ANEXO 9

OMC - ADPIC

Council for Trade-Related Aspects of Intellectual Property Rights. Document IP/C/W/370: The Protection of Traditional Knowledge and Folklore: Summary of Issues Raised and Points Made (august 2002)

OMC

WORLD TRADE ORGANIZATION
COUNCIL FOR TRADE-RELATED ASPECTS
OF INTELLECTUAL PROPERTY RIGHTS

THE PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

SUMMARY OF ISSUES RAISED AND POINTS MADE

Note by the Secretariat

This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

1. This note summarizes the issues raised and the points made by delegations in the Council for TRIPS in regard to the protection of traditional knowledge and folklore. It has been prepared in response to the request made during the TRIPS Council meeting of 5–7 March 2002[1] that the Secretariat prepare short papers on, *inter alia*, the agenda items related to review of the provisions of Article 27.3(b), the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the protection of traditional knowledge and folklore, summarizing the relevant material presented to the TRIPS Council, whether in written or oral form, and listing all the relevant documentation.

2. Up until this year the discussion in the TRIPS Council on these three matters has taken place in the context of the review of the provisions of Article 27.3(b), and to a much lesser extent in the context of the review of Article 71.1. This note seeks to summarize those parts of this work which relate more specifically to traditional knowledge and folklore. To avoid undue duplication, cross–references to the two other notes have been made in certain places. In accordance with the mandate given to the Secretariat, the note only contains issues raised and points made by delegations in the Council for TRIPS and does not cover the documentation of the Committee on Trade and Environment and of the General Council, unless the relevant paper has also been circulated as a Council for TRIPS document.

3. It is emphasized that this note is an attempt to summarize the work done so far. By its very nature, it cannot include a full reflection of all the interventions made and documents submitted. It is structured around the issues raised rather than the positions of individual Members. Therefore any reader wishing to appreciate fully the position of a particular Member should consult the statements made and any papers submitted by that Member. As requested, such documentation is listed in the Annex to this note. It is also referred to in the footnotes.

4. This note is divided into three major sections. The first concerns general issues relating to the protection of traditional knowledge, the second concerns the grant of patents in respect of traditional knowledge, and the third concerns consent and benefit sharing. There is also a final section which provides information on national legislation, practices and experiences with respect to this agenda item.

5. The title of this paper covers both traditional knowledge and folklore as indicated in paragraph 19 of the Doha Ministerial Declaration.[2] However, most of what has been said so far in the Council for TRIPS has related only to traditional knowledge and relatively little has been said so far with respect to folklore. Therefore, most of this note pertains to traditional knowledge. However, it is possible that for some delegations, the issues raised and points that were made in relation to traditional knowledge were

[1] IP/C/M/35, para. 226.
[2] WT/MIN(01)/DEC/1.

also intended to apply to folklore. For example, one proposal has included, in its definition of traditional knowledge, the term "cultural expressions"[3] and another submission has referred to the protection of designs, music and other art forms generated by traditional communities.[4]

I. GENERAL ISSUES RELATING TO THE PROTECTION OF TRADITIONAL KNOWLEDGE

6. This section primarily sets out views that have been expressed on two issues:

- why there is need for international action on the protection of traditional knowledge and folklore; and
- the international forum/forums most appropriate to pursue such a work.

7. The concerns expressed about the present situation by the proponents of international action to protect traditional knowledge and folklore can be put into two main categories:

- concern about the grant of patents or other IPRs covering traditional knowledge to persons other than those indigenous peoples or communities who have originated and legitimately control the traditional knowledge;
- concern that traditional knowledge is being used without the authorization of the indigenous peoples or communities who have originated and legitimately control it and without proper sharing of the benefits that accrue from such use.

8. The reasons that have been put forward for **why international action should be taken** to remedy these problems can be summarized as follows:

- **Common economic interest.** It has been said that traditional knowledge is a valuable global resource and hence international efforts to secure its protection should be actively supported.[5] More specifically, it has the potential of being translated into commercial benefits by providing leads for the development of useful products and processes, in particular in the pharmaceutical and agricultural sectors, saving time and cost for the biotechnology industry.[6] For these reasons it is in the common interest of mankind to provide conditions that would be favourable to the preservation of traditional knowledge and the continuing vitality of the peoples and communities which generate and develop it.[7]
- **Equity.** It has been said that, given the important economic value of traditional knowledge, the holders of traditional knowledge should share in the economic benefits derived from that knowledge.[8] Given that the TRIPS Agreement requires countries with traditional and indigenous communities to provide intellectual property protection for a broad range of subject matters including new ones such as plant varieties, biological materials, lay-out designs and computer software, it is only equitable that traditional knowledge should be given legal recognition.[9] Indeed, it is the responsibility of the international community to create an egalitarian system for the availability, acquisition, maintenance and enforcement of intellectual property rights, which does not *a priori* exclude any section of the society.[10]
- **Food security.** Local farming communities have over the years developed knowledge systems for the conservation and sustainable use of biological diversity, including through the selection and breeding of plant varieties. The well–established practices of saving, sharing and

