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UPDATE ON THE ACTIVITIES OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) IN COOPERATION WITH THE CONVENTION ON BIOLOGICAL DIVERSITY

Note by the Executive Secretary

The Executive Secretary is circulating herewith, for the information of participants in the eighth meeting of the Conference of the Parties, an information document submitted by the World Intellectual Property Organization providing an update on WIPO activities in cooperation with the Convention on Biological Diversity.

The document is circulated in the form and languages in which it was received by the Secretariat.

* UNEP/CBD/COP/8/1.

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Document submission to COP-8 of the CBD
by the World Intellectual Property Organization:

UPDATE ON WIPO ACTIVITIES IN COOPERATION WITH THE CBD

I. INTRODUCTION: CBD-WIPO COOPERATION

This document updates the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD) on the progress of WIPO's activities relating to the work and mandate of the CBD. It sets the relevant activities in context within WIPO-CBD cooperation, which has continued since 1998 when COP-4 decided "to enhance cooperation between the Convention on Biological Diversity and the World Intellectual Property Organization, including through … a Memorandum of Understanding" (Decision IV/9), a request renewed in COP Decision V/26. The resultant WIPO-SCBD Memorandum of Understanding, concluded in 2002, provides the framework for ongoing cooperation. As described below, WIPO has worked most recently in response to several invitations issued by the COP in the field of genetic resources, traditional knowledge (TK) and technology transfer. This work has aimed to provide focussed, technical and practical information to support the organs of the CBD in achieving the objectives of the Convention.

II. ACTIVITIES RELEVANT TO THE COP OF THE CBD

This Section outlines recent developments and ongoing activities relevant to the COP. Most have taken place in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the IGC'). The WIPO General Assembly established the IGC in 2000 as a dedicated forum to address the relationship between intellectual property (IP) and related policy areas. Its initial mandate was to discuss IP issues related to (i) access to genetic resources and benefit-sharing, (ii) protection of traditional knowledge, and (iii) protection of expressions of folklore. The IGC's current mandate requires a particular focus on the international dimension of its work, and raises the possibility of an international instrument or instruments.

Intellectual Property and Traditional Knowledge

WIPO has worked on the protection of expressions of folklore (also termed traditional cultural expressions or TCEs) since 1978. This work was broadened to cover the related areas of TK and genetic resources in 1998. WIPO then initiated a series of wide-ranging consultations with indigenous and local communities, other TK holders and bearers of TCEs, such as traditional healers, farmers and artisans, about their needs and expectations for protection of TK and TCEs. Fact-finding consultations were undertaken in over 60 locations in 28 countries resulting in an WIPO Report on the needs and expectations of TK holders (available at www.wipo.int/tk), which provided insights and guidance that still guide WIPO's work in this area. The present note focusses on the protection of TK as such, and not the related, complementary field of folklore or TCEs.

Since 2001, the IGC has precipitated amendment of two global patent systems to enhance their recognition of TK and has developed draft Objectives and Principles for international protection of TK and folklore. The work of the Committee on TK has focused on two areas:

- defensive protection, which includes measures to safeguard against invalid IP rights taken out by others over TK subject matter, such as the widely documented turmeric case;
- positive protection, which includes giving TK holders a positive right to take action against misappropriation and misuse of TK.

In its work, the WIPO Member States and other stakeholders, including TK holders, have taken into account the important role of customary laws and protocols.

Positive legal protection of TK – draft objectives and principles for protection of TK, including sui generis *elements for protection*

The WIPO IGC has worked on elements of *sui generis* protection of TK since 2002. This work has cultminated in draft Policy Objectives and Core Principles on the protection of TK,[1] complementing parallel provisions on the protection of TCEs (expressions of folklore).[2] These complementary sets of provisions recognize the holistic character of much TK and TCEs, and the integral relationship of much TK with genetic resources, while also responding to the diverse policy interests concerned with TK and with TCEs.

With reference to the draft provisions for protection of TK, the fourth meeting of the Ad Hoc Working Group on Article 8(j) and Related Provisions (WG8J) recommended that COP-8 should:

> "*Acknowledge[ ]* the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Foklore of World Intellectual Property Organization on intellectual property aspects of *sui generis* systems for the protection of traditional knowledge against misappropriation."[3]

Similarly, the CBD Working Group on Access and Benefit-sharing at its fourth meeting developed a document entitled 'International Regime on Access and Benefit-sharing' which includes the following under "Scope [of the International Regime]":

"[The international regime … will take into account the work of the WIPO/IGC on the intellectual property-aspects of sui generis systems for the protection of traditional knowledge and folklore against misappropriation and misuse.]"[4]

Both Working Groups of the CBD have referred to "the work of the WIPO/IGC on the intellectual property-aspects of *sui generis* systems for the protection of TK and folklore against misappropriation and misuse" and have recommended that the COP take this work into account. This work has culminated in two sets of provisions, draft Objectives and Core Principles for the Protection of TK ('the draft TK provisions') and draft Objectives and Core Principles for the Protection of Expressions of Folklore/Traditional Cultural Expressions. The current text of two sets of draft materials, extracted from recent IGC documents, follows at the end of this document as parts IV and V. A brief description of the work on TK protection follows immediately below.

Protection against misappropriation

The draft TK provisions concern protection against misappropriation and misuse, thus concentrating on repression of unfair or illegitimate third party acts in an *ex-situ* context, in contrast to *in-situ* conservation, safeguarding and protection against erosion or disappearance of TK. The provisions articulate and build upon a general principle against the misappropriation of TK, drawing together existing approaches and building on existing legal

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1 Annexes to WIPO/GRTKF/IC/7/5, WIPO/GRTKF/IC/8/5 and WIPO/GRTKF/IC/9/5
2 Annexes to WIPO/GRTKF/IC/7/3, WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/9/4
3 See UNEP/CBD/WG8J/4/L.11, para 6.
4 See, paragaph 4, page 3, «Scope», UNEP/CBD/WG-ABS/4/CRP.1/Rev.2

frameworks. The provisions deal with that aspect of protection which represses acts of misappropriation and misuse of TK by third parties. Importantly for TK holders, the provisions do not call for exclusive property rights over TK where TK holders themselves do not wish to pursue that option. Where the legitimate holders of TK wish to assert property rights, such as the property rights established within some traditions of customary law, this remains one option for them to exercise. But these provisions focus on the suppression of misuse or misappropriation by actors beyond the source community.

Scope of protected TK

The scope of knowledge covered by the draft Objectives and Principles includes not only the TK "relevant to the conservation and sustainable use of biological diversity" which is the particular subject of the CBD, but all TK. The term TK is understood to mean "the content or substance of knowledge resulting from intellectual activity in a traditional context".[5] Therefore, the scope of knowledge covered by the draft Objectives and Principles includes, but is not limited to, the scope of knowledge, innovations and practices covered by the CBD. As outlined below, a key element of the IGC's mandate, expressed in the draft provisions, is that its work should complement and not prejudice the work of other fora such as the CBD.

Legal form and regulatory diversity

The draft Objectives and Principles respect the diversity of TK held by different peoples and communities in different sectors, acknowledge differences in legal contexts of national jurisdictions. They allow flexibility for national authorities to determine the appropriate means of implementing the Principles within existing and specific legislative mechanisms, since too narrow or rigid an approach may preempt necessary consultation with TK holders. Reflecting actual experience and the needs expressed by TK holders, protection may combine proprietary and non-proprietary measures, and make appropriate use of IP rights (including measures to improve the application and practical accessibility of such rights), *sui generis* extensions or adaptations of IP rights, and specific *sui generis* laws.

The draft provisions reflect the diverse experience of many countries with the protection of TK. They are not new in substance, but rather distil and bring to an international level the essence of a wide range of national and regional laws and the extensive practical experience with TK protection which has accumulated during seven years of consultations with TK holders, three years of in-depth policy discussions in the IGC, and numerous proposals to the IGC made by Member States and indigenous and local communities. The draft principles and objectives are described as facilitating the international protection of TK by creating an agreed international policy platform from which the international dimension of TK protection could be effectively addressed.

Principle of respect for and cooperation with the CBD and its work on Article 8(j)

Of potential interest to the COP is the question of how such provisions would complement work undertaken on other aspects of protection, conservation and recognition of TK. One key principle driving the work of the IGC, indeed an aspect of its current mandate, is that it should complement and not prejudice the work of other international fora. As noted, the draft provisions characterize those *ex-situ* acts of third parties, beyond the traditional communities, which are to be considered illegitimate, unauthorized or otherwise inappropriate

[5] Article 3, Annex, WIPO/GRTKF/IC/9/5

forms of use of TK or TCEs/EoF, without prejudicing or pre-empting the communities' own laws, including customary laws and protocols. This may complement work under way in other contexts, such as conservation and benefit-sharing associated with biodiversity, indigenous rights, cultural heritage cultural diversity, without pre-empting outcomes in other fora on these crucial issues. This approach may help ensure that the work of the IGC meets a wide array of stakeholders' expectations, firstly by appropriately complementing other international laws and processes, without pre-empting or conflicting with them; and secondly by supporting and respecting communities' own traditional and customary norms and practices without encroaching upon or circumscribing them.

The provisions have been developed in harmony with the relevant provisions of the CBD and other important instruments such as the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR). For example, the provisions include the following "Principle of respect for and cooperation with other international instruments and processes:"

> 1. Traditional knowledge shall be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already established under binding legal instruments.
>
> 2. Nothing in these Principles shall be interpreted to affect the interpretation of other instruments or the work of other processes which address the role of traditional knowledge in related policy areas, including the role of traditional knowledge in the conservation of biological diversity, the combating of drought and desertification, or the implementation of farmers' rights as recognized by relevant international instruments and subject to national legislation."[6]

The draft objectives and principles also take into account the discussions, decisions and developments within the subsidiary bodies of the CBD and FAO, such as the work of the WG8J and the FAO Commission on Genetic Resources for Food and Agriculture. For example, they follow the recommendation of the WG8J adopted by the COP in Decision VI/10 that the most appropriate means of protecting TK is "based on a combination of appropriate approaches, … including the use of existing intellectual property mechanisms, *sui generis* systems, customary law, the use of contractual arrangements, registers of traditional knowledge, and guidelines and codes of practice."[7] The draft provisions implement this 'combined approach' by applying a customized range of legal tools, including the recognition of customary laws and protocols, the use of access and benefit-sharing mechanisms (applying the principle of prior informed consent and mutually agreed terms), existing IP principles, compensatory liability principles and unfair competition law.

<u>Application of the provisions and future directions</u>

These draft provisions have already proven useful in many national, regional and international policy processes. They have provided input for a range of different

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[6] Principle A.7, '*Principle of respect for and cooperation with other international and regional instruments and processes,*' draft WIPO Provisions on TK Protection. See document WIPO/GRTKF/IC/7/5, Annex 1. Emphasis added.

[7] CBD COP Decision VI/10A, para. 33.

intergovernmental processes, including the Working Group on Indigenous Populations[8] under the Human Rights Commission and the Working Group on Article 8(j)[9] of the CBD, as reflected in the contents of their respective working documents and outcomes.

