



Question Q232

National Group: U.S. National Group

Title: **The relevance of traditional knowledge to intellectual property law**

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Reporter within Working Committee: Not Defined

Date: 18 May 2012

Questions

I. Analysis of current law and case law

The Groups are invited to answer the following questions under their national laws:

1) Is TK defined in your national law?

No. Traditional knowledge is not defined in U.S. law.

2) If yes to question 1, what is the source of the definition?

N/A.

3) If yes to question 1, how is TK defined?

N/A.

4) If TK is not defined in your national law, is there any 'working definition' described in any draft law or regulation, policy document or other discussion material?

No. There is no current 'working definition' of traditional knowledge in any U.S. draft law, regulation, or policy document.

5) Does your national law provide for any protection (whether positive or defensive) for TK?

The United States has a federal system in which both the national government and the governments of the 50 states enact law. As a result of this, certain intellectual property protections exist in one or both of federal and state law. To the extent that there is a

conflict of the federal and state law, federal law is supreme. See U.S. Constitution, article VI, clause 2.

The four main topics of intellectual property protection are (1) patent, (2) copyright, (3) trademark, and (4) trade secret. The United States Constitution has been found by the Supreme Court to allow federal law to pre-empt any attempt by a state to enact a patent law (See U.S. Constitution article I, § 8, clause 8; *Compco Corporation v. Day-Brite Lighting, Incorporated*, 376 U.S. 234 (1964)) and the Copyright Act explicitly pre-empts state law. See 17 U.S.C. § 301. In contrast, trademarks are protected at both the federal and state level. Finally, trade secret protection is generally made available under state law. However, federal law provides a limited form of such protection under the Economic Espionage Act which provides criminal remedies for the misappropriation of a trade secret. See 18 U.S.C. §§ 1831-1839. Because the applicability of state law on Indian reservations varies from state-to-state and from tribe-to-tribe, state trade secret law may not necessarily be applicable on Indian reservations where a fraction of the indigenous peoples in the U.S. reside.

In light of this, the combination of U.S. federal and state law provides a combination of positive and defensive protection for intellectual property that may also pertain to traditional knowledge, as discussed below. It should be noted that for positive protection there is a tension between the patent law requirements for disclosure and the trade secret law requirements to maintain secrecy. This is also true with respect to the defensive protection afforded to published prior art and the potential loss of trade secret rights through publication.

6) If yes to question 5, is the protection found in:

a) existing IP laws or regulations;

Positive protection for traditional knowledge (TK) can be sought via patent law (See, e.g., 35 U.S.C. § 271), trademark law and unfair competition (See, e.g., 15 U.S.C. § 1114, 1125), copyright law (See, e.g., 17 U.S.C. § 501, 1309) and trade secret law (See, e.g., 18 U.S.C. § 1832; Uniform Trade Secrets Act (see Appendix A with attached definition of "Trade secret")), to the extent that the subject matter qualifies for such protection.

Defensive protection can be found in a variety of sources, including in patent law (See, e.g., 35 U.S.C. § 102, 103), trademark law (See, e.g., 15 U.S.C. § 1052) and copyright law (See, e.g., 17 U.S.C. § 102, 1301). The USPTO searches the Traditional Knowledge Digital Library (TKDL) and maintains a Native American Tribal Insignia Database).

b) adaptation of IP laws or regulations through sui generis measures for TK protection;
or

c) wholly sui generis laws or regulations relating to TK protection?

Additional positive protection is provided to Native Americans (Indian tribal members) or certified Indian artisans in the Indian Arts and Crafts Act. See, e.g., 18 U.S.C. § 1159 ("It is unlawful to offer or display for sale or sell any good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States").

7) If yes, to any part of question 6, please provide details of the law(s) or regulation(s), including where such detail exists:

a) criteria for eligibility for protection;

Apart from protection through the Indian Arts and Crafts Act, traditional knowledge must meet the same criteria for eligibility for protection as any other type of intellectual property.

The Indian Arts and Crafts Act provides protection to products that are “Indian Produced”, an “Indian Product”, or “the product of a particular Indian or Indian Tribe or Indian arts and crafts organization, resident within the United States.” 18 U.S.C. § 1159(a).