[3] Bolivia, Colombia, Ecuador, Nicaragua and Peru, IP/C/W/165.
[4] Australia, IP/C/W/310.
[5] Indonesia, IP/C/M/32, para.134; Switzerland IP/C/W/284; Venezuela, IP/C/M/32, para. 136.
[6] Brazil, IP/C/M/28, para. 136, IP/C/W/228; India IP/C/W/198.
[7] Ecuador, IP/C/M/30, para. 184; Peru, IP/C/M/30, para. 153.
[8] Bolivia, Colombia, Ecuador, Nicaragua and Peru, IP/C/W/165.
[9] Bolivia, Colombia, Ecuador, Nicaragua and Peru, IP/C/W/165; Cuba, Honduras, Paraguay and Venezuela, IP/C/W/166.
[10] Bolivia, Colombia, Ecuador, Nicaragua and Peru, IP/C/W/165; Cuba, Honduras, Paraguay and Venezuela, IP/C/W/166; India, IP/C/M/28, para. 128.

replanting seeds sustain these communities and ensure their food security.[11] International recognition and protection of traditional knowledge would help maintain and promote such systems.

- **Culture.** The traditional knowledge of traditional communities is put into practice in a way which is part of the day–to–day lives of these peoples and thus part of their culture.[12] International action to protect traditional knowledge would help sustain such cultures.[13]
- **Environment.** The traditional knowledge of indigenous peoples and local communities is central to their ability to operate in a environmentally sustainable way and to conserve genetic and other natural resources. Protection of traditional knowledge is therefore closely linked to the protection of the environment.[14]
- **Development.** The point has been made that for the various reasons set out above, protection of traditional knowledge could contribute significantly to the fulfilment of developmental objectives.[15]
- **Coherence of international and national law.** International recognition of traditional knowledge, including farmers' rights, as protectable subject–matter would be in conformity with the obligation to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities provided for under Article 8(j) of the CBD.[16] Other international systems such as the International Undertaking on Plant Genetic Resources[17] and the model law of the Organization of African Unity (OAU) also recognize and protect the rights of local communities, farmers and breeders and there is a need to reconcile these with the TRIPS Agreement which considers intellectual property rights to be private rights.[18] Without the existence of an international mechanism, national and regional laws which acknowledge the collective rights of indigenous and local communities over their traditional knowledge and folklore could be undermined.[19]
  Moreover, the legal protection of traditional knowledge would improve confidence in the international intellectual property system.[20]

9. On the question of the **appropriate international forum/forums** for further development of the protection of traditional knowledge and folklore, two main views seem to exist:

- priority should be given to the ongoing work in WIPO and other relevant international forums, and the WTO should come back to this matter when this work has sufficiently clarified conceptual issues and possible options;
- all relevant forums, including the TRIPS Council, should pursue work on this matter in parallel and in a mutually supportive way.

10. The following reasons have been put forward for the view that emphasis should be put, at this stage, on the work of WIPO and other relevant intergovernmental organisations:

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[11] Kenya, IP/C/M/28, para. 142; Mauritius on behalf of the African Group IP/C/W/206; Peru, IP/C/M/29, para. 175.
[12] India, IP/C/M/28, para. 125.
[13] India, IP/C/M/28, para. 127, IP/C/M/25, para.70.
[14] Ecuador, IP/C/M/30, para. 184.
[15] Venezuela, IP/C/M/29, para. 201.
[16] Bolivia, Colombia, Ecuador, Nicaragua and Peru, IP/C/W/165.
[17] Now the International Treaty on Plant Genetic Resources for food and Agriculture (2001) adopted on 3 November 2001 in Rome. See www.fao.org/biodiversity/doc_en.asp.
[18] Brazil, IP/C/W/228; Cuba, Honduras, Paraguay and Venezuela, IP/C/W/166; Kenya, on behalf of the African Group, IP/C/W/163; Mauritius, on behalf of the African Group, IP/C/W/206.
[19] Ecuador, IP/C/M/30, para. 184.
[20] EC, IP/C/M/35, para. 238–9, IP/C/M/30, para. 145.

- WIPO is already engaged in a very substantive programme in the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, which has already yielded concrete results, including a decision to prepare a document on the elements of a *sui generis* system for the protection for traditional knowledge. It is therefore, necessary to follow closely this discussion and to avoid duplication of efforts.[21] The TRIPS Council should only deal with issues not tackled, or not fully tackled, in WIPO;[22]
- indigenous communities, whose views vary widely with regard to both the main problems and the possible solutions, are involved in WIPO's work;[23]
- at this stage the WTO is not the right place to negotiate a fully fledged system of protection for a complex new, and as yet undefined, subject–matter like traditional knowledge or folklore.[24] It is important to try to reach a consensus on the concept and modalities which could be acceptable at an international level and once self–standing solutions as discussed in the appropriate forum are in place, attention could then be focused on examining how and to what extent these need to be included in the TRIPS Agreement;[25]
- WIPO, as the specialized UN agency responsible for the promotion of intellectual property world–wide, is from a technical point of view, the most appropriate forum to tackle the issue of legal protection of traditional knowledge, especially if the purpose is to create a new "intellectual–property–like" protection regime.[26] The issue of traditional knowledge does not involve trade and therefore handling it in the WTO would be inappropriate.[27]
- reference has been also been made to the work of the Working Group on Article 8(j) of the CBD and the International Treaty on Plant Genetic Resources for Food and Agriculture of the FAO.[28]

11. The reasons that have been advanced for the view that work should proceed in parallel in all relevant forums are as follows:

- conflicts in the implementation of the CBD and the TRIPS Agreement, including on the subject of traditional knowledge, demand a systemic solution that should be addressed as part of the review of Article 27.3(b).[29] In response, it has been said that the CBD deals only with that part of traditional knowledge relevant for the conservation and sustainable use of biological diversity;[30]
- it would be inappropriate to have issues and problems arising out of the TRIPS Agreement dealt with by the WIPO.[31] Indeed, the TRIPS Council has a valuable role to play in shedding light on these issues and in looking for practical and equitable responses to the concerns raised, while minimising duplication of efforts by dealing with issues not dealt with at all or only inadequately at the WIPO;[32]
- lack of definition or clarity on the concept of traditional knowledge should not prevent WTO Members from establishing multilateral disciplines just as it did not do so in the case of "microorganisms".[33] Indeed, the exercise was called for precisely because there was a lack of clarity;[34]

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[21] EC, IP/C/M/35, para. 238–9, IP/C/W/254; United States, IP/C/M/35, para. 241–242.
[22] Australia, IP/C/M/28 para. 150; Switzerland, IP/C/M/35, para. 247.
[23] United States, IP/C/M/35, para. 241-242.
[24] EC, IP/C/M/35, para. 238–239; Japan, IP/C/M/26, para. 62; Singapore, IP/C/M/26, para. 74.
[25] EC, IP/C/M/35, para. 238–239, IP/C/W/254; Japan, IP/C/M/25, para. 93; Korea, IP/C/M/28, para. 164, IP/C/M/25, para. 95; United States, IP/C/M/35, para. 241–242.
[26] EC, IP/C/M/35, para. 239.
[27] Canada, IP/C/M/25, para. 91.
[28] Switzerland, IP/C/W/284.
[29] Brazil, IP/C/M/28, para. 185.
[30] United States, IP/C/W/257.
[31] Brazil, IP/C/M/28, para. 168; India, IP/C/M/28, para. 167; Australia and Norway stated that the Council for TRIPS should deal with issues that touched on the TRIPS Agreement–IP/C/M/28, para. 151 and IP/C/M/27, para. 133, respectively.
[32] Australia, IP/C/M/28, para. 150; Switzerland, IP/C/M/35, para. 247.
[33] Brazil, IP/C/M/30, para. 183.
[34] India, IP/C/M/28, para. 128.

- WTO is an appropriate forum to discuss traditional knowledge as work on this issue is being carried out not only in the TRIPS Council but also in the Committee on Trade and Environment;[35]
- it is important for the TRIPS Council to take note of the discussions elsewhere on this subject, so as to avoid duplication of efforts and to create the basis for the necessary synergies between the work done in the TRIPS Council and the WIPO, CBD, FAO and other relevant intergovernmental organisations.[36]

II. THE GRANT OF PATENTS IN RESPECT OF TRADITIONAL KNOWLEDGE

12. As indicated earlier, a concern that has been expressed in the discussions in the TRIPS Council is about the grant of patents or other IPRs covering traditional knowledge to persons other than the indigenous peoples or communities who have originated the knowledge and legitimately control it. Several patents have been cited as examples, including in regard to turmeric, neem[37] and ayahuasca vine.[38]

13. The view has been expressed that the granting of patents on traditional knowledge already in the public domain amounts to unauthorized appropriation of the knowledge.[39] It has been said that this occurs particularly in the case where Members do not follow appropriate definitions of the criteria for patentability or appropriate procedures.[40] In response, it has been said that, if patents are improperly granted, the patent system provides remedies, as demonstrated by the revocation of the neem and turmeric patents.[41] Were parties other than traditional knowledge holders to obtain patent protection, the patent should be cancelled.[42]

14. Two areas where it has been said that the patent system is not working well enough in connection with the granting of patents covering traditional knowledge have been referred to:

- one is in connection with the **definition of prior art** used to determine whether a claimed invention meets the novelty standard for patentability. In this connection, it has been said that some Members define novelty in a manner that does not recognize information available to the public through use or oral traditions outside their domestic jurisdictions.[43] In response, it has been said that under the patent laws of many Members prior art comprises not just earlier disclosures in writing but also what is already publicly known or used anywhere in the world;[44]
- the second concerns the **adequacy of the information on prior art** available to patent examiners. It has been said that the instances of patents wrongly granted show that the prior art in the case of traditional knowledge originating in one country is not widely known or documented and available to patent offices all over the world.[45] Often traditional knowledge

[35] Venezuela, IP/C/M/26, para. 73.
[36] Brazil, IP/C/M/26, para. 62, 64; Mauritius on behalf of the African Group, IP/C/W206; Venezuela, IP/C/M/26, para. 84. Others supported coordination with other relevant organizations: EC, IP/C/M/30, para. 146; New Zealand, IP/C/M/26, para. 69; Switzerland, IP/C/M/29, para. 176.
[37] India, IP/C/W/198.
[38] Brazil, IP/C/W/228.
[39] India, IP/C/M/30, para. 170.
[40] India, IP/C/M/28, para. 126; Kenya, IP/C/M/28, para. 141.
[41] United States, IP/C/M/32, para. 131; Japan, IP/C/M/29, para. 157.
[42] EC, IP/C/W/254.
[43] India, IP/C/M/28, para. 126; Kenya, IP/C/M/28, para. 141.
[44] Japan, IP/C/W/236.
[45] United States, IP/C/W/209; Switzerland, IP/C/W/284.

