## Detailed Thematic Report on Benefit Sharing

Intellectual property and traditional knowledge related to genetic resources

*(a) How to define relevant terms including subject matter of traditional knowledge and scope of existing rights.*

There is a clear distinction between what Maori consider cultural and intellectual property to be, and what the intellectual property rights granted under law by government constitute.

The major difficulty from a policy perspective, is isolating what might fall within the scope of current intellectual property laws and identifying those aspects of Maori cultural and intellectual property that fall outside, including for example, traditional knowledge, (encompassing but not limited to cultural images, oral tradition, medicinal remedies and other traditional uses of native plants). The government is working to further develop policies in this area, including where appropriate, the modification of existing intellectual property right systems to enable the protection of cultural and intellectual property, and scoping new and additional protection mechanisms, both legal and non-legal.

*(b) Whether existing intellectual property rights regimes can be used to protect traditional knowledge.*

There is agreement with the statements made in the Secretariat's paper (UNEP/CBD/WG8j/1/2) prepared for the meeting in Seville earlier this year, that there are clear windows of opportunity presented by the main forms of intellectual property protection that have not yet been investigated. Within New Zealand work has been underway for some years to examine ways in which existing systems of intellectual property right protection might be modified to provide both strengthened levels of protection for Maori cultural and intellectual property from wrongful exploitation, and also, to strengthen the process and profile of existing laws to offer greater coverage to Maori businesses who might want to develop products at a tribal level. To date this has resulted in the inclusion of a number of provisions in draft legislation designed to address Maori concerns regarding the inappropriate use of Maori imagery and text as trade marks. These provisions include a mechanism for informed consent, where applicants with proposed trade marks containing Maori imagery, the use or registration of which might be considered to cause offence, will be referred to the appropriate Maori authority for confirmation.

Further consultations with Maori communities in recent years on issues relating to the reform of the Patents Act have helped to identify the nature of Maori concerns in this area but it is understood that public awareness, including Maori awareness of the role of patents has increased significantly over the past couple of years. Some of the concerns previously raised range from concern as to the effectiveness of the existing regime to protect matters of importance to Maori, including traditional knowledge based

inventions, through to broader issues concerning the appropriateness of granting patents for genetic material, particularly indigenous genetic material. We anticipate that further work on proposals to address these concerns (where it is possible to do so within the parameters of the Patents Act) will commence shortly.

There is also broad agreement with the Secretariat's paper, that conventional intellectual property rights systems were not designed to anticipate or address the various concerns raised by the CBD in relation to matters such as access to genetic resources, equitable benefit sharing, and the protection of the traditional biodiversity related knowledge of indigenous communities. Where it is not possible to develop positive solutions to these concerns within existing frameworks, the government sees merit in examining new and alternative models of protection.

*(c) Options for the development of sui generis protection of traditional knowledge rights*

As noted above, there is considerable scope for examining options for the development of sui generis protection of traditional knowledge. New Zealand considers that there is available a range of options of both legal and non-legal nature, and that such options will vary from state to state depending on national circumstances. For instance, within New Zealand protection of traditional knowledge rights can be promoted through treaty settlements on a tribal-by-tribal basis. They can also be protected through changes in government policy, eg, requiring informed consent protocols for applicants wishing to access public research funds. New Zealand is continuing to scope the range of options feasible for our situation.

*(d) The relationship between customary laws governing custodianship, use and transmission of traditional knowledge on the one hand, and the formal intellectual property on the other.*

Historically, traditional knowledge of Maori was considered by whanau (family), hapu (sub-tribe) and Iwi (tribe) to be a taonga (treasure). There was no public right to knowledge per se, and access to knowledge both from within whanau, hapu and Iwi and by outsiders was strictly regulated by tikanga (rules). The transfer of knowledge occurred on a selective basis, often based on whakapapa (genealogy).

The customary Mäori system contrasts sharply with the formal intellectual property system. The relationship between the two systems has at times been fraught and there will inevitably continue to be incidents when the systems will clash due to their inherent differences. Mäori have raised concern over the inadequate and inappropriate protection afforded to their traditional knowledge under the current intellectual property regime. These concerns are the subject of a claim to the Waitangi Tribunal -Wai 262. We are also undertaking a review of intellectual property legislation with the intention to provide better protection for traditional knowledge of Maori.