Official insignia of a U.S. government recognized Indian tribe can be included in the Native American Tribal Insignia Database if the insignia is adopted as an official tribal insignia by a tribal resolution.

b) beneficiaries of protection;

The Indian Arts and Crafts Act only benefits U.S. government recognized Indians (any person who is a member of an Indian tribe or is certified as an Indian artisan by an Indian tribe. See 18 U.S.C. § 1159(c)(1)), Indian Tribes (Native American group recognized by either the U.S. federal government or one of the U.S. state governments. See 18 U.S.C. § 1159(c)(3)), and Indian arts and crafts organizations (any legally established arts and crafts marketing organization composed of members of Indian tribes. See 18 U.S.C. § 1159(c)(4)).

The Native American Tribal Insignia Database features insignia that various federally and state recognized tribes have identified as their official insignia.

The general forms of protection including patent, copyright, trademark, and trade secret are available to all originators, owners, and/or users of intellectual property.

c) scope of protection;

The Indian Arts and Crafts Act prevents the offer or display for sale of goods marked to falsely suggest that they are “Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.” 18 U.S.C. § 1159(a).

By arranging for its official insignia to be entered in the Native American Tribal Insignia Database, a Native American Tribe does not gain any of the benefits that result from registration of a trademark. The database is used as an aid in the examination of applications for trademark registration.

The scope of the other protections are coterminous with the scope of protection for all originators, owners, and/or users of intellectual property.

d) sanctions, remedies and exercise of rights;

The Indian Arts and Crafts Act provides criminal remedies (See 18 U.S.C. § 1159) and civil remedies (See 25 U.S.C. § 305(E)).

The sanctions, remedies, and exercise of rights of the other intellectual property rights are coterminous with the sanctions, remedies, and exercise of rights available for all originators, owners, and/or users of intellectual property.

e) administration of rights;

The Indian Arts and Crafts Act is administered by the Indian Arts and Crafts Board.

The Native American Tribal Insignia Database is administered by the USPTO.

Any TK protected under general IP laws is administered by the same administrative groups responsible for the administration of the general intellectual property rights.

- f) exceptions to and limitations on rights;

There are no special exceptions to and limitations on rights.

- g) term of protection;

Protection under the Indian Arts and Crafts Act does not have a term.

There is no special term of protection for TK protected under existing intellectual property laws.

- h) formalities to which protection is subject;

The formalities for TK protection are the same as required for other intellectual property.

- i) transitional measures;

There are no transitional measures in U.S. law.

- j) consistency with other laws;

The U.S. laws are consistent with each other in that they generally do not provide special or additional protection for TK.

- k) national treatment and foreign interests; and

The Indian Arts and Crafts Act and the Native American Tribal Insignia Database only extend to recognized Indians, Indian Tribes, and Indians arts and crafts organization that reside inside the United States. Apart from this, current U.S. law does not provide preferential national treatment for TK.

- l) trans-boundary cooperation.

The U.S. has signed the Convention on Biological Diversity, however, this convention has not been ratified by the U.S. Senate. Additionally, the U.S. has cooperated with the Indian government to receive access to the TKDL. Finally, the U.S. signed the United States–Peru Trade Agreement (see attached Understanding Regarding Biodiversity and Traditional Knowledge), which includes an understanding regarding biodiversity and traditional knowledge. While this understanding recognizes the importance of TK, it does not provide any specific definition of TK. The understanding states that TK can be adequately protected through contracts and quality patent examination.

Note: the items in this non-exhaustive list are taken from the IGC draft articles relating to the protection of TK dated 20 May 2011: WIPO/GRTKF/IC/19/5. Groups may benefit from

referring to this document in answering question 7, but should also add any additional criteria, which exists in their national law.

8) Are the protections described in response to questions 6 and 7:

- a) referable to TK alone; or
- b) related to or linked to the concepts of protection of:
 - (i) genetic resources; or
 - (ii) TCEs?

The protections described above are not related to or linked to the concepts of protection of genetic resources or TCEs. Instead, the above discussed TK specific concepts of protection seem related or linked to concepts of consumer protection.

9) If yes to question 8(b), please provide details of any linkages.

N/A.

10) Please identify any shortcomings in any protection of TK in your country by reference to the matters in questions 6 to 9 above.

The most apparent shortcoming of the U.S. law is the inequality of protection offered to individuals based solely on classification as an Indian, belonging to an Indian tribe (see attached list of federally recognized Indian Tribes), or belonging to a recognized Indian arts and crafts organization. It is unclear what protection is provided through these Indian specific laws that could not be provided through already existing intellectual property law, and what if any basis exists for legislative favoritism of one class.

11) Please identify any significant case law in connection with protection of TK in your country.