exists only in oral form or, if documented, is available in languages that the patent authorities are not familiar with.[46]

15. With regard to patent applications, not for traditional knowledge itself but when traditional knowledge is used as a basis for further innovations which meet the relevant criteria, it has been said that these innovations are perfectly patentable. However, the existence of a patent would, however, not override accompanying national requirements to obtain authorisation from the owners of the traditional knowledge from which the invention is derived and to reward them for the use of it or share the benefits of its use.[47] In response, it has been said that, even if the national laws applicable do not allow patents on inventions based on traditional knowledge, patents in other regimes that allow such patents reduce the economic value of the knowledge of local communities and may constrain the development and use of their knowledge in the market–place or may facilitate others' use or exploitation of their knowledge without any rewards to them.[48]

16. It has been suggested that the development of **databases on traditional knowledge** would help prevent the grant of patents for subject–matter that should not be patentable.[49] Some specific suggestions have been made in this regard.[50] Creating organized data bases of traditional knowledge searchable over the Internet[51] would be beneficial for determining prior art in patent offices[52] as well as help potential licensees.[53] Moreover, to the extent that traditional knowledge is already recorded in databases and print media, it is important to ensure that patent examiners are made familiar with these resources.[54] It has been said that care should be taken that the databases do not themselves facilitate piracy.[55] Thus, such data bases should only disclose traditional knowledge already in the public domain or traditional knowledge for which prior informed consent has been obtained. It has also been said that access to these databases should not involve costly or burdensome procedures[56]. A further point has been that, while such databases might help forestall the grant of inappropriate patents, they could not address the problem of the non–accrual to the holders of traditional knowledge of economic benefits resulting from the use of that knowledge.[57]

17. It has also been suggested that a requirement on patent applicants to disclose in their applications any traditional knowledge used in the invention in question could help in the assessment of novelty and also assist countries with possible claims to examine the application and oppose the patent in time.[58] This discussion on this suggestion, which has also been made in regard to prior informed consent and benefit-sharing with regard to genetic resources, is set out in the Secretariat summary note on the relationship between the TRIPS Agreement and the CBD.

III. CONSENT AND BENEFIT SHARING

18. As indicated earlier, one of the major concerns expressed has been that traditional knowledge is being used without the authorization of the indigenous peoples or communities who have originated

[46] EC, IP/C/M/32 para. 137; Switzerland, IP/C/M/30, para.164.
[47] EC, IP/C/W/254.
[48] India, JOB(00)/6091.
[49] EC, IP/C/M/32, para. 137; Switzerland, IP/C/M/30, para.164; IP/C/W/284; Brazil, IP/C/W/228; India, IP/C/W/198; US, IP/C/W/209.
[50] Switzerland, IP/C/W/284.
[51] Switzerland, IP/C/M/30, para. 164.
[52] Brazil, IP/C/W/228; Japan, IP/C/M/32, para. 142; Switzerland, IP/C/M/30, para.164; United States IP/C/W/257.
[53] United States, IP/C/W/257.
[54] United States, IP/C/W/209.
[55] Brazil, IP/C/W/228, IP/C/M/32, para. 130, IP/C/M/28, para. 136; India, IP/C/W/198, IP/C/M/29, para. 164, 165; Venezuela, IP/C/M/32, para. 136.
[56] Brazil, IP/C/W/228; Switzerland, IP/C/W/284, IP/C/M/32, para. 124; Venezuela, IP/C/M/32, para. 136.
[57] Brazil, IP/C/W/228; IP/C/M/32, para. 130; India, IP/C7M/29, para. 164; Pakistan, IP/C/M/28, para. 159.
[58] Brazil, IP/C/W/228, IP/C/M/33, para. 121, IP/C/M/32, para. 128; India, IP/C/W/195, IP/C/M/29, para. 164–5.

and legitimately control it and without proper sharing of the benefits that accrue from such use. Several suggestions have been put forward with a view to addressing this concern:

- **Use of the existing IPR system**. It has been suggested that a starting-point should be to explore possibilities for making more effective use of the existing IPR system for protecting the traditional knowledge of indigenous peoples and local communities;[59]
- **Disclosure requirement**. It has been suggested that applicants for patents for inventions that use traditional knowledge should be required to disclose the traditional knowledge in their patent application and to provide evidence that they have obtained any necessary prior informed consent from the competent authority in the country of origin of that knowledge and have entered into appropriate benefit–sharing arrangements;[60]
- **Contracts**. It has been suggested that the best way of addressing these concerns would be through systems based on bilateral contracts between holders of traditional knowledge and persons or companies wishing to access and use that knowledge. Such systems could be backed up by suitable national or local legislation;[61]
- **Sui generis system of protection**. It has been suggested that only a system of protection of traditional knowledge which provides proprietary rights can ensure that market forces will operate to generate fairness and equity.[62]

19. The subsections that follow summarize the discussion on each of these suggestions, except that concerning disclosure. This suggestion, which has also been made in regard to genetic material used in inventions that are the subject of patent applications, is discussed in more detail in the Secretariat summary note on the relationship between the TRIPS Agreement and the CBD.