The IGC agreed at its eighth session in (June 2005) that there was "broad support for the process and work being undertaken within the Committee" on TK.[10] However, the Committee "noted the diverse views expressed" on this issue[11] and no specific directions were given concerning future IGC work on TK. In October 2005, the WIPO General Assembly renewed the IGC's existing mandate for the 2006-2007 biennium. The IGC next meets from April 24 to 28, 2006, to take this work forward.

Customary law

Both the IGC and the CBD have stressed the role of the customary law of indigenous and local communities. The combined approach recommended by the COP includes reference to customary law. Similarly, IGC documents have noted the 'irreducibily holistic quality' of TK, and have explored a comprehensive approach that includes 'customary and indigenous laws and protocols.' The IGC has promoted work on customary law issues. To deepen the understanding of customary law and protocols and their relationship to the protection of TK and TCEs, and to the IP system, WIPO has initiated an enhanced study process, based on the existing references to customary law in the IGC materials, and supplementary issues papers and studies.

Defensive protection of TK, including databases/registries of previously disclosed TK

WIPO's work on defensive protection of TK has benefited from the cooperation and assistance of the WG8J. It has already yielded the following concrete results:

Amendment of Patent Cooperation Treaty (PCT) Minimum Documentation to recognize TK

The WG8J assisted the IGC in preparing the groundwork for a recent revision of the PCT Minimum Documentation. This revision aimed to improve the recognition of disclosed TK as prior art, by including a range of TK-related journals among the information that the patent offices which International Search Authorities must consider when undertaking an 'International [Prior Art] Search' within the PCT system. This measure is intended to increase the likelihood of invalid patents being granted claiming TK-related subject matter.

Amendment of International Patent Classification under the Strassbourg Agreement to recognize TK

On January 1, 2006, a revised edition of the International Patent Classification (IPC) took effect, which includes more than 200 subclasses dedicated exclusively to traditional medicine.

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[8] See document E/CN.4/Sub.2/AC.4/2005/3, "Standard-Setting. Review of the draft principles and guidelines on the the heritage of indigenous peoples." COMMISSION ON HUMAN RIGHTS, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, Twenty-third session, 18-22 July 2005.

[9] In the CBD context, see also Decision VII/16H and documents UNEP/CBD/WG8J/4/7 and UNEP/CBD/WG8J/4/8.

[10] WIPO/ GRTKF/IC/8/15 Prov, para 162

[11] WIPO/ GRTKF/IC/8/15 Prov, para 163

WIPO has revised the IPC under the Strassbourg Agreement in order to improve the recognition of TK and the classification of traditional medicine related literature during patent procedures.

International Standard for TK Registries and Databases and Toolkit for IP Management When Documenting TK

The IGC has not recommended or promoted the use of databases or registries for TK, given the diverse views expressed on these issues by TK holders. Some forms of documentation of TK, and in particular its entry into the public domain, can run directly contrary to the interests and customary law and protocols of traditional and local communities. Following the guidance of the IGC, WIPO is developing a toolkit to strengthen the capacity of TK holders to make informed decisions about the documentation of their knowledge, so that inappropriate documentation or publication does not occur. For those stakeholders who have themselves decided to utilize TK registers or databases as protection or documentation mechanisms, the IGC has adopted a data specification for such registries/databases.

Intellectual Property and Genetic Resources

IP issues when developing mutually agreed terms for access to genetic resources and benefit-sharing

When custodians of genetic resources negotiate mutually agreed terms for the sharing of the benefits that may arise from the use of their resources, they frequently face a wide range of IP questions. These IP questions may require complex decision-making on a technical level from the custodians of genetic resources. Thus a need has been expressed for clear, accessible and practical information on the technical aspects of IP practices and clauses in access and benefit-sharing agreements. The IGC has therefore considerd the IP-aspects of such mutually agreed terms, bearing in mind the general guidance on benefit-sharing that was provided by the COP in the Bonn Guidelines and in Decisions II/11, III/15, IV/8, V/26, VI/24 and VII/19. An on-line, publicly accessible and searchable database of biodiversity-related access and benefit-sharing contracts has therefore been compiled, with a particular emphasis on the IP aspects of such agreements. The database seeks to provide information on the general approach taken in concluding relevant agreements, and to stimulate the flow of information in this important area, rather than to serve as a database of legal texts and precedents.

The COP has also encouraged WIPO to "make rapid progress" towards the development of further guidance on IP issues model IP clauses which may be considered for inclusion in contractual agreements when mutually agreed terms are under negotiation." In line with this encouragement, the IGC has developed general principles and draft guidelines on intellectual property aspects of access and equitable benefit-sharing (WIPO/GRTKF/IC/7/9), building on the practical experience captured in the capacity building database and further input from the CBD and IGC participants.

Interrelation of Access to Genetic Resources and Disclosure Requirements in IP Rights Applications

The COP has issued two invitations to WIPO to prepare studies on issues regarding the interrelation of access to genetic resources and disclosure requirements in IP rights applications. In both cases, WIPO responded positively and undertook extensive data collection, consultations, and review and commentary by Member States and other

stakeholders to produce two closely related information resources. This included the creation of a specific consultation and review process by the WIPO General Assembly, and a detailed technical questionnaire directed to all WIPO Member States. Both of these studies have been transmitted to the COP as technical materials to assist it and other CBD bodies in their work. They do not adopt or promote any particular policy position, but provide technical backgound information.

These materials comprise the following:

(i) A technical study on methods consistent with obligations in treaties administered by WIPO for requiring the disclosure within patent applications of, inter alia: (a) genetic resources utilized in the development of the claimed inventions; (b) the country of origin of genetic resources utilized in the claimed inventions; (c) associated TK, innovations and practices utilized in the development of the claimed inventions; (d) the source of associated TK, innovations and practices; and (e) evidence of prior informed consent. The sixth CBD COP invited WIPO to prepare this technical study. It was prepared and transmitted by WIPO to the seventh COP, which noted it with appreciation, and invited WIPO to undertake further work on these issues.

(ii) An examination of issues regarding the interrelation of access to genetic resources and disclosure requirements in IP rights applications, including, inter alia: (a) options for model provisions on proposed disclosure requirements; (b) practical options for IP rights application procedures with regard to the triggers of disclosure requirements; (c) options for incentive measures for applicants; (d) identification of the implications for the functioning of disclosure requirements in various WIPO-administered treaties; (e) IP-related issues raised by a proposed international certificate of origin/source/legal provenance. The eighth COP invited WIPO to examine these issues and to regularly provide reports to the CBD on its work. The examination of issues was prepared and completed by WIPO and has been presented to the eighth COP for its consideration.

Intellectual Property and Transfer of Technology under the CBD

Developments relevant to invitations contained in Decision VII/29

On the recommendation of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), COP-7 adopted a Programme of Work on Technology Transfer and Technological and Scientific Cooperation for the CBD. Several elements in this Programme of Work pertain *inter alia* to WIPO, such as Activities 2.1.1 and 2.1.2 (Information Systems) and a specific invitation to WIPO and other agencies to prepare technical studies that further explore and analyze the role of IP rights in technology transfer in the context of the CBD (Activity 3.1.1 under Creating Enabling Environments).

The WIPO Secretariat has worked actively with the SCBD and the Secretariat of UNCTAD to prepare draft technical materials that could form the basis of the study on the role of IP rights in technology transfer. This draft, which does not reflect an official WIPO position, has been sent out for peer review. WIPO has undertaken other, related work, in partnership with the SCBD and in line with the joint MoU. This work draws on past WIPO analysis of the role of IP rights in technology transfer under other Multilateral Environmental Agreements (MEAs).

Information Systems - Programme Element 2 of the CBD Work programme on Technology Transfer

Activity 2.1.3 (on Information Systems) of this work programme foresees the "development of advice and guidance on the use of new information exchange formats, protocols and standards to enable interoperability among relevant existing systems of national and international information exchange, including technology and patent databases." WIPO has held informal discussions with the SCBD with a view to further cooperation to enhance interoperability among relevant existing systems, in particular patent databases, so as to promote access to this technological information and the more effective use of this information as a means of promoting and analysing patterns in technology transfer relevant to the CBD. The recent launch of PatentScope, a new portal on patents and the international patent system, and enhanced patent information resources by WIPO, can be expected to provide a useful platform for expanded cooperation in this area.

III. CONCLUSION

The IGC at its first session affirmed that WIPO should address relevant issues in conjunction with the Secretariat of the CBD and the FAO, and a consistent goal has been to ensure that WIPO's work continues to be consistent with and complementary to work undertaken by the CBD and the FAO. This work has included the wide range of activities reported upon above, and is expected to expand, in line with the joint Memorandum of Understanding.

WIPO's focus is naturally limited to IP issues that arise in relation to genetic resources and TK. However, WIPO has since 1998 paid particular attention to the role of IP in the preservation, conservation and dissemination of global biological diversity. A wide range of cooperative activities have addressed the IP-aspects of the CBD, and in particular access to and benefit-sharing in genetic resources. IP is one of several factors that can influence the allocation and flow of benefits from the use of genetic resources. The CBD provides that "intellectual property rights may have an influence on the implementation of the Convention." Accordingly, it is expected that this ongoing and wideranging cooperation will assist in the goal of ensuring that "such rights are supportive of and do not run counter to [the CBD's] objectives," in line iwht Article 16.5 of the CBD.

IV. DRAFT OBJECTIVES AND PRINCIPLES FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

(Extract from IGC document WIPO/GRTKF/IC/9/4)

I. INTRODUCTION

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') has extensively reviewed legal and policy options for the protection of traditional knowledge (TK), on the basis of a comprehensive analysis of existing national and regional legal mechanisms, certain core elements of TK protection, case studies, ongoing surveys of the international policy and legal environment as well as certain previously supported key principles and objectives of TK protection.

2. At its sixth session, the Committee reviewed key principles and objectives of TK protection, which had reflected its previous work (outlined below)[12] and decided to develop an overview of policy objectives and core principles for the protection of TK.[13] On the basis of guidance provided by the Committee, draft materials were then provided for the Committee to consider at its seventh and eighth sessions as follows:

(i) WIPO/GRTKF/IC/7/5 provided an initial draft of objectives and principles, and was extensively reviewed at the Committee's seventh session;
(ii) the Committee established an intersessional commentary process which drew extensive comments from a wide range of Member States and Committee observers;[14]
(iii) WIPO/GRTKF/IC/8/5 incorporated the comments received from Member States and Committee observers into the draft objectives and principles and was then extensively reviewed at the Committee's eighth session.

3. Document WIPO/GRTKF/IC/7/5 characterized these draft objectives and principles as "possible substantive elements of protection of TK in a manner which leaves open and facilitates future decisions by Member States on the context and legal status which they may assume at the international, regional and national levels." The material in this document was "not, in substance, new to the Committee: it simply distils and structures the existing legal mechanisms and the extensive practical experience with protection of TK that have already been widely discussed by the Committee, and draws essentially on the Committee's own deliberations and the various materials put to the Committee." This document therefore drew on the reported and documented national and regional experience with the protection of TK of countries and communities in many geographical regions, at every level of economic development, that had been surveyed extensively in previous sessions of the Committee.

