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?
   
   In Malaysia, there is yet to be a specifically enacted legislation to protect traditional knowledge.

2) If yes to question 1, what is the source of the definition?
   
   Not applicable.

3) If yes to question 1, how is TK defined?
   
   Not applicable.

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?

   There is no working definition proposed in any of the bills, draft law or regulation, policy document or any other discussion paper in Malaysia.

   However, Malaysia has referred to the following all-encompassing and working term of “traditional knowledge” adopted by the World Intellectual Property Organisation (WIPO) in its fact-finding mission carried out in 1998-1999 for general discussion and academic purposes:
“traditional knowledge” refers to “... tradition based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”

“Tradition based” in this case is taken to refer to “knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment.”

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

Malaysian law does not provide protection for TK under any specific statute law or regulation. However there is the Protection of New Plant Varieties Act 2004. This new Act is distinct from the other intellectual property systems as a whole. It has its own registration system and there is a Plant Varieties Board which has been established under the Act that issues registration certificates for the new plant variety and grant of breeder’s right to the applicant. This Act provides for the protection of the rights of breeders of new plant varieties, and the recognition and protection of the contribution made by farmers, local communities and indigenous people towards the creation of new plant varieties in Malaysia. This Act aims to encourage investment in and the development of the breeding of new plant varieties in both public and private sectors. In order to qualify for a grant of rights under the Plant Varieties Act, the variety must be new, distinct, uniform and stable. The Protection of New Plant Varieties Act 2004 of Malaysia also provides for the “limitations of breeder’s right”. One of these limitations is that a breeder cannot keep others from using a protected variety to breed other plant varieties, except where such other plant varieties have been essentially derived from the registered plant variety. In addition, the “farmer’s privilege” permits small farmers to use the harvested material of the registered plant variety planted on their own holdings.

Malaysia has launched the “National Policy on Biological Biodiversity” in 1998 to provide the direction for the country to implement strategies, action plans and programmes on biological diversity for the conservation and sustainable utilization of its biological resources. The “National Policy on Biological Biodiversity” includes a policy statement “to conserve Malaysia’s biological diversity and to ensure that its components are utilised in a sustainable manner for the continued progress and socio-economic development of the nation. As part of this new policy, the government had built the “Sarawak Biodiversity Centre”, whose purpose was to help develop national policy and guidelines, and to document indigenous medical practices.

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

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?

Response to 6(a)

The trade mark laws in Malaysia affords protection to marks that are distinctive for an indefinite period. Under the Trade Marks Act 1976, trade mark is defined as “a mark
used or proposed to be used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services and a person having the right either as proprietor or as registered user to use the mark”. The term “mark” includes “a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof”. Hence, any signs, symbols and terms associated with any TK related product may be protected as trade marks. Any manufacturer, craftsman, professional person or trader in a native or indigenous community, including the bodies that represent such person or in which they are grouped (cooperatives, guilds, etc) may identify themselves with trade names and may apply trade marks on the goods that they have manufactured using TK. Unregistered mark may be protected by the common law of passing off if the mark has acquired the necessary goodwill and reputation. Where products have been manufactured in accordance with a particular method or standard, they can be protected as certification marks under the Trade Marks Act. Actions may also be taken against false or misleading claims that a product is authentically indigenous or has been produced or endorsed by, or otherwise associated with a particular traditional community based on the Trade Descriptions Act 2011.

Copyright may afford protection to the artistic manifestations of TK holders, especially artists who belong to indigenous and native communities. To be eligible for protection, the author must have expended sufficient effort to make the work original in character and that the work must have been reduced to material form. Related rights to copyright such as performing rights may be used for the protection of performances of singers and dancers and presentations of stage plays, puppet shows and other comparable performances.

In Malaysia, a patent can only be granted if an invention is novel, non-obvious and has industrial applicability. Novelty and non-obviousness are judged against everything disclosed to the public before the invention as shown in earlier patents and other published material. This body of public knowledge is called “prior art”. Prior art means any disclosure of the contents of a claim, prior to the application for patent. Any processes associated with the use and exploitation of TK may fall under the scope of protection for patent. Similarly, any TK known to the native communities may form part of the prior art and could prevent third parties from misuse or misappropriate the TK to obtain the grant of a patent.

The design and shape of utilitarian craft products such as furniture, receptacles, garments and articles of ceramics, leather, wood and other materials may qualify for protection as industrial designs. However, the duration of protection is limited.

Geographical Indications Act 2000 may also provide protection to traditional and craft products which derive their unique characteristics from the indigenous resources of a particular locality.

In Malaysia, pursuant to the enactment of the Protection of New Plant Varieties Act 2004, a Plant Varieties Board has been established to issue registration certificates for the new plant variety and grant of breeder’s right to the applicant. In order to qualify for a grant of rights under this new Act, the variety must be new, distinct, uniform and stable. This Act is relevant to protect the TK which may be used to create a new plant variety.