20. A general point that has been made is on the importance of educating indigenous and local communities to be able to protect their interests by effectively negotiating contracts and using intellectual property systems.[63]

A. Use of the existing IPR system

21. The view has been expressed that, while there is a need to examine ways of improving protection for traditional knowledge, the starting-point should be to explore possibilities for making more effective use of the existing legal framework, particularly the intellectual property system.[64] Dismissing the applicability of the current system ignores not only the potential benefits to be gained and identify the legitimate "gaps" in protection and could lead to the creation of additional regulatory burdens and procedures.[65] Under the existing system traditional artists and creators have legal rights through which they can exclude unauthorized use by others and obtain financial benefits for their efforts, including in the international market. Beyond the patent system several other IPRs such as copyright and related rights, trademarks and certifications marks can be used.[66] Points that have been made and some examples cited in the discussion so far that relate to specific IPRs are set out below:

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[59] Australia, IP/C/W/310; Japan, IP/C/M/29, para. 157.
[60] Brazil, IP/C/W/228; India; IP/C/M/195
[61] United States, IP/C/W/257.
[62] Brazil, IP/C/W/228, IP/C/M/32, Indonesia, IP/C/M/32, para 134.
[63] United States, IP/C/W/209.
[64] Australia, IP/C/W/310; Japan, IP/C/M/29, para. 157.
[65] Australia, IP/C/W/310.
[66] Australia, IP/C/M/28, para. 152.

- copyright and related rights. While it is claimed that copyright laws illustrate the existing system's inability to accommodate the concept of traditional knowledge, for example on account of communal ownership, attention has been drawn to some recent court cases that have extended legal rights over copyright to traditional knowledge in certain circumstances, thus demonstrating that creative use of the current legal system can provide for such protection.[67] These cases including ones involving the unauthorized use of a photograph of an indigenous dance group, the unauthorized reproduction of spiritual rock art images and the distortion of artistic works containing pre–existing cultural clan images;[68]
- patents, plant variety protection and utility models. It has been argued that, when combined with voluntary contracts, obtaining patents around the world on commercial products that use traditional knowledge would provide a firm legal basis for the sharing of benefits, whereas the absence of such protection would mean that anyone would be free to use the technology without any obligation to share benefits.[69] It has also been said that *sui generis* systems for protecting plant varieties can be designed so as to recognize traditional knowledge and farmers' rights, for example those that take the form of selecting, breeding, using and sustaining plant varieties. The example of the OAU Model Law has been cited as protecting the rights of local communities, farmers and breeders.[70] It has been suggested that a footnote might be added to the TRIPS Agreement to clarify that any *sui generis* law for plant variety protection can provide for the protection of the innovations of indigenous and local farming communities in developing countries and the continuation of traditional farming practices.[71] The view has also been expressed that the TRIPS Agreement does not exclude the possibility of protecting farmers' varieties under a system separate from that providing effective protection for commercially bred plant varieties[72] and that farmers' rights and breeders' rights would have to be balanced;[73]
- unfair competition and trade secrets. Some examples have been given in the discussion involving the use of unfair competition laws or remedies against passing off, in conjunction with, for example, copyright and related rights to deal with the protection of traditional knowledge.[74] It has been said that trade secret law is particularly appropriate in helping indigenous and local communities maintain limitations on the circulation of their knowledge, innovations and practices;[75]
- industrial designs. It has been said that the extent to which indigenous groups have used design law to protect their indigenous cultural expression, through registration and enforcement of indigenous designs and symbols, is the subject of a study in one Member country. An example has been given of the unauthorized reproduction of an indigenous artist's work embodying clan designs, on imported fabric. It has been said that this case involves examining the ability of another party to bring an action as co–applicant, as a representative of the clan involved;[76]
- trademarks and certification marks. Examples have been given of the use of trademarks by indigenous arts centres and galleries for the protection of artistic works and other forms of indigenous knowledge.[77] Another example has been given of a national label of authenticity registered as a certification trademark for indigenous art and art products;[78]

[67] Australia, IP/C/W/310.
[68] Australia, IP/C/W/310.
[69] United States, IP/C/W/257.
[70] Mauritius, on behalf of the African Group, IP/C/W/206.
[71] Kenya, on behalf of the African Group, IP/C/W/163.
[72] Switzerland, IPC/W/284.
[73] Malaysia, IP/C/M/29, para. 206.
[74] Australia, IP/C/W/310.
[75] United States, IP/C/W/257.
[76] Australia, IP/C/W/310.
[77] Australia, IP/C/W/310.
[78] Australia, IP/C/W/310.

- Geographical indications. The view has been expressed that under certain circumstances geographical indications could be a particularly important way of protecting traditional knowledge,[79] for example for identifying products originating from a "protected area" as defined in Article 1 of the CBD where producers decide to link their collective production standards and related traditional knowledge to conservation goals.[80]

22. The view has been expressed that, while the existing IPR system may be usable in certain circumstances, it cannot provide for sufficient protection of traditional knowledge. Several reasons have been given to support this argument:

- IPRs protect individual property rights whereas traditional knowledge is by and large collective;[81]
- traditional knowledge is developed over a period of time and is intergenerational and therefore, may not meet the criteria of novelty or originality or inventive step required byIPRs;[82]
- communities often hold this knowledge in parallel which makes it difficult to determine title holders;[83]
- communities lack adequate education, awareness and resources to take advantage of IPRs;[84]
- communities do not use scientific methods but trial and error over time.[85]