4. The documents included drafts of:

(i) policy objectives, which could set common general directions for protection and provide a consistent policy framework;

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12 WIPO/GRTKF/IC/6/4, paras 17 to 28; and WIPO/GRTKF/IC/6/14, para 109
13 WIPO/GRTKF/IC/6/14, para 109
14 WIPO/GRTKF/IC/8/INF/4.

(ii) general guiding principles, which could ensure consistency, balance and effectiveness of substantive principles; and

(iii) specific substantive principles, which could define the legal essence of protection.

5. The Committee decided to deal with the international dimension integrally with its work on the protection of TK. Supplementary documents WIPO/GRTKF/IC/8/6 and WIPO/GRTKF/IC/6/6 set out various considerations concerning the international dimension of the work of the Committee. These documents were provided as information resources for the Committee and remain potentially relevant to its work. For instance, WIPO/GRTKF/IC/8/6 provides information that may be relevant to the international context of the draft objectives and principles, noting that there have been calls for outcomes in the field of TK protection but equally concerns that this work should complement and not prejudice or encroach upon other international instruments or processes. For instance, this document sets out the role of measures against misuse and misappropriation of TK and other IP policy measures within the context of an holistic approach protection of all TK, which would complement legal instruments and policy approaches in other cognate policy areas, such as the recognition, preservation and protection of biodiversity-related TK under the Convention on Biological Diversity, the recognition of farmer's rights under the FAO International Treaty on Plant Genetic Resources for Food and Agriculture, the protection of traditional and local knowledge under the United Nations Convention to Combat Desertification, and work in other forums such as the Working Group on Indigenous Populations of the Commission on Human Rights.

6. Committee members generally supported the draft objectives and principles in WIPO/GRTKF/IC/7/5 as a basis for continuing work on the protection of TK.[15] A revised version was then prepared, on the basis of the extensive comments made at the seventh session, as well as the comments and specific suggestions for wording, which were provided by a wide cross-section of Committee participants during the intersessional commentary process established by the Committee. This revised version was circulated as the Annex to WIPO/GRTKF/IC/8/5.

7. At the Committee's eighth session, a number of delegations supported the revised version of the objectives and principles as the basis for continuing work (although not necessarily suggesting that the document was entirely adequate or complete in that form), and a number expressed opposition to further discussion of and consultation on the revised version of specific substantive principles within the draft objectives and principles (see Part III of the Annex to WIPO/GRTKF/IC/8/5).

Background to the development of the provisions

8. The draft objectives and principles built on the Committee's work on the elements of protection of TK that commenced in 2001. Briefly, this work entailed:

(a) *Second session (December 2001)*: Delegations of the African Group, Venezuela, supported by the Delegations of Brazil, Ecuador and Egypt, request the preparation of a document with "elements for a possible *sui generis* system"[16];

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15 WIPO/GRTKF/IC/7/15, para 149

16 WIPO/GRTKF/IC/2/16, paras 188, 189, 190, 191; recorded in Chairman's Conclusions, para 194

(b) *Third session (June 2002)*: the Committee considered "Elements of a *Sui Generis* System for the Protection of Traditional Knowledge", which set out eight core elements.[17] Based on these elements, the Delegation of Norway proposed "to provide protection for TK … using Article 10*bis* [of the Paris Convention] as a model when considering the framework of a *sui generis* system for TK" and "to have a general international norm that obliged the States to offer protection against unfair exploitation of TK … supplied with internationally agreed guidelines on how to apply the norm."[18] The Committee decided to "prepare an amended … version of the document … taking into account the suggestion made by the Delegation of Norway"[19] and to "discuss whether it would be possible to provide protection for TK along similar lines as in article 10*bis* of the Paris Convention concerning unfair competition."[20] The Committee invited written comments on the contents of *sui generis* TK systems and, based on the comments, requested a revised draft text on the core elements of TK protection;[21]

(c) *Fourth session (December 2002)*: the Committee considered a revised version of the core elements[22], which incorporated the Norwegian proposal and the comments and observations of Committee members. It decided to incorporate the core elements of *sui generis* systems for TK into a composite study, aiming for "a more concrete analysis of specific options"[23];

(d) *Fifth session (July 2003)*: the Committee conducted a comparative analysis of ten existing *sui generis* TK laws,[24]. It also heard a Panel on national experiences with these laws, which became the basis for the development of the draft objectives and principles;

(e) *Sixth session (December 2003)*: the Committee welcomed an African Group proposal on "Objectives, Principles and Elements of an International Instrument, or Instruments".[25] Support was expressed for ten "key principles and objectives of TK protection."[26] The Committee agreed to develop "first drafts of an overview of policy objectives and core principles" of TK protection;[27]

(f) *Seventh session (November 2004)*: as noted above, the Committee considered draft objectives and principles on the protection of TK, based on proposals, discussion and documented approaches from the previous five sessions.[28] The Committee agreed that the draft should provide a basis for preparing further drafts of the objectives and principles[29] and called for "comments on the draft … including specific suggestions for wording" within an agreed timeframe, which would provide the basis for the preparation of the next draft.[30]

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17 WIPO/GRTKF/IC/3/8, paras 29 to 57 ("V. Elements of a *Sui Generis* System for the Protection of Traditional Knowledge")
18 WIPO/GRTKF/IC/3/17, para 227
19 WIPO/GRTKF/IC/3/17, para 249, item 3
20 Ibid.
21 WIPO/GRTKF/IC/3/17, para 249, items 2 and 4
22 WIPO/GRTKF/IC/4/8
23 WIPO/GRTKF/IC/4/15, para 163(i)
24 Including those of the African Union, Brazil, China, Costa Rica, India, Peru, Philippines, Portugal, Thailand and the United States of America: see WIPO/GRTKF/IC/5/INF/4, WIPO/GRTKF/IC/5/INF/6 and WIPO/GRTKF/IC/5/INF/7
25 WIPO/GRTKF/IC/6/12
26 For the ten key principles of TK protection see WIPO/GRTKF/IC/6/4, paras 17 to 28; and WIPO/GRTKF/IC/6/14, para 109
27 WIPO/GRTKF/IC/6/4, para 104, and WIPO/GRTKF/IC/6/14, para 109
28 WIPO/GRTKF/IC/7/5
29 WIPO/GRTKF/IC/7/15, para 149
30 WIPO/GRTKF/IC/7/15, para 150

Extensive comments were provided,[31] including specific suggestions for wording, on the draft Objectives and Principles on the protection of TK and TCEs. As noted, these comments were integrated into the revised draft provisions for consideration at the eighth session.

[…]

ANNEX
[OF DOCUMENT WIPO/GRTKF/IC/9/5]
REVISED PROVISIONS
FOR THE PROTECTION OF
TRADITIONAL KNOWLEDGE

POLICY OBJECTIVES AND CORE PRINCIPLES

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[31] WIPO/ GRTKF/IC/8/INF/4

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I. POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

Recognize value

(i) recognize the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are fundamentally important for indigenous and local communities and have equal scientific value as other knowledge systems;

Promote respect

(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge holders; and for the contribution which traditional knowledge holders have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology;

Meet the actual needs of holders of traditional knowledge

(iii) be guided by the aspirations and expectations expressed directly by traditional knowledge holders, respect their rights as holders and custodians of traditional knowledge, contribute to their welfare and economic, cultural and social benefit and reward the contribution made by them to their communities and to the progress of science and socially beneficial technology;

Promote conservation and preservation of traditional knowledge

(iv) promote and support the conservation and preservation of traditional knowledge by respecting, preserving, protecting and maintaining traditional knowledge systems and providing incentives to the custodians of those knowledge systems to maintain and safeguard their knowledge systems;

Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems

(v) be undertaken in a manner that empowers traditional knowledge holders to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and the need to tailor solutions that meet the distinctive nature of such systems, bearing in mind that such solutions should be balanced and equitable, should ensure that conventional intellectual property regimes operate in a manner supportive of the protection of traditional knowledge against misappropriation, and should effectively empower traditional knowledge holders to exercise due rights and authority over their own knowledge;

Support traditional knowledge systems

(vi) respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders; and

support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;

Contribute to safeguarding traditional knowledge

(vii) contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary practices, norms, laws and understandings of traditional knowledge holders, for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general;

Repress unfair and inequitable uses

(viii) repress the misappropriation of traditional knowledge and other unfair commercial and non-commercial activities, recognizing the need to adapt approaches for the repression of misappropriation of traditional knowledge to national and local needs;

Respect for and cooperation with relevant international agreements and processes

(ix) take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit-sharing from genetic resources which are associated with that traditional knowledge;

Promote innovation and creativity

(x) encourage, reward and protect tradition-based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous and traditional communities, including, subject to the consent of the traditional knowledge holders, by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge;

Ensure prior informed consent and exchanges based on mutually agreed terms

(xi) ensure prior informed consent and exchanges based on mutually agreed terms, in coordination with existing international and national regimes governing access to genetic resources;

Promote equitable benefit-sharing

(xii) promote the fair and equitable sharing and distribution of monetary and non-monetary benefits arising from the use of traditional knowledge, in consistency with other applicable international regimes, the principle of prior informed consent and including through fair and equitable compensation in special cases where the individual holder is not identifiable or the knowledge has been disclosed;

Promote community development and legitimate trading activities

(xiii) if so desired by the holders of traditional knowledge, promote the use of traditional knowledge for community-based development, recognizing the rights of traditional and local communities over their knowledge; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where traditional knowledge holders seek such development and opportunities consistent with their right to freely pursue economic development;

Preclude the grant of improper IP rights to unauthorized parties

(xiv) curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources, by requiring, in particular, as a

condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit-sharing conditions have been complied with in the country of origin;

Enhance transparency and mutual confidence

(xv) enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct and the principles of free and prior informed consent;

Complement protection of traditional cultural expressions

(xvi) operate consistently with protection of traditional cultural expressions and expressions of folklore, respecting that for many traditional communities their knowledge and cultural expressions form an indivisible part of their holistic identity.

[Commentary on Objectives follows]

COMMENTARY ON
POLICY OBJECTIVES

Background

Most existing measures, legal systems and policy debates concerning the protection of traditional knowledge have expressly stated the policy objectives which they seek to achieve by protecting TK, and often they share certain common objectives. These objectives are often articulated in preambular language in laws and legal instruments, clarifying the policy and legal context. The draft policy objectives draw on the common goals expressed within the Committee as the common objectives for international protection.

Part A sets out the policy objectives of traditional knowledge (TK) protection, as they have been articulated by the Committee. These objectives give a common direction to the protection established in the principles of Part B. Such objectives could typically form part of a preamble to a law or other instrument. The listed objectives are not mutually exclusive but rather complementary to each other. The list of objectives is non-exhaustive and, given the evolving nature of the provisions, the Committee members may supplement the current list with additional objectives or decide to combine existing objectives from the current list which are notionally related.

