiguously already in the public domain – where the material is already widely available, with no IP rights or other legal constraints on its use. The defensive strategy entails ensuring that patent examiners take it into account when examining relevant patent applications. The situation may be different for TK that is not already widely published (for instance, TK that is still only held and transmitted orally by a community). If one wishes to use the proposed inventory for defensive purposes, it should emphasize the potential costs and drawbacks of publishing previously undisclosed TK and placing it in the public domain. Defensive publication of documented TK should be limited to those cases where there is a clear interest in doing so, and where TK holders give prior informed consent for this usage. But once a defensive strategy is adopted, certain practical guidelines should be followed, covering clear publication dates, the medium and language of publication, content of the disclosure, availability to the public, timing of publication, and the management of rights arising from the compilation and publication of the inventory.

Defensive protection will often entail the first publication of TK or information about genetic resources. It may therefore have significant implications for the rights of the TK holders and custodians of genetic resources. For instance, it would mean that TK holders may forego patent rights over any innovations thus disclosed, and it would effectively end the protection of such material under laws concerning trade secrets and confidentiality. For material that is already publicly available in principle, but is in fact obscure and difficult to access, the proposed inventory may entail making this material much more readily available – in turn, this may increase the possibility of third parties gaining access to and using this information, potentially in ways that would run counter to the interests and concerns of TK holders. For this reason, it is essential to consider carefully whether defensive protection is really what is intended, and whether the community or institution concerned would actually prefer to pursue a positive protection strategy or a combined positive and defensive approach. It would be important to secure the prior informed consent of any party providing information or material that would be disclosed in the inventory: this consent may need to be based on a full description of the implications of disclosure.

While the inventory is intended to waive any possibility of acquisition of patent rights for the disclosed invention, the inventory may itself give rise to other intellectual property rights such as copyright or *sui generis* rights in non-original databases. These rights should be proactively managed by your country. Additionally, there are some forms of defensive publication which may allow the publishing stakeholder to retain certain rights or to defer the surrender of the rights. These options as well should be proactively managed and will be addressed in the forthcoming WIPO Toolkit for IP Management when Documenting TK and Genetic Resources.

Documenting, recording and digitizing TCEs – new rights in "public domain" materials

While traditional music and art may be "public domain" under existing IP law,

recordings of that material are protected under related rights law. Therefore, communities may wish to record their TCEs and exercise rights in the recordings, for their own direct economic benefit. New technologies offer unprecedented opportunities for the protection, promotion and revitalization of folklore. Expressions of traditional creativity and innovation can serve as springboards for new cultural expression, especially in the digital world. Digitized traditional music, designs and art can reach new audiences in niche markets for distinctive, diverse and "local" cultural goods and services, and, in so doing, promote community and rural economic and cultural development. WIPO's Creative Heritage Project provides IP and IT assistance to communities wishing to record their TCEs as part of an IP strategy. New technologies also offer enhanced means to safeguard and restore intangible cultural heritage, especially elements in danger of erosion and disappearance. They can also facilitate educational and scholarly opportunities, as well as enhanced cultural exchange.

V. REGIONAL AND INTERNATIONAL FRAMEWORKS

48. Any national legal system that protects TK and/or TCEs in a *sui generis* way, distinct from established and/or adapted IP rights, may need to interact with IP systems in other countries. It is therefore a key legal and practical issue how to achieve international recognition of *sui generis* rights granted under national systems. In practical terms, legal protection against unauthorized commercial exploitation of TK and TCEs is often needed most vitally outside the country of origin, where most commercial exploitation occurs. Therefore, TK and TCE holders and countries that are rich in TK and TCEs have called for the development of regional and international frameworks for their recognition and protection. This has led to dialogue over TK and TCE-specific legal frameworks in several regional and international fora.

5.1 Regional Frameworks and Systems

49. It is beyond the scope of this paper to discuss in depth the objectives, nature and forms of regional frameworks, but some initial and general information is provided for further consideration.

50. There might be several objectives behind establishing a regional framework, and a “regional framework” can take a variety of different forms. The type of regional framework selected would ultimately depend on the desired degree of (i) regional integration, and (ii) centralization of authority and/or functions at the regional as opposed to the national level. A key consideration is the interrelationship between the regional framework and individual national routes and a decision would have to be made on how “open” or “closed” to leave the national route. An “open” national route implies that the regional framework would only function to complement the national route, whereas a “closed” national route would eventually lead to the formulation of a single integrated/unified regional approach and/or system. An open national route could imply that the national IP offices of Member States would still play a prominent role and that the regional organization would only play a complementary role. A closed national route, on the other hand, could imply that the regional organization would be the main IP office where all legislative, administrative and granting procedures would be focused and that the national IP offices would therefore play a less prominent role.