B. Contracts

23. It has been suggested that bilateral contracts, backed by suitable national or local legislation between those seeking to develop knowledge, innovations and practices into commercial products and those providing such traditional knowledge would be the best way forward. While it is possible that a few individuals could ignore legal requirements laid down in a contract, in the same way that some individuals counterfeit trademarks or pirate copyrighted works, this does not negate the value of a contractual system that would apply to the vast majority of those seeking access to traditional knowledge.[86] Moreover, criminal provisions and/or civil liability for failure to comply with such contracts can be included in a country's laws.[87] In response, it has been said that, bilateral contracts in themselves are not sufficient to protect traditional knowledge because they are not easily enforceable and result from negotiations between unequal parties.[88] Consequently, there is no way of ensuring that the prior consent obtained from these communities will actually be an informed one.[89] It has been added that similar problems arise with other schemes, such as voluntary guidelines to be followed by bio–prospecting companies; however constructive the intent, they may end up being ineffective due to their voluntary nature.[90]

[79] EC, IP/C/W/254; Venezuela, IP/C/M/32, para. 136.
[80] EC, IP/C/W/254.
[81] Brazil, IP/C/W/228; India, IP/C/W/198; Venezuela, IP/C/M/25, para. 86.
[82] Brazil, IP/C/W/228; India, IP/C/W/198.
[83] Brazil, IP/C/W/228; India, IP/C/W/198.
[84] India, IP/C/W/198.
[85] Venezuela, IP/C/M/25, para. 86.
[86] United States, IP/C/W/257.
[87] United States, IP/C/W/257.
[88] Brazil, IP/C/W/228; Pakistan, IP/C/M/28, para. 158; Peru, IP/C/M/35, para. 236, IP/C/M/32, para. 133.
[89] Brazil, IP/C/W/228.
[90] Brazil, IP/C/W/228.

C.Protecting traditional knowledge under a sui generis system

24. It has been suggested that only a system of protection of traditional knowledge that provides proprietary rights can ensure that market forces will operate to generate fairness and equity.[91] A proprietary protection approach could provide protection *erga omnes*, in the sense that, even if the knowledge is in some way publicly disclosed, there could be mechanisms available to prevent its use by all third parties.[92]

25. In response, it has been said that any discussion of such a system would require clarity as to the definition and scope of the term traditional knowledge[93] There would also be considerable hurdles to overcome regarding issues of the determination and modalities of ownership.[94] It has also been said that careful thought would need to be given before establishing different systems of intellectual property protection for public domain traditional knowledge developed by industrial and non–industrial communities.[95] In response, it has been argued that the absence of clarity as to the meaning of some terms or the limited amount of experience with national legislation should not be used to justify a refusal to discuss, any more than they had deterred Members from agreeing to the protection of a range of subjects in the TRIPS Agreement that were new to many Members.[96]

26. The point has been made that there is nothing in the TRIPS Agreement that prevents WTO Members from setting up a specific protection regime for traditional knowledge that regulates or enforces access to, prohibition of, and rewards for the use of traditional knowledge.[97] Support has been expressed for drawing up an international model for such legislation.[98]

27. With regard to action at the multilateral level, views have been expressed that national systems will not be sufficient and that there is a need to explore an international system of minimum standards of protection of traditional knowledge, drawing on synergies with the work of CBD, WIPO, FAO and UNCTAD.[99] Another view in this connection is that once WIPO has completed work on model national legislation, attention could be focussed on how and to what extent the protection of traditional knowledge can be included in the TRIPS Agreement.[100]

28. Some more specific suggestions have been made on what such a *sui generis* system should cover:

- a possible definition put forward states that traditional knowledge consists largely of innovations, creations and cultural expressions generated or preserved by its present possessors, who may be defined and identified as holders of rights who are either individuals or whole communities, natural or legal persons;[101]
- the rights provided should follow those provided in Article 28 of the TRIPS Agreement so as to give exclusive rights to prevent third parties not having the owner's consent from the acts of making, using, offering for sale, or importing the covered product or process;[102]

[91] Brazil, IP/C/W/228; Indonesia, IP/C/M/32, para. 134.
[92] Brazil, IP/C/W/228 para. 34.
[93] Japan, IP/C/M/29, para. 157.
[94] EC, IP/C/M/35, para. 238–9.
[95] Singapore, Job(00)7853.
[96] Brazil, IP/C/M/30, para. 183.
[97] EC, IP/C/W/254.
[98] Brazil, IP/C/W/228; Indonesia, IP/C/M/32, para. 134.
[98] EC, IP/C/W/254.
[99] Brazil, IP/C/W/228.
[100] EC, IP/C/W/254.
[101] Bolivia, Colombia, Ecuador, Nicaragua and Peru, IP/C/W/165.
[102] Indonesia, IP/C/M/32, para. 134.