Changes reflecting stakeholder comments and inputs received from Committee members regarding the policy objectives in WIPO/GRTKF/IC/7/5

Committee participants provided valuable and in-depth comments on the policy objectives contained in Annex I of WIPO/GRTKF/IC/7/5 including specific proposals for redrafting the wording of the objectives. In addition, comments had already been made on policy objectives at earlier sessions of the Committee and in related early exercises regarding TK protection, such as the WIPO Fact-finding missions on intellectual property and traditional knowledge in 1998-1999. All the comments and inputs have been taken into account in the revised draft policy objectives. Committee participants' proposals for specific wording have been directly entered into the text wherever possible, so that the revised text is a direct reflection of the drafting proposals. In some cases, policy objectives have been significantly reworded or entirely replaced, such as the objective to "ensure prior informed consent and exchanges based on mutually agreed terms," which replaces the objective to "promote intellectual and technological exchange" at the request of Brazil. In some cases, changes have been introduced to respond to comments in the light of earlier inputs from TK holders, such the need to recognize that TK is as valuable as conventional scientific knowledge[32] while also recalling that TK itself is of scientific value and may be considered by some as a distinct but equally valid scientific system.[33] In other cases, new policy objectives or guiding principles have been added at the request of Committee members, such as the objective of conservation and preservation of TK at the request of the United States of America and the guiding principle of "providing assistance to address the needs of traditional knowledge holders" at the request of China.

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[32] See, Objective (i) in the present document and WIPO/GRTKF/IC/8/INF/4, Comment of Brazil.

[33] E.g., TK holders have pointed out that "… the implication [of certain assumptions about TK] is that TK is not "science" in the formal sense of a systematic body of knowledge that is continually subject to empirical challenges and revision. Rather the term implies something "cultural" and antique. […] What the international community needs to protect is 'indigenous science'." See Statement by Dr. Russell Barsh, 21 July 2000, *IP Needs and Expectations of TK Holders. Report on Fact-finding Missions on IP and TK*. Geneva, 2001: page 116, footnote 3.

Comments and inputs reflected: African Group,[34] GRULAC;[35] Brazil, Canada, China, New Zealand, United States of America; European Community; OAPI; Call of the Earth, Indigenous Peoples' Council on Biocolonialism, Inuit Circumpolar Conference, Saami Council, UNU-IAS.

[34] African Group (WIPO/GRTKF/IC/6/12, Annex, "Objectives")
[35] GRULAC (WIPO/GRTKF/IC/1/5, Annex I, "II. Objectives")

II. GENERAL GUIDING PRINCIPLES

These principles should be respected to ensure that the specific substantive provisions concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection:

(a) Principle of responsiveness to the needs and expectations of traditional knowledge holders

(b) Principle of recognition of rights

(c) Principle of effectiveness and accessibility of protection

(d) Principle of flexibility and comprehensiveness

(e) Principle of equity and benefit-sharing

(f) Principle of consistency with existing legal systems governing access to associated genetic resources

(g) Principle of respect for and cooperation with other international and regional instruments and processes

(h) Principle of respect for customary use and transmission of traditional knowledge

(i) Principle of recognition of the specific characteristics of traditional knowledge

(j) Principle of providing assistance to address the needs of traditional knowledge holders

[Commentary on General Guiding Principles follows]

COMMENTARY ON

GENERAL GUIDING PRINCIPLES

Background

The substantive provisions set out in the next section are guided by and seek to give legal expression to certain general guiding principles which have underpinned much of the discussion within the Committee since its inception and in international debate and consultations before the Committee's establishment.

Elaboration and discussion of such principles is a key step in establishing a firm foundation for development of consensus on the more detailed aspects of protection. Legal and policy evolution is still fast-moving in this area, at the national and regional level, but also internationally. Equally, strong emphasis has been laid on the need for community consultation and involvement. Broad agreement on core principles could put international cooperation on a clearer, more solid footing, but also clarify what details should remain the province of domestic law and policy, and leave suitable scope for evolution and further development. It could build common ground, and promote consistency and harmony between national laws, without imposing a single, detailed legislative template.

(a) Principle of responsiveness to the needs and expectations of traditional knowledge holders

Protection should reflect the actual aspirations, expectations and needs of traditional knowledge holders; and in particular should: recognize and apply indigenous and customary practices, protocols and laws as far as possible and appropriate; address cultural and economic aspects of development; address insulting, derogatory and offensive acts; enable full and effective participation by all traditional knowledge holders; and recognize the inseparable quality of traditional knowledge and cultural expressions for many communities. Measures for the legal protection of traditional knowledge should also be recognized as voluntary from the viewpoint of indigenous peoples and other traditional communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their traditional knowledge.

(b) Principle of recognition of rights

The rights of traditional knowledge holders to the effective protection of their knowledge against misappropriation should be recognized and respected.

(c) Principle of effectiveness and accessibility of protection

Measures for protecting traditional knowledge should be effective in achieving the objectives of protection, and should be understandable, affordable, accessible and not burdensome for their intended beneficiaries, taking account of the cultural, social and economic context of traditional knowledge holders. Where measures for the protection of traditional knowledge are adopted, appropriate enforcement mechanisms should be developed permitting effective action against misappropriation of traditional knowledge and supporting the broader principle of prior informed consent.

(d) Principle of flexibility and comprehensiveness

Protection should respect the diversity of traditional knowledge held by different peoples and communities in different sectors, should acknowledge differences in national circumstances and the legal context and heritage of national jurisdictions, and should allow sufficient flexibility for national authorities to determine the appropriate means of implementing these principles within existing and specific legislative mechanisms, adapting protection as necessary to take account of specific sectoral policy objectives, subject to international law, and respecting that effective and appropriate protection may be achieved by a wide variety of legal mechanisms and that too narrow or rigid an approach may preempt necessary consultation with traditional knowledge holders.

Protection may combine proprietary and non-proprietary measures, and use existing IP rights (including measures to improve the application and practical accessibility of such rights), *sui generis* extensions or adaptations of IP rights, and specific *sui generis* laws. Protection should include defensive measures to curtail illegitimate acquisition of industrial property rights over traditional knowledge or associated genetic resources, and positive measures establishing legal entitlements for traditional knowledge holders.

(e) Principle of equity and benefit-sharing

Protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and maintain traditional knowledge, namely traditional knowledge holders, and of those who use and benefit from traditional knowledge; the need to reconcile diverse policy concerns; and the need for specific protection measures to be proportionate to the objectives of protection and the maintenance of an equitable balance of interests. In reflecting these needs, traditional knowledge protection should respect the right of traditional knowledge holders to consent or not to consent to access to their traditional knowledge and should take into account the principle of prior informed consent.

The rights of traditional knowledge holders over their knowledge should be recognized and safeguarded. Respect for prior informed consent should be ensured, and holders of traditional knowledge should be entitled to fair and equitable sharing of benefits arising from the use of their traditional knowledge. Where traditional knowledge is associated with genetic resources, the distribution of benefits should be consistent with measures, established in accordance with the Convention on Biological Diversity, providing for sharing of benefits arising from the utilization of the genetic resources.

Protection which applies the principle of equity should not be limited to benefit-sharing, but should ensure that the rights of traditional knowledge holders are duly recognized and should, in particular, respect the right of traditional knowledge holders to consent or not to consent to access to their traditional knowledge.

(f) Principle of consistency with existing legal systems governing access to associated genetic resources

The authority to determine access to genetic resources, whether associated with traditional knowledge or not, rests with the national governments and is subject to national legislation. The protection of traditional knowledge associated with genetic resources shall be consistent with the applicable law governing access to those resources and the sharing of

benefits arising from their use. Nothing in these Principles shall be interpreted to limit the sovereign rights of States over their natural resources and the authority of governments to determine access to genetic resources, whether or not those resources are associated with protected traditional knowledge.

(g) Principle of respect for and cooperation with other international and regional instruments and processes

Traditional knowledge shall be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already codified in or established under binding legal instruments and international customary law.

Nothing in these Principles shall be interpreted to affect the interpretation of other instruments or the work of other processes which address the role of traditional knowledge in related policy areas, including the role of traditional knowledge in the conservation of biological diversity, the combating of drought and desertification, or the implementation of farmers' rights as recognized by relevant international instruments and subject to national legislation.

(h) Principle of respect for customary use and transmission of traditional knowledge

Customary use, practices and norms shall be respected and given due account in the protection of traditional knowledge, subject to national law and policy. Protection beyond the traditional context should not conflict with customary access to, and use and transmission of, traditional knowledge, and should respect and bolster this customary framework. If so desired by the traditional knowledge holders, protection should promote the use, development, exchange, transmission and dissemination of traditional knowledge by the communities concerned in accordance with their customary laws and practices, taking into account the diversity of national experiences. No innovative or modified use of traditional knowledge within the community which has developed and maintained that knowledge should be regarded as offensive use if that community identifies itself with that use of the knowledge and any modifications entailed by that use.

(i) Principle of recognition of the specific characteristics of traditional knowledge

Protection of traditional knowledge should respond to the traditional context, the collective or communal context and inter-generational character of its development, preservation and transmission, its relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values, and constantly evolving character within the community.

(j) Principle of providing assistance to address the needs of traditional knowledge holders

Traditional knowledge holders should be assisted in building the legal-technical capacity and establishing the institutional infrastructure which they require in order to effectively utilize and enjoy the protection available under these Principles, including, for example, in the setting up of collective management systems for their rights, the keeping of records of their traditional knowledge and other such needs.

[Substantive provisions follow]

III. SUBSTANTIVE PROVISIONS

ARTICLE 1

PROTECTION AGAINST MISAPPROPRIATION

1. Traditional knowledge shall be protected against misappropriation.

2. Any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.

3. In particular, legal means should be provided to prevent:

(i) acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception, misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means;

(ii) acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent as a condition of access to the knowledge, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent concerning access to that knowledge;

(iii) false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matter when those intellectual property rights are not validly held in the light of that traditional knowledge and any conditions relating to its access;

(iv) if traditional knowledge has been accessed, commercial or industrial use of traditional knowledge without just and appropriate compensation to the recognized holders of the knowledge, when such use has gainful intent and confers a technological or commercial advantage on its user, and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge; and

(v) willful offensive use of traditional knowledge of particular moral or spiritual value to its holders by third parties outside the customary context, when such use clearly constitutes a mutilation, distortion or derogatory modification of that knowledge and is contrary to ordre public *or morality.*

4. Traditional knowledge holders should also be effectively protected against other acts of unfair competition, including acts specified in Article 10bis of the Paris Convention. This includes false or misleading representations that a product or service is produced or provided with the involvement or endorsement of traditional knowledge holders, or that the commercial exploitation of products or services benefits holders of traditional knowledge. It also includes acts of such a nature as to create confusion with a product or service of traditional knowledge

holders; and false allegations in the course of trade which discredit the products or services of traditional knowledge holders.

