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## 5.2 Protection requirements

The second objective of this chapter is to determine what should be the requirements for protection of a TK and TCE under the treaty herein recommended.

The international treaty must not subject TK and TCEs to *Western* scientific criteria for IP protection. To remedy the problem caused by the IP requirement that protected matter be reduced to some material form, TK and TCEs should be protected whether or not they are in any material form. While it is instructive that much TK and TCEs do not exist in tangible forms as established in Chapter two, the rights to be granted should not be subject to registration with a government agency (but registration may be encouraged to enhance certainty).

It is also important that for any TK or TCE to be protected, it must be connected to the cultural and social identity of an indigenous group, be transmitted in *any mode* of expression from generation to generation, be created, maintained and shared collectively by the members of the said indigenous community and must have resulted from their innovative actions, regardless of when such TK or TCE was created or developed.

## 5.3 Disciplines

To guarantee the effectiveness and efficiency of the treaty across the multilateral trading system, the protection of TK should be subject to the most-favoured nation<sup>458</sup> and national treatment disciplines.<sup>459</sup> This will help prevent any form of discrimination in the manner in which countries treat and protect the TK of different countries.<sup>460</sup>

## 5.4 Conclusion

One thing is certain, an international *sui generis* treaty designed as recommended herein will significantly help in combatting the incidences of biopiracy. While it is acknowledged that implementing such a *sui generis* system of protection will have its own challenges (just like

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<sup>458</sup> Para 4.2.2(b) above.

<sup>459</sup> National treatment requires that under national laws, foreigners must not be subjected to lesser rights and benefits than citizens, subject to the specific terms of the relevant international conventions. The principle requires States to give foreigners the same treatment they give to their own citizens: see Article 3 TRIPs Agreement.

<sup>460</sup> In this context, States with TK and TCEs must not subject foreign TK and TCEs to discriminatory treatment relative to their own TK and TCEs. For example, the South African government will not be able to treat/protect Zimbabwean TK and TCEs differently from the way it treats South African TK.



