- creating a system for registration of innovations and giving the registered owner the right to challenge any use of the innovations without prior permission. It has been said that for novel and useful innovations, some kind of a petty patent system should be implemented.[103]

IV. INFORMATION ON MEMBERS' NATIONAL LEGISTATION, PRACTICES AND EXPERIENCES

29. Three Members have made submissions with regard to their legislation, practices and experiences, with respect to the protection of traditional knowledge. These are Australia, India and Peru.[104]

ANNEX

DOCUMENTS OF THE TRIPS COUNCIL WITH RESPECT TO THE REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B), THE RELATIONSHIP BETWEEN TRIPS AND THE CONVENTION ON BIOLOGICAL DIVERSITY AND THE PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

The TRIPS Council held 15 formal meetings during the period January 1999 to March 2002. The reports on these meetings (IP/C/M/21–35) reflect the work done so far in the TRIPS Council pursuant to *inter alia* the mandated review of the provisions of Article 27.3(b). The substantive discussions in the TRIPS Council on these issues have been recorded in the reports of the meetings held from August 1999 to March 2002 (IP/C/M/24–35).

Other documents that have been made available include:

- Members' submissions relating to specific issues. Over the period December 1998 to October 2001, 22 papers have been submitted by Members or groups of Members (List B).
- Information on national legislation, practices and experiences submitted by four Members; and the responses to the questionnaire on Article 27.3(b) from 23 Members (List C).
- Information provided on work in intergovernmental organizations (List D).
- Notes by the Secretariat on relevant issues under discussion in the TRIPS Council (ListE).

LIST A – RECORDS OF THE WORK OF THE TRIPS COUNCIL		
IP/C/M/21–35	Minutes of the TRIPS Council Meetings	22 January 1999 – 22 March 2002

[103] India, IP/C/W/198.
[104] Australia, IP/C/W/310; India, IP/C/W/198; Peru, IP/C/W/246.

LIST B - MEMBERS' SUBMISSIONS RELATING TO THE AGENDA ITEMS 2001			
Australia	IP/C/W/310	Communication from Australia: Review of Article 27.3(b)	2 October 2001
EC	IP/C/W/254	Review of the Provisions of Article 27.3(b) of the TRIPS Agreement: Communication from the European Communities and their Member States	13 June 2001
Norway	IP/C/W/293	Communication from Norway: Review of Article 27.3(b) of the TRIPS Agreement: The Relationship between the TRIPS Agreement and the Convention on Biological Diversity	29 June 2001
Switzerland	IP/C/W/284	Communication from Switzerland: Review of Article 27.3(b): The View of Switzerland	15 June 2001
United States	IP/C/W/257	Communication from the United States – Views of the United States on the Relationship between the Convention on Biological Diversity and the TRIPS Agreement	13 June 2001

2000			
Brazil	IP/C/W/228	Review of Article 27.3(b) – Communication from Brazil	24 November 2000
India	IP/C/W/195	Communication from India	12 July 2000
India	IP/C/W/196	Communication from India	12 July 2000
India	JOB(00)/6091	Non–paper by India	5 October 2000
Japan	IP/C/W/236	Review of the provisions of Article 27.3(b) – Japan's view	11 December 2000
Mauritius	IP/C/W/206	Communication from Mauritius on behalf of the African Group	20 September 2000
Singapore	JOB(00)/7853	Non–paper by Singapore – Article 27.3(b)	11 December 2000
United States	IP/C/W/209	Review of the Provisions of Article 27.3(b) – Further Views of the United States – Communication from the United States	3 October 2000

1999			
Andean Group	IP/C/W/165	Review of the Provisions of Article 27.3(b) – Proposal on the Intellectual Property Rights Relating to the Traditional Knowledge of Local and Indigenous Communities – Communication from Bolivia, Colombia, Ecuador, Nicaragua and Peru	3 November 1999
Canada, EC, Japan and USA	IP/C/W/126	Review of the Provisions of Article 27.3(b) – Communication from Canada, the European Communities, Japan and the United States	5 February 1999
Brazil	IP/C/W/164	Review of the Provisions of Article 27.3(b) – Communication from Brazil	29 October 1999
Cuba, Honduras, Paraguay and Venezuela	IP/C/W/166	Review of Implementation of the Agreement under Article 71.1: Proposal on the Intellectual Property Rights of the Traditional Knowledge of Local and Indigenous Communities	5 November 1999
India	IP/C/W/161	Review of the Provisions of Article 27.3(b)– Communication from India	3 November 1999
Kenya	IP/C/W/163	Review of the Provisions of Article 27.3(b) – Communication from Kenya on behalf of the African Group	8 November 1999
Norway	IP/C/W/167	Review of the Provisions of Article 27.3(b) – Communication from Norway	3 November 1999
United States	IP/C/W/162	Review of the Provisions of Article 27.3(b) – Communication from the United States	29 October 1999

1998			
Mexico	Job No. 6957	Non–paper from Mexico: Application of Article 27.3(b)	8 December 1998

LIST C - INFORMATION ON NATIONAL LEGISLATION, PRACTICES AND EXPERIENCES 2002			
United States	IP/C/W/341	Technology transfer practices of the US National Cancer Institute's departmental therapeutics programme – Communication from the United States	25 March 2002

2001			
Australia	IP/C/W/310	Communication from Australia: Review of Article 27.3(b)	2 October 2001
Czech Republic	IP/C/W/125/Add.8/ Suppl.1	Review of the Provisions of Article 27.3(b) – Information from Members – Supplement	18 September 2001
Estonia	IP/C/W/125/Add.20	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	2 July 2001
Hong Kong, China	IP/C/W/125/Add.22	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	10 August 2001
Thailand	IP/C/W/125/Add.21	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	10 July 2001
Peru	IP/C/W/246	Communication from Peru: Peru's Experience of the Protection of Traditional Knowledge and Access to Genetic Resources	14 March 2001