*(e) Means by which holders of traditional knowledge, including indigenous peoples, may test means of protection of traditional knowledge based on existing intellectual property rights, sui generis possibilities, and customary laws.*

There are mechanisms in existing laws which could be considered to provide opportunities to better protect traditional knowledge and or cultural property. These include opposition, and in some instances revocation proceedings, in both Trade Marks and Patents law. Such mechanisms are open to persons wishing to challenge the granting of intellectual property rights. Certification marks, which when applied to particular goods provide certainty as to authenticity, and trade secrets, are also able to be used to protect traditional knowledge and cultural property. Intellectual property laws however are not the only mechanisms available for protection of traditional knowledge. As mentioned previously, other possibilities include treaty settlements and cultural heritage and resource management laws that have potential. New Zealand agrees there is merit in further exploring links between conventional and both customary and proposed sui generis systems of protection.

*(f) How to ensure that granting intellectual property rights does not preclude continued customary use of genetic resources and related knowledge.*

Where patents are granted for inventions involving traditional knowledge, such as customary use of genetic resources, then the patent may be invalid as the invention will not be novel. Opposition and revocation proceedings could be used to prevent a grant of, or revoke a patent of this nature if it has inadvertently been granted. The possibility of patents being granted in areas of traditional knowledge could be reduced if traditional knowledge was written down and published. This material could then form part of the "prior art" that is searched during examination of a patent application. Clearly, this latter option would require separate sui generis mechanisms for preventing others from making use of the published traditional knowledge. There is nothing in the New Zealand system which would prevent continued traditional customary use of a particular resource should the resource feature in a new patent application. New Zealand is currently involved in a review of the Patents Act and we will be considering this issue as part of the review.

*(g) Ways to regulate the use of resources in order to take into account ethical concerns.*

"The relationship that Maori have with New Zealand's indigenous biodiversity as tangata whenua is recognised and valued in terms of conserving and sustainably using biodiversity. Traditional Maori knowledge, or Matauranga Maori about biodiversity is respected and informs biodiversity management.

New Zealand uses two key methods to deal with this issue.

In some cases, the government has acquired ownership of the resources in order to allow their management to be undertaken in a way that reflects the public views and/or that allow the government to protect the particular ethical concerns of Maori. For example,

the government has ownership of all marine mammals, and manages these under legislation which requires their full protection.

In other cases, the government has passed legislation to ensure that private property interests are not used in ways which are contrary to widely accepted ethical standards. For example, New Zealand has legislation dealing with animal welfare issues.

*(h) Ways to ensure the continued customary use of genetic resources and related knowledge.*

Mäori custom places great emphasis on the natural environment and matauranga Mäori (traditional Mäori knowledge) associated with natural resources. The retention and promotion of matauranga Mäori is of key importance to the continued customary use of genetic resources.

The Mätauranga Maori project is one initiative that encourages the continued customary use of genetic resources. This project is part of the New Zealand Biodiversity Strategy and provides specifically for Iwi and hapu participation in managing biodiversity in ways that are consistent with customary knowledge remaining the property of the particular Iwi and hapu.

The Mätauranga Mäori project aims to work with Mäori knowledge specialists to develop a framework for the retention and promotion of mätauranga Mäori and its use in biodiversity management. It recognises the knowledge and role of Mäori as kaitiaki in the conservation and sustainable use of biodiversity, including the cooperative management of public conservation areas and local authority resource management processes. It will also enable Mäori to incorporate traditional values and practices within tikanga-based biodiversity projects as part of their role as kaitiaki (rules) and as a means of promoting and reviving matauranga Mäori.

*(i) How to make provision for the exploitation and use of intellectual property rights to include joint research, obligation to work any right on inventions obtained or provide licenses.*

Although there is no clear government policy in this regard, preliminary thinking between government agencies suggests there is potential to rely on a number of non-statutory as well as possible statutory mechanisms to provide for the protection of traditional knowledge and cultural property. The extent to which the latter may take the form of intellectual property right or other regulation is yet to be determined. The proposed bioprospecting policy (currently under development) may also include further exploration of these and related issues.

Possible mechanisms may include contractual arrangements (non legislative), or where appropriate, modification of existing regulatory frameworks to provide solutions in this regard. Integral to the development of any new government policy in this area is the need to ensure an appropriate balance between the needs of all users of the system, and

the contribution any proposed solutions may make to an environment which encourages enterprise, innovation, competition, and enhances overall business performance in New Zealand.

*(j) How to take into account the possibility of joint ownership of intellectual property rights.*

The New Zealand statutory framework does not preclude joint ownership of intellectual property rights.