5. The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.

COMMENTARY ON ARTICLE 1

This provision builds on an international consensus that traditional knowledge should not be misappropriated, and that some form of protection is required to achieve this. Existing international and national laws already contain norms against misappropriation of related intangibles such as goodwill, reputation, know-how and trade secrets. These norms can be viewed as part of the broader law of unfair competition and civil liability rather than as necessarily requiring distinct exclusive rights as provided for in the chief branches of modern intellectual property law. This provision establishes a general principle against the misappropriation of TK as a common frame of reference for protection, drawing together existing approaches and building on existing legal frameworks. The provision thus reflects the African Group's proposal that the first objective of TK protection should be to "Prevent the misappropriation of … traditional knowledge"[36] and other expressions of commitment to "preventing the misappropriation of TK."[37]

The general norm against misappropriation is elaborated in three, cumulative steps. The provision first articulates a basic norm against misappropriation as such; second, it develops the nature of "misappropriation" by providing a general, non-exclusive description of misappropriation; and finally it catalogues specific acts of misappropriation which should be suppressed. This drafting structure (but not its legal content) mirrors the structure of a provision in the Paris Convention which has proven to be widely adaptable (Article 10*bis*) and which has engendered several new forms of protection, such as the protection of geographical indications and the protection of undisclosed information. Importantly for traditional knowledge protection, this article does not create exclusive property rights over intangible objects. Rather, it represses unfair acts in certain spheres of human intellectual activity without creating distinct private property titles over the knowledge which is being protected against those illegitimate acts. Similarly, the first paragraph in this provision defines misappropriation as an unfair act which should be repressed, without creating monopolistic property rights over TK.

The second paragraph describes the nature of misappropriation in a general and non-exclusive manner. A link with unfair competition law is suggested by the focus on acquisition *by unfair means*. Akin to Article 10 *bis*, the term "unfair means" may be defined differently, depending on the specific legal settings in national law. This allows countries to take into account various domestic and local factors when determining what constitutes misappropriation, in particular the views and concerns of indigenous and local communities. The non-exclusive nature of this description of "misappropriation" allows the term "misappropriation" to become the umbrella term and structure under which the various unfair, illicit and inequitable acts, which should be repressed, may be subsumed.[38]

Paragraph 3 provides an inclusive list of those specific acts which, when undertaken in relation to TK covered by these Principles, would, at a minimum, be considered acts of misappropriation. By allowing a wide range of measures as appropriate "legal means" within

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[36] See, Objective 1, African Group proposal, Annex, WIPO/GRTKF/IC/6/12

[37] United States of America (WIPO/GRTKF/IC/6/14, para. 157)

[38] The approach taken under a misappropriation regime, as reflected in the present Principles, is thus to modulate the term "misappropriation", if and as required, rather than to subsume that term under another, broader term or structure, as suggested by one comment. This would appear to be more of a linguistic difference in the choice of terms, rather than a fundamental difference in structure of the protection provided (see WIPO/GRTKF/IC/8/INF/4, OAPI).

national law to suppress the listed acts, the chapeau of this paragraph applies the Guiding Principle of flexibility and comprehensiveness. The different subparagraphs of Article 1.3 distil specific acts of misappropriation, which include: (i) the illicit acquisition of TK, including by theft, bribery, deception, breach of contract, etc; (ii) breach of the principle of prior informed consent for access to TK, when required under national or regional measures; (iii) breach of defensive protection measures of TK; (iv) commercial or industrial uses which misappropriate the value of TK where it is reasonable to expect the holders of TK to share the benefits from this use; and (v) willful morally offensive uses of TK which is of particular moral or spiritual value to the TK holder. The provision gives wide flexibility for countries to use different legal means to suppress these listed acts. In countries which admit this possibility, judicial and administrative authorities may even draw upon these principles directly, without requiring specific legislation to be enacted. The words "in particular" leave the choice open to national policy makers to consider additional acts as forms of misappropriation and include these in the list nationally. This could include, for example, passing-off, misrepresentation of the source of TK, or failure to recognize the origin of TK.[39]

Paragraph 4 supplements the basic misappropriation norm by clarifying that the specific acts of unfair competition already listed in Article 10*bis* do have direct application to TK subject matter. As requested by commentators, the paragraph now been extended to clarify the relation between protection against misappropriation and protection under Article 10*bis* of the Paris Convention. It expressly states that TK holders are additionally protected against misleading representations, creating confusion and false allegations in relation to products or services produced or provided by them.

Since the notion of misappropriation would need to be more closely interpreted under national law, paragraph 5 suggests that concepts such as "unfair means," "equitable benefits" and "misappropriation" should in particular cases be guided by the traditional context and the customary understanding of TK holders themselves. The traditional context and customary understandings may be apparent in a community's traditional protocols or practices, or may be codified in customary legal systems.

Changes reflecting stakeholder comments and inputs received on this provision

Several comments requested the addition of a further category of acts to the list of specific acts of misappropriation. Accordingly, sub-paragraph 3(v) was added, which would repress willful offensive use by third parties of TK which is of moral or spiritual value to the TK holders. In paragraph 4 the relationship between those acts of unfair competition which are repressed under Article 10*bis* of the Paris Convention and the protection against misappropriation have been further clarified through an additional sentence as requested by China. It expressly states that the acts of unfair competition listed in Article 10*bis*(3)2 and 10*bis*(3)3 Paris Convention should also be repressed, namely acts which create confusion with TK products or services and false allegations which discredit the TK products or services.

Comments and inputs reflected: Brazil, China, United States of America; European Community, OAPI, Saami Council, UNU/IAS;

[39] For example, the conceptions of "unfair" in the Indian Arts and Crafts Act of the United States of America and Peruvian Law.

ARTICLE 2

LEGAL FORM OF PROTECTION

1. The protection of traditional knowledge against misappropriation may be implemented through a range of legal measures, including: a special law on traditional knowledge; laws on intellectual property, including laws governing unfair competition and unjust enrichment; the law of contracts; the law of civil liability, including torts and liability for compensation; criminal law; laws concerning the interests of indigenous peoples; fisheries laws and environmental laws; regimes governing access and benefit-sharing; or any other law or any combination of those laws. This paragraph is subject to Article 11(1).

2. The form of protection need not be through exclusive property rights, although such rights may be made available, as appropriate, for the individual and collective holders of traditional knowledge, including through existing or adapted intellectual property rights systems, in accordance with the needs and the choices of the holders of the knowledge, national laws and policies, and international obligations.

COMMENTARY ON ARTICLE 2

Existing *sui generis* measures for TK protection at the level of domestic law already display a high diversity of legal forms and mechanisms. If the current provisions are not to pre-empt or supersede existing national and regional choices for TK protection, this diversity of legal mechanism would need to be accommodated in these international standards. Again, this approach is not new in the articulation of international standards. Provisions similar to this Article can be found in existing international instruments covering diverse fields of protection. Examples that have earlier been cited include the Washington Treaty,[40] the Paris Convention, and the Rome Convention.[41] This provision applies the guiding principle of flexibility, to ensure that sufficient space is available for national consultations with the full and effective participation of TK holders, and legal evolution as protection mechanisms are developed and applied in practice.

Accordingly, in order to accommodate existing approaches and ensure appropriate room for domestic policy development, paragraph 1 gives effect to the Guiding Principle of flexibility and comprehensiveness and reflects the actual practice of countries which have already implemented *sui generis* forms of TK protection. It allows the wide range of legal approaches which are currently being used to protect TK in various jurisdictions, particularly in the African Union, Brazil, China, India, Peru, Portugal and the United States of America. It leaves national authorities a maximum amount of flexibility in order to determine the appropriate legal mechanisms which best reflect the specific needs of local and indigenous communities in the domestic context and which match the national legal systems in which protection will operate. The paragraph is modeled on a provision from a binding international instrument, namely Article 4 of the Washington Treaty.

Paragraph 2 clarifies that these principles do not require the creation of exclusive property titles on TK, which are perceived by many TK holders as inappropriate (see commentary on Article 1). Many TK holders have expressed the concern that new forms of protection of TK against misappropriation should not impose private rights on their TK. On the contrary, these principles give effect to an underlying norm against misappropriation by third parties, and thus against the illegitimate privatisation or commodification of TK, including through the improper assertion of illegitimate private property rights. Instead they leave open the scope for using alternative legal doctrines in formulating policy on these issues as suggested by several Committee participants. However, since several countries have already established *sui generis* exclusive rights over TK, the paragraph gives scope for such exclusive rights, provided that they are in accordance with the needs and choices of TK holders, national laws and policies, and international obligations.

Changes reflecting stakeholder comments and inputs received on this provision

Comments by Committee participants informed that in some jurisdictions fisheries laws and environmental laws are also relevant to the protection of some forms of TK and therefore these references have been added to the possible means of implementation of the Principles. The listing of laws has also been amended to bring it into line with the civil law tradition in continental Europe and francophone African countries.

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[40] *Treaty on Intellectual Property in Respect of Integrated Circuits* (1989) (hereinafter, "the Washington Treaty")

[41] *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (1961) (hereinafter, "the Rome Convention")

Comments and inputs reflected: OAPI, Australia, New Zealand, ICC, Saami Council, UNU-IAS.

ARTICLE 3

GENERAL SCOPE OF SUBJECT MATTER

1. These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking externally to define the diverse and holistic conceptions of knowledge within the traditional context. These principles should be interpreted and applied in the light of the dynamic and evolving nature of traditional knowledge and the nature of traditional knowledge systems as frameworks of ongoing innovation.

2. For the purpose of these principles only, the term "traditional knowledge" refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

COMMENTARY ON
ARTICLE 3

This provision does two things: it clarifies the general nature of traditional knowledge for the purposes of these provisions, and it sets appropriate bounds to the scope of protectable subject matter. It therefore gives effect to concerns that international provisions on TK should reflect the distinctive qualities of TK, but also responds to concerns that provisions against misappropriation of TK should not intrude on the traditional context and should not place external constraints or impose external interpretations on how TK holders view, manage or define their knowledge in the customary or traditional context.

International IP standards typically defer to the national level for determining the precise scope of protected subject matter. The international level can range between a description in general terms of eligible subject matter, a set of criteria for eligible subject matter, or no definition at all. For example, the Paris Convention and the TRIPS Agreement do not define "invention." The Paris Convention defines 'industrial property' in broad and expansive terms. This provision takes a comparable approach which recognizes the diverse definitions and scope of TK that already apply in existing national laws on TK, and does not seek to apply one singular and exhaustive definition. Guided by existing national laws, however, this provision clarifies the scope of TK in a descriptive way. Its wording draws on a standard description that has been developed and consistently used by the Committee, which was based in turn on the Committee's analysis of existing national laws on the protection of TK. In essence, if intangible subject matter is to constitute traditional knowledge for the purposes of these provisions, it should be "traditional," in the sense of being related to traditions passed on from generation to generation, as well as being "knowledge" or a product of intellectual activity.

The second paragraph clarifies that these provisions cover traditional knowledge as such. This means that they would not apply to TCEs/EoF, which are treated in complementary and parallel provisions (document WIPO/GRTKF/IC/8/4). In its general structure, but not its content, the paragraph is modeled on Article 2(1) of the Berne Convention which delineates the scope of subject matter covered by that Convention by first providing a general description and then an illustrative list of elements that would fall within its scope. In following a similar approach, this paragraph does not seek to define the term absolutely. A single, exhaustive definition might not be appropriate in light of the diverse and dynamic nature of TK, and the differences in existing national laws on TK.