2000			
Iceland	IP/C/W/125/ Add.19	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	17 July 2000
India	IP/C/W/198	Protection of Biodiversity and Traditional Knowledge – The Indian Experience	14 July 2000

1999			
Australia	IP/C/W/125/Add.13	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	16 March 1999
Bulgaria–(Republic of)	IP/C/W/125	Review of the Provisions of Article 27.3(b) – Information from Members	3 February 1999
Canada	IP/C/W/125/Add.12	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	12 March 1999
Czech Republic	IP/C/W/125/Add.8	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	16 February 1999
European Communities	IP/C/W/125/Add.4	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	10 February 1999
Hungary	IP/C/W/125/Add.1	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	16 February 1999
Japan	IP/C/W/125/Add.7	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	12 March 1999
Korea (Republic of)	IP/C/W/125/Add.9	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	16 February 1999
Morocco	IP/C/W/125/Add.14	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	20 April 1999
New Zealand	IP/C/W/125/Add.2	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	12 February 1999
Norway	IP/C/W/125/Add.17	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	19 May 1999
Poland	IP/C/W/125/Add.11	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	12 March 1999
Romania	IP/C/W/125/Add.6	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	16 February 1999
Slovak Republic	IP/C/W/125/Add.18	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	27 July 1999
Slovenia	IP/C/W/125/Add.10	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	16 February 1999
South Africa	IP/C/W/125/Add 16/ Corr.1	Review of the Provisions of Article 27.3(b) – Information from Members – Corrigendum	25 May 1999
South Africa	IP/C/W/125/Add.16	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	21 April 1999
Switzerland	IP/C/W/125/Add.15	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	13 April 1999
United States	IP/C/W/125/Add.5	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	20 April 1999
Zambia	IP/C/W/125/Add.3	Review of the Provisions of Article 27.3(b) – Information from Members – Addendum	10 February 1999

LIST D - INFORMATION ON THE WORK OF INTERGOVERNMENTAL ORGANIZATIONS 2002			
UPOV	IP/C/W/347/ Add.3	Review of the Provisions of Article 27.3(b) – Relationship between the TRIPS Agreement and the Convention on Biological Diversity and Protection of Traditional Knowledge and Folklore	7 June 2002
UNCTAD	IP/C/W/347/ Add.2	Review of the Provisions of Article 27.3(b) – Relationship between the TRIPS Agreement and the Convention on Biological Diversity and Protection of Traditional Knowledge and Folklore	7 June 2002
CBD	IP/C/W/347/ Add.1	Review of the Provisions of Article 27.3(b) – Relationship between the TRIPS Agreement and the Convention on Biological Diversity and Protection of Traditional Knowledge and Folklore	7 June 2002
FAO	IP/C/W/347	Review of the Provisions of Article 27.3(b) – Relationship between the TRIPS Agreement and the Convention on Biological Diversity and Protection of Traditional Knowledge and Folklore	7 June 2002

2001			
WIPO	IP/C/W/242	Statement by the World Intellectual Property Organization (WIPO) on intellectual property, biodiversity and traditional knowledge	6 February 2001

2000			
UNCTAD	IP/C/W/230	Document prepared by the UNCTAD Secretariat for the expert meeting on systems and national experiences for protecting traditional knowledge, innovations and practices which took place from 30 October to 1 November 2000 in Geneva: Outcome of the expert meeting	14 December 2000
International Bureau of WIPO	IP/C/W/218	Document prepared by the International Bureau of WIPO for the meeting on intellectual property and genetic resources, which took place on 17 and 18 April 2000 in Geneva: Intellectual Property and Genetic Resources – An Overview	18 October 2000
International Bureauof WIPO	IP/C/W/217	Document prepared by the International Bureau of WIPO for the round table on Intellectual Property and traditional knowledge, which took place on 1 and 2 November 1999 in Geneva: Protection of Traditional Knowledge: A Global Intellectual Property Issue	18 October 2000

1999			
CBD	IP/C/W/130/Add.1	Review of the Provisions of Article 27.3(b) – Information from Intergovernmental Organizations – Addendum	16 March 1999
FAO	IP/C/W/130/Add.2	Review of the Provisions of Article 27.3(b) – Information from Intergovernmental Organizations – Addendum	12 April 1999
UPOV	IP/C/W/130	Review of the Provisions of Article 27.3(b) – Information from Intergovernmental Organizations	17 February 1999

LISTE – NOTES BY THE SECRETARIAT 2001		
Job No. 2689 IP/C/W/273	Review of the Provisions of Article 27.3(b): Synoptic Tables of Information provided by Members – Informal Note by the Secretariat	5 June 2001

2000		
JOB(00)/7517	The Relationship between the Convention on Biological Diversity and the TRIPS Agreement: Checklist of Points Made – Note by the Secretariat	23 November 2000
Job. n° 2627	UPOV–WIPO–WTO joint symposium on the protection of plants varieties under Article 27.3 (b) of the TRIPS Agreement: Texts of presentations	7 May 1999

1998		
IP/C/W/122	Illustrative Questions: Review of the Provisions of Article 27.3(b)	22 December 1998