We are not aware of any significant case law in connection with the protection of TK in the U.S.

II. Proposals for harmonisation

The Groups are invited to put forward proposals for the adoption of harmonised rules in relation to the role of TK in relation to IP law.

12) Is a harmonised definition of TK desirable?

Given the dynamic nature of Traditional Knowledge (TK), and the breadth and diversity of potential subject matter, rather than delineate a precise harmonized definition it may be more useful to compile an inclusive listing of TK.

13) If yes to question 12, please propose a definition of TK, or the concepts that should be included in any proposed harmonised definition of TK.

By way of example, TK may be stated to encompass the following:

- a body of spiritual, cultural or intellectual knowledge, including the expression, depending on the context and the audience, of such knowledge and ideas;
- generated collectively by a given cultural community or traditional society;
- preserved and transmitted within the cultural community or traditional society;
- including, but not limited to the know-how, skills, innovations, practices, and learning of the cultural community or traditional society.

Such broad-brush abstractions can lead to confusion if removed from their contextual underpinnings. It is unclear whether a definition of TK can be separated from knowledge held by indigenous peoples.

- 14) Is it desirable to have only one form of protection for TK, either positive or defensive, or both forms? Please state reasons.

There is no clear consensus in the U.S. as to whether a separate system is needed for the protection of TK, apart from the existing protections afforded by the patent, trademark, copyright, trade secret, unfair competition and similar laws. However, there is consensus that TK that can be shown to be prior art should receive defensive protection, and as such, steps should be taken to increase the accessibility of patent offices to information relating to the existence and content of qualifying TK. Thus, steps should be taken to increase the level of defensive protection for such a class of TK by collection and identification.

Referring now to different views of TK in the United States, some advocates for greater protection suggest that it would be desirable to have an additional form of protection for TK. Reasons given include:

- Where one form of protection fails to provide adequate protection, protection could be sought from the other form. For example, if a particular piece of TK cannot be offered patent protection because of inventorship and/or public disclosure issues, other means of protection could offer protection from exploitation to the TK holder. These include, for example:
 - defensive protection in the form of sui generis laws designed to provide adequate compensation for products and/or intellectual property rights that arise out of the manipulation and other use of TK,
 - defensive protection designed to ensure that closely-held TK is not wrongfully (e.g. without permission) taken out of its cultural use/context and exploited for personal/commercial gain by unrelated third parties,
 - procedural rules designed to ensure that the body granting IP rights on an invention has access to relevant TK, and the relevant TK is taken into account (e.g. as prior art) before IP protection in the form of patent rights is granted (e.g. to address issues of novelty, and obviousness).

Many others in the U.S believe that the existing laws are sufficient to provide protection for TK, and that no additional expansion of the law is needed. Reasons include:

- TK can be used as defensive protection to the extent that it is prior art. See 35 U.S.C. § 102.
- TK is not distinguishable from other forms of knowledge and thus does not deserve special protection:
 - A part of modern knowledge is traceable to TK;
 - Some branches of modern knowledge are developed and maintained in a manner that can be likened to TK (e.g., communities of software developers); and
 - Discrepancies in bargaining power are common throughout the intellectual property landscape and are not unique to TK.
- Separate protection of TK does not further the policy motivations behind IP laws:
 - To the extent that TK is newly developed, then it is protectable under existing IP law and as TK is indistinguishable from other sources of IP (see above), it does not warrant separate protection;
 - To the extent that TK can be shown to have been publicly known with reasonable efforts, providing positive protection would be contrary to the intent of patent law. (c.f. U.S. Constitution article I, § 8, clause 8).
- After 500 years of interactions since Columbus made landings on American shores, prior developed TK that could have been positively protected is now largely blended into the extant prior art or maintained as trade secrets within tribes.

15) Should TK be protected by:

- a) existing IP laws or regulations;
- b) adaptation of IP laws or regulations through sui generis measures for TK protection; or
- c) wholly sui generis laws or regulations relating to TK protection? In your answer, please identify which and state reasons.

See answer to 14 above. Some in the U.S. have suggested that TK should be protected by some or all of a) existing IP laws or regulations, b) an adaptation of IP laws or regulations through sui generis measures for TK protection, or c) wholly sui generis laws or regulations relating to TK protection.