As also set out above, Malaysia has launched the “National Policy on Biological Biodiversity” in 1998 to provide the direction for the country to implement strategies, action plans and programmes on biological diversity for the conservation and sustainable utilization of its biological resources. The “National Policy on Biological Biodiversity” includes a policy statement “to conserve Malaysia’s biological diversity
and to ensure that its components are utilised in a sustainable manner for the continued progress and socio-economic development of the nation. As part of this new policy, the government had built the “Sarawak Biodiversity Centre”, whose purpose was to help develop national policy and guidelines, and to document indigenous medical practices. As part of this new policy, the government had built the “Sarawak Biodiversity Centre”, whose purpose was to help develop national policy and guidelines, and to document indigenous medical practices.

Response to 6(b) and 6(c)

There are no sui generis measures for TK protection under Malaysian IP laws.

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;
   b) beneficiaries of protection;
   c) scope of protection;
   d) sanctions, remedies and exercise of rights;
   e) administration of rights;
   f) exceptions to and limitations on rights;
   g) term of protection;
   h) formalities to which protection is subject;
   i) transitional measures;
   j) consistency with other laws;
   k) national treatment and foreign interests; and
   l) trans-boundary cooperation.

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.

See response to question 6 above.

8) Are the protections described in response to questions 6 and 7:
   a) referable to TK alone; or
      The protection afforded under the existing IP laws in Malaysia are not referable to TK alone.
   b) related to or linked to the concepts of protection of:
      (i) genetic resources; or
      (ii) TCEs?
      No

9) If yes to question 8(b), please provide details of any linkages.
   Not applicable.

10) Please identify any shortcomings in any protection of TK in your country by reference to the matters in questions 6 to 9 above.
Trade mark laws only protects the mark and will not be able to afford protection to the knowledge.

In the context of copyright, as TK is generally transmitted by oral means and is not well-documented, it would fail to satisfy the requirement of being reduced to material form and would not attract copyright protection. In addition, the duration of copyright in literary, musical and artistic works are for the life of the author and shall continue to subsist until the expiry of a period of 50 years after the death of the author. This would mean that works that are very old and transmitted from generation to generation or works where the original creator has passed away for more than 50 years ago would not be eligible for protection. There are also problems in identifying the authorship of a particular work derived from TK as such lineage is not documented by the indigenous communities.

In the case of patent, given the nature of TK which has often been used by indigenous peoples for generations, the novelty requirement for the grant of patent may be difficult to meet. It is also impossible to identify the inventor due to the collective nature of TK having been created by groups or tribes within a community. Furthermore, patent law will not permit the patenting of knowledge per se. Thus, knowledge about the identity and medicinal properties is not an invention within the definition of the Patents Act.

TK often cannot be attributed to a particular geographical location and thus would fall outside the protection afforded under the Geographical Indications Act 2000. As in the case of trade marks, the knowledge of the indigenous peoples would still not be protected.

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

As far as the Malaysian Group has ascertained, there is no Malaysian case law in connection with TK.

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.

11) Is a harmonised definition of TK desirable?

The concept of TK is very wide and broad. A definition that will encompass all the existing TK in each country would have to be drafted very widely. Such a definition will not be practical and is inadequate in the context of protecting TK as TK is something very special and peculiar that differs from country to country. Furthermore, different countries have different policy objectives for the protection of TK, as well as different cultural and heritage factors that ought to be taken into account in drafting a suitable definition. Thus in lieu of the above, we do not believe a harmonised definition of TK to be desirable.

12) 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.

Not applicable.
13) Is it desirable to have only one form of protection for TK, either positive or defensive, or both forms? Please state reasons.

Both forms. As TK is very wide and encompasses various types of works, both the positive and defensive forms of protection will operate to complement each other in affording the most appropriate form of protection to TK. For certain TK, positive rights are justified to be granted to its holders as a reward as well as to encourage the further development of TK while in other cases, defensive protection may be more suitable to preserve the TK.

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.

The Malaysia Group is of the view that a wholly sui generis framework will offer the most appropriate protection for TK. The concepts, criteria and eligibility for protection of the various IPRs are designed and drafted based on very different policy reasons. There is no justification for altering the existing IP laws to accommodate for the protection of TK which is based on totally different policy objectives.

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 to protection of TK would not be able to provide appropriate protection to the TK holders. As mentioned above, the concept of TK is very wide and will differ from country to country. Before offering protection to TK, the policy reasons and objectives for protecting TK have to be agreed on. These policy reasons are essential in determining the extent and scope of protection for TK, the duration of such protection, eligibility for protection, persons entitled to the protection, whether positive rights should be granted to TK holders and other relevant rights. These policy issues will be difficult to be harmonised as the characteristics of the indigenous peoples in each country will not be the same and the TK that they possess would also differ vastly. Effective protection could only be achieved if it is tailored according to the indigenous people and the existing TK in each country. Thus in lieu of the above, we do not believe a harmonised definition of TK to be desirable.

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?

Not applicable.

18) Having regard to WIPO/GRTKF/IC/19/5, please provide any proposals you have as to a harmonised approach concerning:
   a) criteria for eligibility for protection;
   b) beneficiaries of protection;
   c) scope of protection;
   d) sanctions, remedies and exercise of rights;
   e) administration of rights;
   f) exceptions to and limitations on rights;
g) term of protection;
h) formalities to which protection is subject;
i) transitional measures;
j) consistency with other laws;
k) national treatment and foreign interests; and
l) trans-boundary cooperation.
m) 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.

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

Not applicable as the Malaysia Group finds it undesirable to have a harmonised scheme of protection for TK.