Changes reflecting stakeholder comments and inputs received on this provision

Comments by Committee participants suggested that the evolving and dynamic nature of indigenous knowledge over time should be further emphasized and reflected in this provision. A sentence to this effect has been added. Other comments suggested to develop and qualify certain prerequisites and terms used in the provision, such as "resulting from intellectual activity", and thus the description of traditional knowledge has been further specified, drawing on well-known language in existing international IP and other instruments.[42]

Comments reflected: European Community, Indigenous Peoples' Committee on Biocolonialism, International Publishers' Association, UNU-IAS.

[42] For example, the terms "resulting from intellectual activity" has a long established, clear usage in Article 2 of the WIPO Convention, and the term "embodying traditional lifestyles" has a similar long-established and clear usage in the context of Article 8(j) CBD. See comments of the European Community and its Member States.

ARTICLE 4

ELIGIBILITY FOR PROTECTION

Protection should be extended at least to that traditional knowledge which is:

(i) generated, preserved and transmitted in a traditional and intergenerational context;

(ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and

(iii) integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.

COMMENTARY ON ARTICLE 4

This provision clarifies what qualities TK should have at least to be eligible for protection against misappropriation in line with these provisions. Again without intruding on the traditional domain, this provision would help set out the criteria that TK should meet in order to be assured protection against misappropriation by third parties in the external environment, beyond the traditional context. It leaves open the possibility of wider eligibility for protection, where this is in line with particular national choices and needs.

This provision is guided by the criteria that are applied in existing national *sui generis* TK laws and by the extensive Committee discussions on the criteria that should apply for TK protection. These national laws and Committee discussions cover diverse criteria, but certain common elements have emerged. This provision articulates those common elements: in essence, providing that TK should have (i) a traditional, intergenerational character, (ii) a distinctive association with its traditional holders, and (iii) a sense of linkage with the identity of the TK holding community (which is broader than conventionally recognized forms of 'ownership' and embraces concepts such as custodianship). For example, TK might be integral to the identity of an indigenous or traditional community if there is a sense of obligation to preserve, use and transmit the knowledge appropriately among the members of the community or people, or a sense that to allow misappropriation or offensive uses of the TK would be harmful. Some guidance on these concepts may be found in existing national laws. For example, the Indian Arts and Crafts Act in the United States of America specifies that a product is a product of a particular tribe when "the origin of a product is identified as a named Indian tribe or named Indian arts and crafts organization[43]." This could be a form of 'distinctive association' as suggested in subparagraph (ii).

This provision builds on the general description of TK in Article 3, and provides a conceptual link with the beneficiaries of protection, who are specified in Article 5. Together, these three articles clarify the minimal traditional linkage that would apply between TK and its holders, in order for protection against misappropriation to be assured under these provisions. They do not rule out broader scope of protection, since they define a minimum only (this is the intent of the term 'at least' in the chapeau). Yet the reference to "at least" in the chapeau of this provision clarifies that policymakers can choose more inclusive criteria to meet with national needs and circumstances.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on whether specific TK elements, which were of specific importance to the commentators, such as TK utilized by environmental impact assessment projects,[44]would fulfill the criteria of eligibility. Such a question would depend primarily on whether the knowledge was intergenerational, how it was associated with the community, and whether the community itself saw it as integral to its identity, as well as on national interpretation and existing national jurisprudence.

Comments and inputs reflected: IPA, ICC, OAPI, Saami Council, UNU-IAS.

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[43] (Section 309.2(f), 25 CFR Chapter II 309 (Protection of Indian Arts and Crafts Products)).

[44] Inuit Circumpolar Conference (ICC).

ARTICLE 5

BENEFICIARIES OF PROTECTION

Protection of traditional knowledge should benefit the communities who generate, preserve and transmit the knowledge in a traditional and intergenerational context, who are associated with it and who identify with it in accordance with Article 4. Protection should accordingly benefit the indigenous and traditional communities themselves that hold traditional knowledge in this manner, as well as recognized individuals within these communities and peoples. Entitlement to the benefits of protection should, as far as possible and appropriate, take account of the customary protocols, understandings, laws and practices of these communities and peoples.

COMMENTARY ON ARTICLE 5

Preceding principles have focussed on the subject matter of protection. This provision seeks to clarify who should principally benefit from protection of TK. It articulates the principle that the beneficiaries should be the traditional holders of TK. This draws on established practice in existing national systems and the consistent theme in international TK debates. The same approach is found in existing proposals for international protection frameworks. For example, the third objective of the international instrument or instruments proposed by the African Group is "to ensure that these benefits are harnessed for the benefit of traditional knowledge holders".[45]

Because TK is in general held by, associated with and related to the cultural identity of a community, the basic principle provides for that community collectively to benefit from its protection. Studies and actual cases have, nonetheless, shown that in some instances a particular individual member of a community may have a specific entitlement to benefits arising from the use of TK, such as certain traditional healers or individual farmers, working within the community. This provision therefore clarifies that beneficiaries may also include recognized individuals within the communities. Typically, the recognition will arise or be acknowledged through customary understandings, protocols or laws.

Entitlement to and distribution of benefits within a community (including the recognition of entitlements of individuals) may be governed by the customary law and practices that the community itself observes. This is a key area where external legal mechanisms for protection of TK may need to recognize and respect customary laws, protocols or practices. Case law suggests that financial penalties imposed for IP infringement can be distributed according to customary law. The mutually agreed terms for access and benefit-sharing agreements can also give effect to customary laws and protocols by allowing the communities to identify internal beneficiaries of protection according to their own laws, practices and understandings. This option is recognized in the third sentence.

This provision reflects a balance between the diverse forms of custodianship of TK at national and community levels, and the need for guidance on the determination of the beneficiaries of protection, entailing a trade-off between flexibility and inclusiveness on the one hand, and precision and clarity on the other hand. Existing national and community laws may already define the communities who would be eligible for protection. (See further detailed discussion of this question in document WIPO/GRTKF/IC/8/6). In contrast to seeking to create a new body of law *ab initio* concerning the identity of indigenous and other local communities, this text currently allows scope for reference to the national laws of the country of origin to determine these matters. Relevant law at the national or local levels can define relevant communities and/or individuals.[46]

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[45] See Objective 3, page 1, Annex, WIPO/GRTKF/IC/6/12.

[46] For example, the Indian Arts and Crafts Act in the United States, at WIPO/GRTKF/IC/5/INF/6, specifies that an "Indian tribe" means "any Indian tribe, band, nation, Alaska Native village, or any organized group or community which is recognized as eligible … by the United States …; or (2) Any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority." (Section 309.2(e), 25 CFR Chapter II 309).

Comments and inputs received and changes regarding this provision

Comments received on this provision suggested that the beneficiaries should be defined with further precision even in the international layer of protection. This would apply both if the entitled TK holders are "indigenous or traditional communities or peoples" as such, and if they are "recognized individuals within these communities". More precise qualifiers have thus been incorporated by reference into the provision.

Comments and inputs reflected: OAPI, UNU-IAS

ARTICLE 6

FAIR AND EQUITABLE BENEFIT-SHARING AND RECOGNITION OF KNOWLEDGE HOLDERS

1. The benefits of protection of traditional knowledge to which its holders are entitled include the fair and equitable sharing of benefits arising out of the commercial or industrial use of that traditional knowledge.

2. Use of traditional knowledge for non-commercial purposes need only give rise to non-monetary benefits, such as access to research outcomes and involvement of the source community in research and educational activities.

3. Those using traditional knowledge beyond its traditional context should mention its source, acknowledge its holders, and use it in a manner that respects the cultural values of its holders.

4. Legal means should be available to provide remedies for traditional knowledge holders in cases where the fair and equitable sharing of benefits as provided for in paragraphs 1 and 2 has not occurred, or where knowledge holders were not recognized as provided for by paragraph 3.

5. Customary laws within local communities may play an important role in sharing benefits that may arise from the use of traditional knowledge.

COMMENTARY ON ARTICLE 6

The misappropriation of traditional knowledge may include gaining benefits, especially commercial benefits, from the use of the knowledge without equitable treatment of the holders of the knowledge. This is generally congruent with the concerns expressed that TK should not be the subject of unjust enrichment or should not give rise to inequitable benefits for third parties. Accordingly, the elaboration of a system of protection of TK against misappropriation may entail providing for positive standards for equitable sharing of benefits from the use of TK. Such equitable benefit-sharing is also a means of implementing such policy objectives as "recognition of the value of TK"; "ensuring respect for TK and TK holders"; and "promoting equitable benefit-sharing" (Objectives (i), (ii) and (xi) above).

This provision therefore supplements the broad reference to equitable benefit-sharing in the general description of misappropriation (Article 1 above), and covers commercial or non-commercial uses. Internationally agreed guidelines on biodiversity-related TK suggest that basic principles for benefit-sharing can include (i) covering both monetary and non-monetary benefits and (ii) developing different contractual arrangements for different uses.[47] Accordingly, this provision differentiates between commercial and non-commercial uses of TK and specifies different benefit-sharing principles for these uses.

Paragraph 1 establishes the general principle that TK holders are entitled to the sharing of benefits arising from commercial or industrial uses of their TK. The paragraph is worded in such a way that benefits would be shared directly with the TK holder, i.e. the traditional and local communities.

In contrast to the first paragraph, paragraph 2 concerns non-commercial uses of TK and concedes that such uses may give rise only to non-monetary benefit-sharing. The paragraph gives an illustration of non-monetary benefits that could be shared, namely access to research outcomes and involvement of the source community in research and educational activities. Other examples might include institutional capacity building; access to scientific information; and institutional and professional relationships that can arise from access and benefit-sharing agreements and subsequent collaborative activities.

The third paragraph concerns the recognition of TK holders and specifies that users should identify the source of the knowledge and acknowledge its holders. It also provides that TK should be used in a manner that respects the cultural values of its holders.

The final paragraph specifies that civil judicial procedures should be available to TK holders to receive equitable compensation when the provisions in paragraph 1 and 2 have not been complied with. It also specifies the possible role of customary laws and protocols in benefit-sharing since, as has been observed, "customary laws within local communities may play an important role … in sharing any benefits that may arise" from access to TK.[48]

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47 See Section IV.D.3 ("Benefit-sharing"), *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (Decision VI/24A, Annex)

48 United States of America, WIPO/GRTKF/IC/6/14, para. 76.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on fair and equitable benefit-sharing rather than equitable compensation and the provision has been redrafted accordingly. Other comments highlighted the role of customary laws and protocols in benefit-sharing and an additional sentence has thus been added. As requested by some comments, concrete principles regarding the determination of compensation and damages have also been added to the provision.

Comments and inputs reflected: Australia, Brazil, China, IPA, Saami Council, United States of America, UNU-IAS

ARTICLE 7

PRINCIPLE OF PRIOR INFORMED CONSENT

1. The principle of prior informed consent should govern any access of traditional knowledge from its traditional holders, subject to these principles and relevant national laws.

2. The holder of traditional knowledge shall be entitled to grant prior informed consent for access to traditional knowledge, or to approve the grant of such consent by an appropriate national authority, as provided by applicable national legislation.