Consideration of any such sui generis system raises numerous issues for further study:

- The extent to which existing IP laws may not provide adequate protection, as these laws were not designed with TK in mind (e.g. strict inventorship requirements, and disclosure standards may remove most TK from the purview of these laws)
- The difficulty of legislating wholly sui generis laws relating to TK protection due to the lack of political will for such measures in countries like the U.S. without a strong TK lobby. To be effective, such a system would have to take into consideration issues related to unfair competition, human rights, differing concepts of ownership and property, environmental concerns, as well as concerns regarding how such a *sui generis* system would affect an existing and well developed IP regime in the region. Developing such a system consequently would require expending a good deal of time and effort, in order to ensure that the system would be able to adequately balance the many objectives and interests at stake.
- Consideration of the problems that would surround creation of separate or more flexible standards for inventorship and public disclosure for inventions derived from TK. There is also a difficult issue related to whether sui generis laws complementing such adaptations would apply in such cases to ensure that the group that generated the TK relied upon by a derived invention would be acknowledged, compensated, and/or not barred from practising or otherwise using the TK from which an invention was derived.
- Some have suggested that, under some conditions, it would be beneficial to provide incentives for TK holders to disclose privately held TK in exchange for the TK holding group receiving IP rights over the TK. In these circumstances, more flexible standards for inventorship and public disclosure may need to apply. However, a substantial showing of group membership may also be required to ensure that TK rightfully belonging to the TK holding group is not misappropriated by persons outside the group. Safeguards would also be needed to protect against abusive or unwarranted assertion of dubious TK claims against legitimate, independently developed inventions, works of authorship, symbols, and other intellectual property.

In light of the discussion in response to question 14 and the above, there is consensus that steps should be taken to increase the accessibility of worldwide TK that qualifies as prior art to patent offices. This does not require a change to existing IP laws.

16) If yes to any part of question 15, is a harmonised approach to protection desirable? In your answer, please state reasons.

A harmonised approach would appear to be desirable to the extent that it provides a set of consistent definitions, and a collection of information on existing schemes of protection. A better understanding of the pros and cons of providing sui generis protection may serve as a useful starting point from which definitions and information may be developed. For example, there may be a benefit to creating, maintaining, and/or providing access to searchable databases of TK.

A one-size-fits-all or entirely harmonised approach to TK is probably not possible or desirable, given the varying levels of importance placed on the protection of TK afforded by different nations (e.g., developing nations such as India, Brazil, and Thailand already place substantially more importance on the protection of TK arising out of their regions, as compared to some of the more developed nations). Moreover, TK by its very nature is a very broad concept encompassing many different peoples, knowledge systems, and cultural norms/practices. While these knowledge systems may be substantially different from their “Western” counterparts, there exists such diversity within these TK systems that developing a set of “harmonised” rules for application to these diverse systems may undermine the very diversity it hopes to protect.

17) If yes to question 16, how should that approach be implemented

- a) at an international level; and
- b) at a national or regional level?

There is currently no consensus in the United States in favour of providing a separate system for protection of TK. Any harmonised approach to protection would best be implemented at b) a national or regional level, based on guidance from the international level.

- The national level appears to be the better forum for developing the implementation details with respect to TK protection, given that TK knowledge and practices are so closely tied with the cultural norms and rituals of the TK creators and holders.

18) Having regard to WIPO/GRTKF/IC/19/5, please provide any proposals you have as to a harmonised approach concerning:

1) criteria for eligibility for protection;

In modern intellectual property protection systems, the general criteria for protection include requirements that the invention be new, non-obvious, and useful. These requirements do not neatly apply to intellectual property arising from traditional knowledge. The cumulative, generational and collective nature of traditional knowledge is an argument, for some perspectives, that traditional knowledge is not eligible for protection, because the situation does not resemble the more familiar situation of one or more identified individuals distinctly producing intellectual contributions presumably not yet possessed by anyone else.

The holders of traditional knowledge are usually communities, which in a traditional and collective setting, have made an investment in developing, preserving, and transmitting the TK. While these intellectual properties are not “new” in the more conventional sense, the possibility exists that such “old” knowledge may be harnessed or adapted in fresh discoveries for important applications by modern entities. In light of this possibility, some observers would like to see possible compensation and acknowledgement of the work invested by the holders of traditional knowledge when that knowledge is proven to have been adapted by conventional researchers or companies. Others would consider non-

secret traditional knowledge to be no more than prior art“ that forms a part of the body of knowledge to be used in considering the novelty and non-obviousness of potentially patentable inventions.