51. In general terms, a “regional framework” can operate at the levels of (i) law (the same or similar legal norms apply in each country in the region) (ii) administration (the application for, grant and renewal of IP titles are centralized, as might be other administrative procedures), and (iii) information (documentation standards are uniform and information is shared).

52. Regional IP frameworks may exist independently, or form part of larger regional structures. In general, a regional framework implies some form of regional office or organization to, at least, administer and coordinate the framework. A regional framework which comprises an administrative institutional structure can have sub-regional layers consisting of several (administrative) organs. These organs would each have different functions and responsibilities.

Objectives, functions and benefits

53. Settling on the objectives and functions of a "regional framework" can help to clarify the legal, administrative and operational character of the desired framework.

54. A "regional framework" can fulfill one or more objectives and functions, and have various benefits, such as:

(a) legislative and/or practical coordination;
(b) harmonization and/or integration of law and/or administrative procedures;
(c) in cases where protected subject matter (such as TK and TCEs) is shared by more than one country of the region, providing for "joint rights" and/or resolving disputes as to entitlement to rights and the sharing of benefits;
(d) centralization of administrative and other services, to avoid duplication, enhance transparency and minimize costs (economies of scale);
(e) centralization of rights management, licensing and compliance, providing greater negotiating power with respect to prospective licensees and efficient distribution of benefits;
(f) pooling of expertise and resources, including financial and human resources;
(g) general cooperation in the promotion, harmonization and development of IP and TK/TCEs protection;
(h) common dispute resolution mechanisms;
(i) exchange of information leading to transparency and the strengthening of enforcement for IP and TK/TCEs protection.

Different kinds of regional frameworks in the IP area

55. From a survey of existing regional frameworks and systems for the protection of IP one can perhaps detect two main approaches:

(a) a unified system with a common legal regime and single administrative procedures, featuring regional laws which have direct application in the countries concerned. Applications for industrial property titles are made to a regional organization, which examines applications and grants them if appropriate. These IP titles are considered as national titles and directly enforceable in each of the countries which are members of the organization. Examples of such organizations in the IP area are the European Patent Office (EPO) and *l'Organisation africaine de la propriété intellectuelle* (OAPI);

(b) a decentralized system with common administrative procedures and harmonized legal norms, in which single applications for patents, industrial designs and trademarks made at the regional office are subject to a "national phase" procedure in which the national offices advise the regional organization as to whether a property right could be granted according to the national laws. Thus the rights granted by the regional organization are subject to the national laws of each designated state. The regional organization adopts laws and regulations, but these do not have direct application in the member countries concerned, which must ratify the laws and enact them through national laws. Hence, the regional organization primarily functions to coordinate the pre-grant proceedings and national offices play a more prominent role. An example of such an organization in the IP area is the African Regional Intellectual Property

Organization (ARIPO).

56. Several regional organizations or initiatives have adopted or are in the process of developing regional frameworks which address the legal protection of TK and/or TCEs. They are diverse in terms of their objectives, functions and responsibilities. Examples of such regional integration organizations or initiatives include ARIPO and OAPI, the Pacific Islands Forum Secretariat (PIFS), the African Union (previously the Organization of African Unity), the Andean Community, the Association of Southeast Asian Nations (ASEAN), the countries negotiating for the Free Trade Area of the Americas (FTAA) and the South Asian Association for Regional Cooperation (SAARC).

57. For example, the Secretariat of the Pacific Community (SPC) has developed a Model Law for the Protection of Traditional Knowledge and Expressions of Culture. This approach can provide a useful starting point for the development of national legislation in the Member States. States have flexibility in how they implement the model but, through following the same model, the national laws of the States should be in broad harmony. The Model does, therefore, not function as a regional law as such, and nor does a regional institution provide centralized administrative, rights management, dispute resolution or other such services.

58. As a further possible approach, a regional IP framework could form part of a larger economic and political integration system. In such systems, a regional organization integrates legal norms, regulations and administrative procedures into a common system which has direct effect on the national laws of Member States. National implementation of the provisions stated in the established common system is obligatory, subject to national needs. An example of such an approach in the IP area is the Andean Community which issues IP "Decisions" applicable in the member countries.