3. Measures and mechanisms for implementing the principle of prior informed consent should be understandable, appropriate, and not burdensome for all relevant stakeholders, in particular for traditional knowledge holders; should ensure clarity and legal certainty; and should provide for mutually agreed terms for the equitable sharing of benefits arising from any agreed use of that knowledge.

COMMENTARY ON ARTICLE 7

The application of the principle of prior informed consent is central to the policy debates and existing measures concerning TK protection. The expanded conception of misappropriation of TK in Article 1 includes violation of legal measures that require the obtaining of prior informed consent. Prior informed consent has been recognized by some Committee members as a key legal principle and by others as "a valuable practice".[49] The principle essentially requires that at the point of access, when an external party first gains access to traditional knowledge held within a community, formal consent is required on the part of the community that holds the knowledge. National laws stipulate a contract or permit, containing mutually agreed terms, is agreed between TK users and providers, based on which consent is granted for access to the TK. The principle has been widely implemented through permits, contract systems or specific statutes.

The general principle, as expressed in the first paragraph, provides that TK holders should be both informed about the potential use of TK and should consent to the proposed use, as a condition of fresh access to their TK. The second paragraph expresses the roles and responsibilities concerning the prior informed consent principle, but leaves flexibility to adapt the application of the principle to national legal systems, stakeholder needs and custodianship structures. The third paragraph sets out basic features of mechanisms to implement prior informed consent, applying the guiding principle 'effectiveness and accessibility of protection' to prior informed consent mechanisms, so as to ensure that such mechanisms provide for legal certainty and are appropriate. An explicit link with equitable benefit-sharing is made through the requirement that prior informed consent should also entail concluding mutually agreed terms on the use and sharing of benefits arising from the use.

The provision recognizes and accommodates the diversity of existing approaches to prior informed consent and merely provides *that* the principle should be applied. In practice, prior informed consent systems might follow certain basic principles that have been developed and agreed internationally,[50] such as providing for legal certainty and clarity; minimizing transaction costs for access procedures; ensuring that restrictions on access are transparent and legally based. However, from the point of view of these principles, as long as the basic principle is applied, the provision leaves the precise modalities of application to the national law of the country where the TK is located, given the numerous and diverse existing TK laws and the diverse needs of TK holders and custodianship structures.

<u>Changes reflecting stakeholder comments and inputs received on this provision</u>

Some comments suggested that the application of prior informed consent principles should be limited to "access" to TK and should not apply to the "acquisition" of TK. Consequently, the term "acquisition" has been deleted. Following a range of comments on

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[49] United States of America (WIPO/GRTKF/IC/6/14, para. 76)

[50] See Section IV.C.1 ('Basic Principles of a Prior Informed Consent System'), *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (Decision VI/24A, Annex)

the basic features of prior informed consent measures, which are described in the provision, the features have been adapted to directly implement Guiding Principle A.3 on "Effectiveness and accessibility of protection."

Comments and inputs reflected: Brazil, ICC, Saami Council, OAPI, United States of America

ARTICLE 8

EXCEPTIONS AND LIMITATIONS

1. The application and implementation of protection of traditional knowledge should not adversely affect:

(i) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders;

(ii) the use of traditional medicine for household purposes; use in government hospitals, especially by traditional knowledge holders attached to such hospitals; or use for other public health purposes.

2. In particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is already readily available to the general public, provided that users of that traditional knowledge provide equitable compensation for industrial and commercial uses of that traditional knowledge.

COMMENTARY ON ARTICLE 8

Like the rights and entitlements granted in other fields of legal protection, rights in traditional knowledge may be limited or qualified so as to avoid unreasonable prejudice to the interests of society as a whole, to the customary transmission of TK systems themselves, and other legitimate interests. This provision sets out such exceptions and limitations in relation to the entitlements and rights provided in the preceding provisions. It ensures that *sui generis* protection does not adversely affect the customary availability of TK to the TK holders themselves by interfering with their customary practices of using, exchanging, transmitting and practicing their TK. It also foresees that TK protection should not interfere with household uses and public health uses of traditional medicine. Besides the general exclusions in paragraph 1 which apply to misappropriation in general, a specific optional exclusion is foreseen for the prior informed consent requirement. It concerns knowledge that is already readily available to the general public and the exclusion is subject to the requirement that users provide equitable compensation for industrial and commercial uses.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on two aspects. First, a clarification was requested on subparagraph 8.1(ii) regarding use in government hospitals. This exception derives from the Thai law on traditional medicine and is focused on ensuring that TK protection does not restrain and hamper the public health benefits which derive from the use of traditional medicine in non-profit government hospitals, especially at the local and district level, to which traditional medicine practitioners may often be attached. Following the request for clarification, the language of subparagraph (ii) was specified accordingly. The second comment proposed that fair use should not be addressed in this provision and the first paragraph was modified accordingly.

Comments and inputs reflected: Brazil, China, OAPI.

ARTICLE 9

DURATION OF PROTECTION

1. Protection of traditional knowledge against misappropriation should last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 4.

2. If competent authorities make available through national or regional measures additional or more extensive protection for traditional knowledge than is set out in these Principles, those laws or measures shall specify the duration of protection.

COMMENTARY ON ARTICLE 9

An important element of any protection measure is the duration of the rights or entitlements which are made available by that measure. In the field of TK protection this has been a particularly difficult element and most conventional IP rights have been considered inappropriate for this field because they foresee a limited term of protection. Existing *sui generis* systems for TK protection have utilized a range of options to define the duration of protection: a single, limited term of protection; successively renewable limited terms; or an unlimited term of protection. Given the inter-generational transmission and creation of traditional knowledge, TK holders have called for a long or unlimited term of protection.

This provision foresees a duration of protection which is not limited to a specific term. This is because TK protection under these Principles is not comparable to those IP titles which grant a time-limited exclusive property right (e.g., a patent or a trademark), but rather resembles those forms of protection which deal with a distinctive association between the beneficiaries of protection and the protected subject matter, and which last as long as that association exists (e.g., the protection of goodwill, personality, reputation, confidentiality, and unfair competition in general). Therefore, the entitlement of TK holders to be protected against misappropriation has been described by one delegation as "an inalienable, unrenouncable and imprescriptable right."[51] In analogy with other forms of unfair competition law based on this distinctive association and based on "support [for] the protection of TK through the suppression of unfair competition"[52], this provision stipulates that the duration of protection against misappropriation should last as long as the distinctive association remains intact and the knowledge therefore constitutes "traditional knowledge." The distinctive association exists as long as the knowledge is maintained by traditional knowledge holders, remains distinctively associated with them, and remains integral to their collective identity (see Articles 4 and 5). So long as these criteria of eligibility are fulfilled, the protection of TK under these Principles may be unlimited.

Since numerous countries already make available through their national or regional laws more extensive TK protection than is required in these Principles, the second paragraph specifies that the duration of this more extensive or additional protection should be specified in the relevant laws or measures. The provision is silent on the whether the duration of such additional rights should be for a limited term or not. It merely requires that the duration should be specified and thus leaves to national policy making the decision what the specified duration should be. This accommodates all existing national *sui generis* laws, whether or not they provide for a limited term of protection.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on simplifying and streamlining the first paragraph of the provision and thus the latter part of the first paragraph has been deleted as compared to the version contained in document WIPO/GRTKF/IC/7/5. In order to address the question of duration of possible additional protection and in order to accommodate existing *sui generis* TK systems, the second paragraph has been added.

Comments and inputs reflected: Brazil, OAPI, Saami Council, IPCB.

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51 Brazil (WIPO/GRTKF/IC/7/15 Prov, para. 110)

52 United States of America (WIPO/GRTKF/IC/6/14, para. 76)

ARTICLE 10

TRANSITIONAL MEASURES

Protection of traditional knowledge newly introduced in accordance with these principles should be applied to new acts of acquisition, appropriation and use of traditional knowledge. Acquisition, appropriation or use prior to the entry into force of the protection should be regularized within a reasonable period of that protection coming into force. There should however be equitable treatment of rights acquired by third parties in good faith.

COMMENTARY ON
ARTICLE 10

The application of a new requirement for legal protection may have retrospective effect, may exclude retroactivity, or may adopt a range of intermediate approaches which apply varying degrees of retroactivity. Applying protection with retrospective effect can create difficulties because third parties may have already used the protected material in good faith, believing it not to be subject to legal protection. In some legal and policy contexts, the rights and interests of such good faith third parties are recognized and respected through measures such as a continuing entitlement to use the protected material, possibly subject to an equitable compensation, or a prescribed period within which to conclude any continuing good faith use (such as sales of existing goods that would otherwise infringe the new right). On the other hand, the traditional context of TK means that proponents of protection have sought some degree of retrospectivity.

Between the extreme positions of absolute retroactivity and non-retroactivity, this provision seeks to provide an intermediate solution, in terms of which recent utilizations, which become subject to authorization under the law or under any other protection measure, but were commenced without authorization before the entry into force, should be regularized as far as possible within a reasonable period. This requirement of regularization, however, is subject to equitable treatment of rights acquired by third parties in good faith. With this arrangement, the provision conforms broadly with the approach taken in other protection systems, and is consistent with the exceptions and limitations set out in Article 8 above.

Changes reflecting stakeholder comments and inputs received on this provision

Following comments by Committee Members, the provision has been renamed as "transitional measures." Member States comments also suggested that the reference to "a certain period" be replaced with "a reasonable period" and that use in good faith not be addressed in this provision. The changes are reflected accordingly.

Comments and inputs reflected: Brazil, OAPI

ARTICLE 11

FORMALITIES

1. Eligibility for protection of traditional knowledge against acts of misappropriation should not require any formalities.

2. In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may maintain registers or other records of traditional knowledge, where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of traditional knowledge holders. Such registers may be associated with specific forms of protection, and should not compromise the status of hitherto undisclosed traditional knowledge or the interests of traditional knowledge holders in relation to undisclosed elements of their knowledge.

COMMENTARY ON ARTICLE 11

Existing TK protection systems take a variety of approaches towards formalities as a requirement of protection: they may expressly require registration of the knowledge as a condition of protection; they may establish registries or databases, but not link them as a requirement to the acquisition of rights; or they may provide that protection does not require formalities. In the legal protection of know-how and innovation, there are trade-offs between legal predictability and clarity on the one hand, and flexibility and simplicity on the other hand. A registration-based system provides greater predictability and makes it easier in practice to enforce the rights. But it can mean that the TK holders need to take specific legal steps, potentially within a defined time-frame, or risk losing the benefits of protection; this may impose burdens on communities who lack the resources or capacity to undertake the necessary legal procedures. A system without formalities has the benefit of automatic protection, and requires no additional resources or capacity for the right to be available.

This provision clarifies that the general safeguard against misappropriation would not be conditional on registration of TK in databases, registries or any other formalities. This reflects concerns and skepticism which certain countries and communities have expressed about the use of registry and database systems.