In modern intellectual property protection systems, disclosure of the invention and knowledge is required to activate positive protection. In exchange for the disclosure, the holder of the invention expects full protective rights to the intellectual property, and appropriate compensation for any use of the intellectual property. However, holders of traditional knowledge often are not in the position to either qualify for positive protection or to use any such protection to be able to request compensation. Common mechanisms used by modern entities to ensure their due compensation include litigation and the use of experts in the laws and procedures, which are usually prohibitively expensive for holders of traditional knowledge. Furthermore, attaining protection, in the first place, is not an automatic result of disclosure. Because the rights of the holders of traditional knowledge are sometimes tenuous in many respects, the exchange of disclosure and protection is not necessarily guaranteed to be equal and adequate.

In WIPO/GRTKF/IC/19/5 (Draft Article), criteria for eligibility acknowledges protection of traditional knowledge can be offered based on intellectual property distinctively associated with indigenous or traditional communities, and collectively generated, shared, preserved, and transmitted by said community. The document also suggests that the knowledge should be integral to the cultural identity of the community, and not made widely known outside that community.

Another consideration might include the extent of disclosure required to activate protection. Depending on the role the traditional knowledge plays in the community, it may be desirable to keep most aspects of the knowledge confidential. One proposal might be to allow various degrees of confidentiality, from simple identification of the knowledge to full disclosure and enablement, and corresponding degrees of protection in response.

There is no consensus in the United States, however, on whether such disclosure or confidentiality provisions are practical or desired. As there is consensus that TK that qualifies as prior art should receive defensive protection, eligibility for this protection should be based on existing prior art rules.

2) beneficiaries of protection;

The Draft Article suggests that the beneficiaries are the holders of traditional knowledge, which include, but are not limited to, indigenous and local communities, nations, families, and individuals, who develop, express, hold and maintain the traditional knowledge.

Some observers suggest that the specific treatment of traditional knowledge, in the context of intellectual property protection, is based on the cultural, generational, and collective context of traditional knowledge. Therefore, these observers maintain that protection for TK rights should be given on a cultural and collective basis. An individual, with truly an individual intellectual contribution, should be encouraged to pursue protection under the modern system.

As there is consensus that certain TK should be provided defensive protection as prior art, the protection benefits the public and all possessing knowledge that qualifies as prior art.

3) scope of protection;

The Draft Article suggests the scope of protection includes collective rights to exclusively control and utilize the traditional knowledge; authorize or deny access and use of the

traditional knowledge; have a fair and equitable share of benefits arising from the use of their traditional knowledge based on mutually agreed terms; prevent misappropriation and misuse of their traditional knowledge; require acknowledgement with the granting of IP rights; require the respect of the reputation and integrity of the traditional knowledge with use of the traditional knowledge; and require prior and informed consent before use of the traditional knowledge.

In particular, with regard to situations where the traditional knowledge involves resources depended upon by the holders of the traditional knowledge, whether for medicinal, cultural, or any other purposes, protection of these resources should be within the scope of protection being discussed. Many of the holders of traditional knowledge are directly dependent on the state of their environment. Furthermore, the holders' stewardship and management of that environment is often a necessary component of the preservation and transmission of the traditional knowledge.

Again, the United States does not currently provide any such protections above and beyond those available under existing law. There is no consensus in the United States that further protections for TK should be implemented.

4) sanctions, remedies and exercise of rights;

The Draft Article suggests the holders of traditional knowledge have accessible, appropriate, and adequate criminal, civil, and administrative enforcement procedures and dispute resolution mechanism. Any such procedures, to the extent they are deemed desirable, should be accessible, effective, fair, equitable, adequate, and not burdensome for holders of traditional knowledge.

The historical, economic, and social situation of the holders of traditional knowledge can make it difficult for them to pursue relief through courts or legislation. Often the holders of traditional knowledge do not have the appropriate economic, social, or political sway or stature to prevent infringement or to extract the appropriate compensation.

However, there is no consensus in the United States that special enforcement mechanisms for TK right holders are needed or desirable.

5) administration of rights;

The Draft Article suggests appointing an appropriate national or regional competent authority or authorities to facilitate the administration of rights, and the established authority shall include authorities originating from indigenous people so that they form part of that authority.

In particular, Draft Article suggests that the inclusion of members that hold traditional knowledge is desirable.

Again, there is no consensus in the United States that such authorities should be created.

6) exceptions to and limitations on rights;

The Draft Article indicates that these rights should not be used against the communities in possession of the traditional knowledge, and should not limit the members of those communities to continue practicing their traditional knowledge.