59. Generally speaking, a "regional framework" could take many forms, as these few examples show. A regional approach could achieve the objectives set out above, such as facilitating the acquisition and administration of rights, by taking advantage of certain similarities between countries in the region, namely geographical, linguistic, economic, political, historical and cultural similarities. Regional cooperation in different parts of the world could eventually be a step towards an international system.

5.2 International Frameworks

60. The policy options available at the international level range from the development of non-binding soft law, in the form of guidelines, recommendations or model provisions, to the negotiation of a binding international treaty. Stating basic principles at the international level, whether in binding or non-binding form, may generate greater understanding within the international community about the policy and legal basis of TK and TCEs protection, and may contribute to the growth of consensus in this area. These options are discussed further in WIPO/GRTKF/IC/14/6

61. There has been strong interest on the part of some countries in the development of a more formal international instrument concerning at least some aspects of IP and TK and TCEs. Others have suggested this step would

be premature, given the need to clarify the full scope and impact of existing intellectual property mechanisms, and to develop the conceptual basis for, and stronger international consensus on, intellectual property protection in these fields. One option for consideration is accordingly the development of a specific legal instrument, on some or all aspects of the current work program of the WIPO IGC (referred to above). Depending on the exact focus of such an instrument, this would have the benefit of providing a stronger international legal framework for the protection of TK and TCEs. This would entail some consideration of whether it would be a feasible goal in the medium term, or whether the continuing process of integrated policy development and capacity building should continue, so that greater understanding and evolution of policy approaches to TK and TCEs could be better taken into account.

Triggering enforceable rights overseas: national treatment

62. One formal question to be considered in the international and regional levels of a comprehensive TK and TCEs strategy is how rights may be made available in foreign jurisdiction. In the international law of IP, the predominant means for achieving this is the principle of national treatment. For example, Article 2(1) of the Paris Convention provides that:

"Nationals of any country of the Union shall … enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have *the same protection* as the latter, and the same legal remedy against any infringement of their rights …" (emphasis added).

63. For its part, and of perhaps direct relevance to TCEs, the Berne Convention (Article 5) provides that "(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention," and that "protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country *the same rights* as national authors" (emphasis added).

64. One role for an international and regional instrument would be, therefore, to determine whether, and if so how, national treatment or a similar principle could be applied to the protection of TK and TCEs of countries parties to the instrument. Alternative approaches, which are apparent in some national *sui generis* laws, include the recognition of the principles of reciprocity and mutual recognition. The regional experience of establishing appropriate mechanisms for triggering enforceable TK and TCEs rights in foreign jurisdictions might help shed light on the possibilities for an international system.

[Annexes follow]

This draft Note draws on international discussions in intergovernmental fora and processes, in particular WIPO and the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the “IGC”).

Key WIPO documents and publications that have been drawn on include:

(d) WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, WIPO Publication, No. 785 (E);
(e) Draft Provisions on Traditional Knowledge and Traditional Cultural Expressions/Folklore, WIPO/GRTKF/IC/17/4 Prov., WIPO/GRTKF/IC/16/5;
(f) Document WIPO/GRTKF/IC/9/INF/4 (“Updated Draft Outline of Policy Options and Legal Mechanisms”);
(g) Document WIPO/GRTKF/IC/9/INF/5 (“Revised Outline of Policy Options and Legal Mechanisms”);
(h) Document WIPO/GRTKF/IC/4/14 (“Technical Proposals on Database and Registries of Traditional Knowledge and Biological/Genetic Resources”);
(i) Documents WIPO/GRTKF/IC/13/4(b) and /5(b) (“Gap analyses” on TCEs and TK);
(j) Intellectual Property and Traditional Cultural Expressions/Folklore, WIPO Publication No. 913 (E);
(k) Intellectual Property and Traditional Knowledge, WIPO Publication No. 920 (E).

[Annex B follows]

Traditional Cultural Expressions – List of Issues

1. Definition of traditional cultural expressions (TCEs)/expressions of Folklore (EoF) that should be protected.

2. Who should benefit from any such protection or who hold the rights to protectable TCEs/EoF?

3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?

4. What forms of behavior in relation to the protectable TCEs/EoF should be considered unacceptable/illegal?

5. Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?

6. For how long should protection be accorded?

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

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

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

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

[Annex C follows]

Traditional Knowledge – List of Issues

1. Definition of traditional knowledge that should be protected.

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

3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?

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

5. Should there be any exceptions or limitations to rights attaching to protectable traditional knowledge?

6. For how long should protection be accorded?

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

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

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

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

[End of Annex C and document]