There is no consensus in the United States that such exceptions should be recognized.

7) term of protection;

The nature of traditional knowledge, which consists of intellectual contributions accumulated over generations, poses questions about the appropriate term length for protection. Familiar term lengths, such as 20 years, in modern intellectual property systems, are often adequate to provide modern entities with a head start compared to competitors and significant profit generation, as exclusive right holders. The modern economic and technological systems are rapidly changing such that these modern entities are constantly renewing their intellectual properties. The traditional communities, concerned with preserving their cultural heritages and ways of life, do not partake in such a rapidly turning system. The traditional communities are particularly concerned with the stewardship and sustainability of their traditional knowledge, which should be taken into account if and when determining any appropriate terms of protection.

Clearly, defensive protection via classification as prior art would provide indefinite protection.

8) formalities to which protection is subject;

As there is no consensus in the United States regarding supplemental or sui generis protections for TK, no recommendation is provided.

Further, regarding defensive protection, no formalities are required for publication other than to satisfy the U.S. patent laws regarding such. To the extent that there were any doubts about publication, a registry of non-published TK could be informative and useful.

i) transitional measures;

As there is no consensus in the United States regarding supplemental or sui generis protections for TK, no recommendation is provided.

j) consistency with other laws;

As there is no consensus in the United States regarding supplemental or sui generis protections for TK, no recommendation is provided.

k) national treatment and foreign interests; and

As there is no consensus in the United States regarding supplemental or sui generis protections for TK, no recommendation is provided.

9) trans-boundary cooperation.

As there is no consensus in the United States regarding supplemental or sui generis protections for TK, no recommendation is provided.

10) any specific measures for facilitating protection of TK, eg, systems for recording TK, specific mechanisms for benefit-sharing, or collective or reciprocal systems of administration on behalf of indigenous people or local communities.

As there is no consensus in the United States regarding supplemental or sui generis protections for TK, no recommendation is provided apart from encouraging and facilitating defensive protection of TK that qualifies as prior art and encouraging parties possessing TK to seek acceptable protection and compensation through contract principles and law.

National Groups are invited to comment on any additional issue concerning the relevance of TK to IP law.

NOTE:

It will be helpful and appreciated if the following points could be taken into consideration when editing the Group Report:

- kindly follow the order of the questions and use the questions and numbers for each answer
- if possible type your answers in a different colour
- please send in a word document
- in case images need to be included high resolution (not less than 300 dpi) is required for good quality printing

ANNEXURE A

Resolution

Question Q166

Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

AIPPI

Observing the struggle of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to come to final conclusions on the topics;

Noting that

- the Convention on Biological Diversity accepts the sovereignty of states over their genetic resources and traditional knowledge connected with it, and puts forward the concept of prior informed consent and access and benefit sharing when utilising such resources;
- many member countries of the Convention on Biological Diversity have not yet set up mechanisms how to access genetic resources under their control and how to get prior informed consent;

Mindful that

- the patent system is intended to encourage inventors to disclose their inventions to the public in return for a monopoly period in which patent owners may prevent others from practising the invention, and that an invention is a solution to a technical problem;
- patents should only be granted for inventions which are new, not obvious and capable of industrial application, and should contain disclosure of the invention sufficient to enable the skilled person in the art to work the invention;
- the patent system cannot prevent unlawful use of genetic material or traditional knowledge in research, development, marketing of products, or trade;

Supporting that users of genetic material and traditional knowledge connected with it comply with the requirements of the Convention on Biological Diversity and national laws in this respect.

Resolves:

- 11) Traditional knowledge in the public domain should be treated as other information in the public domain for the assessment of patentability of inventions.
- 12) The patent system is not suitable to control whether the requirements of the Convention on Biological Diversity are met, in particular since research results and products in commerce and trade need not be covered by patents.
- 13) If national laws require a declaration of the source of genetic material and traditional knowledge in patent applications, such laws should:
 - only require that the patent applicant to the best of his knowledge identifies the source from which the inventor obtained the genetic material or the information based on

traditional knowledge;

- entitle the applicant to rectify any failure to indicate the source or add any later information obtained on the origin of the genetic material.

14) Ways and means other than patent applications should be developed to deal with prior informed consent and access and benefit sharing concerning genetic resources and traditional knowledge connected with it.

Appendix A

Definition of Trade Secret as Found in the Uniform Trade Secrets Act, Section 1

“(4) ‘Trade secret’ means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

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