However, a number of countries have already established *sui generis* systems which provide for registration as a condition of acquiring exclusive rights over registered knowledge. Therefore, paragraph 2 clarifies that such additional protection, established subject to national law and policies, may require such formalities. It thereby recognizes the diversity of existing protection systems which include registration-based systems, but does not prescribe any approach which requires formalities. In addition, it clarifies that appropriate registration or recordal should not jeopardize or compromise the rights and interests of TK holders in relation to undisclosed elements of their knowledge.

Comments and inputs reflected: OAPI, UNU/IAS

ARTICLE 12

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

1. In case of traditional knowledge which relates to components of biological diversity, access to, and use of, that traditional knowledge shall be consistent with national laws regulating access to those components of biological diversity. Permission to access and/or use traditional knowledge does not imply permission to access and/or use associated genetic resources and vice versa.

COMMENTARY ON ARTICLE 12

Traditional knowledge protection would inevitably interface with other legal systems, especially legal systems regulating access to genetic resources which are associated with the protected TK. This provision ensures consistency with those frameworks, while allowing for appropriate independence of the two regulatory systems. The first sentence of the provision is a direct counterpart to paragraph 37 of the Bonn Guidelines which establishes the independence of prior informed consent procedures for access to genetic resources from access to TK related to those resources. The sentence in this provision mirrors the same approach by establishing that independence from the direction of prior informed consent for TK related to biodiversity components.

Changes reflecting stakeholder comments and inputs received on this provision

The wording in the second sentence has been clarified to cover both access to, and use of, TK and associated genetic resources. Furthermore, the scope of this provision has been significantly narrowed to address only the interfaces between TK protection and legal frameworks regulating access to associated genetic resources, rather than addressing the general legal framework at large.

Comments and inputs reflected: Australia, Brazil, OAPI, Saami Council

ARTICLE 13

ADMINISTRATION AND ENFORCEMENT OF PROTECTION

1.(a). An appropriate national or regional authority, or authorities, should be competent for:

(i) distributing information about traditional knowledge protection and conducting public awareness and advertising campaigns to inform traditional knowledge holders and other stakeholders about the availability, scope, use and enforcement of traditional knowledge protection;

(ii) determining whether an act pertaining to traditional knowledge constitutes an act of misappropriation of, or an other act of unfair competition in relation to, that knowledge;

(iii) determining whether prior informed consent for access to and use of traditional knowledge has been granted;

(iv) determining fair and equitable benefit-sharing;

(v) determining whether a right in traditional knowledge has been infringed, and for determining remedies and damages;

(vi) assisting, where possible and appropriate, holders of traditional knowledge to use, exercise and enforce their rights over their traditional knowledge.

(b) The identity of the competent national or regional authority or authorities should be communicated to an international body and published widely so as to facilitate cooperation and exchange of information in relation to protection of traditional knowledge and the equitable sharing of benefits.

2. Measures and procedures developed by national and regional authorities to give effect to protection in accordance with these Principles should be fair and equitable, should be accessible, appropriate and not burdensome for holders of traditional knowledge, and should provide safeguards for legitimate third party interests and the public interest.

COMMENTARY ON
ARTICLE 13

Traditional knowledge protection can be administered and enforced in diverse ways. Typically, TK protection measures identify certain procedures as well as national authorities which ensure effectiveness and clarity in the protection of TK. This provision sets out the key tasks and functions of such a "competent authority", without seeking to specify any particular form of institutional structure, since institutional and administrative arrangements may vary widely from country to country.

A general role of the competent authority may be to assist in awareness raising about and general administration of the protection of TK. This could entail, for example, providing information about TK protection to raise awareness of TK holders and the general public about TK protection; playing a role in determining misappropriation, prior informed consent and equitable benefit-sharing; and providing a national or regional focal point for TK protection matters.

A specific role may be envisaged for competent authorities in enforcing protection of TK. Most existing *sui generis* laws provide that acts that contravene the laws shall be punished with sanctions such as warnings, fines, confiscation of products derived from TK, cancellation/revocation of access to TK, etc. For example, the Indian Arts and Crafts Act of the United States of America contains extensive enforcement provisions, constituting some of the strongest enforcement provisions of all *sui generis* TK laws described to the Committee.[53] There may be practical difficulties for holders of TK to enforce their rights, which raises the possibility of a collective system of administration, or a specific role for government agencies in monitoring and pursuing infringements of rights. In the above-mentioned Indian Arts and Crafts Act, for example, the Indian Arts and Crafts Board has a specific role in monitoring violations of this law. [54]

The wording in the chapeau specifies that the "appropriate competent authority" could be national or regional. Indeed, several regional institutions and authorities have already decided to examine this possibility, such as ARIPO, OAPI, the South Asian Association for Regional Cooperation (SAARC) and the Pacific Community. This reflects the possibility of addressing the issue of regional TK through appropriate regional and sub-regional institutional arrangements and competent authorities *inter alia*.

Changes reflecting stakeholder comments and inputs received on this provision

Subparagraph 1(iv) has been brought into line with the amendment of Article 6 from an equitable compensation approach towards an equitable benefit-sharing model. The competencies of the national or regional authority have been accordingly revised. References to the "acquisition" and "maintenance" of rights have been deleted, since Committee members considered that the rights of indigenous peoples to their traditional knowledge constituted inalienable prior rights, and could not be "acquired" or alienated on the marketplace.

Comments and inputs reflected: Brazil, OAPI, Saami Council

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[53] A person who sells a product falsely suggesting it is Indian produced can be subject to very heavy fines and imprisonment, with penalties escalating for repeat infringement.

[54] See WIPO/GRTKF/IC/5/INF/6, Annex.

ARTICLE 14

INTERNATIONAL AND REGIONAL PROTECTION

The protection, benefits and advantages available to holders of TK under the national measures or laws that give effect to these international standards should be available to all eligible traditional knowledge holders, who nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign holders of TK should enjoy benefits of protection to at least the same level as traditional knowledge holders who are nationals of the country of protection. Exceptions to this principle should only be allowed for essentially administrative matters such as appointment of a legal representative or address for service, or to maintain reasonable compatibility with domestic programs which concern issues not directly related to the prevention of misappropriation of traditional knowledge.

COMMENTARY ON
ARTICLE 14

The General Assembly has instructed the Committee "to focus its work on the international dimension." An essential element of addressing this dimension is to establish standards of treatment which apply to foreign nationals in respect of the protection of TK. Existing systems have utilized several standards which enable nationals of one country to enjoy legal protection in a foreign jurisdiction. These include national treatment, assimilation, fair and equitable treatment, the most-favored nation principle, reciprocity, and mutual recognition. A concise summary of each of these standards and their possible implications for international TK protection are contained in document WIPO/GRTKF/IC/8/6.

To date Committee members have provided limited guidance on how the international dimension should addressed on a technical level. However, one Member State proposal on 'Elements of an international instrument, or instruments', which was put forward by the African Group and widely supported by Committee members, foresees some form of application of the principle of national treatment.[55] This provision therefore sets out a flexible form of national treatment, which would ensure that eligible foreign TK holders should be entitled to protection against misappropriation and misuse of their TK, provided that they are located in a country which is prescribed as eligible. "National treatment" is a principle whereby a host country would extend to foreign TK holders treatment that is at least as favorable as the treatment it accords to national TK holders in similar circumstances. In this way national treatment standards seek to ensure a degree of legal equality between foreign and national TK holders. It is important to note that national treatment is a relative standard whose content depends on the underlying state of treatment for domestic TK holders.

The function of the illustrative language contained in this draft provision is not to prescribe any particular approach, but rather to help identify and highlight the important policy choices that must be made in the formulation of an international instrument or instruments in this area, and to invite further guidance from the Committee members.

While a national treatment approach would, in the light of precedent and past experience in the IP field, appear to be an appropriate starting point, the very nature of TK and the *sui generis* forms of protection being called for by many Committee participants, suggests that national treatment be supplemented by certain exceptions and limitations or other principles such as mutual recognition, reciprocity and assimilation, especially when this concerns the legal status and customary laws of beneficiaries of protection. Under one strict conception of national treatment, a foreign court in the country of protection would have recourse to its own laws, including its own customary laws, to determine whether a foreign community qualifies as a beneficiary. This may not satisfactorily address the situation from the community's viewpoint which would, reasonably, wish for its own customary laws to be referred to. Under mutual recognition and assimilation principles, a foreign court in the country of protection could accept that a community from the country of origin of the TK has legal standing to take action in country A as the beneficiary of protection because it has such legal standing in the country of origin. Thus, while national treatment might be appropriate as a general rule, it may be that mutual recognition, for example, would be the appropriate principle to address certain issues such as legal standing.

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[55] Proposal by the African Group, 'General Elements' (WIPO/GRTKF/IC/6/12, Annex)

The protection of foreign holders of rights in TK is, however, a complex question as Committee participants have pointed out. Concerning TCEs/EoF, the Delegation of Egypt, for example, stated at the seventh session that "TCEs/EoF were often part of the shared cultural heritage of countries. Their regional and international protection was therefore a complex issue and it was necessary to be very careful. Countries would have to consult with each other before adopting any legal measures in this regard."[56] Morocco noted the need for "wider consultation involving all interested parties before the establishment of legal protection mechanisms."[57] In view of this complexity, Committee discussions have thus far provided little specific guidance on this technical question and existing TK *sui generis* national laws either do not protect foreign rightsholders at all or show a mix of approaches.

[End of extract from document WIPO/GRTKF/IC/9/5]

[56] WIPO/GRTKF/IC/7/15 Prov. Par. 69.
[57] WIPO/GRTKF/IC/7/15 Prov. Par. 85.

V. DRAFT OBJECTIVES AND PRINCIPLES FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE

(Extract from IGC document WIPO/GRTKF/IC/9/4)

I. INTRODUCTION

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') has extensively reviewed legal and policy options for the protection of traditional cultural expressions (TCEs)/expressions of folklore (EoF), on the basis of several decades of previous WIPO work on protection of TCEs/EoF, comprehensive analyses of existing national and regional legal mechanisms and forms of protection available under existing intellectual property (IP) and other laws, extensive community consultations and fact-finding, case studies and a survey of the international policy and legal environment.

2. At its sixth session, having discussed legal and policy options for the protection of TCEs/EoF (documents WIPO/GRTKF/IC/6/3 and 6/3 Add.), the Committee decided to develop an overview of policy objectives and core principles for the protection of TCEs/EoF. On the basis of guidance provided by the Committee, draft materials were then provided for the Committee to consider at its seventh and eighth sessions as follows:

(i) WIPO/GRTKF/IC/7/3 provided an initial draft of objectives and principles, and was extensively reviewed at the Committee's seventh session;
(ii) the Committee established an intersessional commentary process which drew extensive comments from a wide range of Member States and Committee observers;
(iii) WIPO/GRTKF/IC/8/4 incorporated the comments received from Member States and Committee observers into the draft objectives and principles and was then extensively reviewed at the Committee's eighth session.

3. Document WIPO/GRTKF/IC/7/3 characterized these draft objectives and principles as "possible substantive elements of protection of TCEs/EoF in a manner which leaves open and facilitates future decisions by Member States on the context and legal status which they may assume at the international, regional and national levels." The material in the document was "not, in substance, new to the Committee: it simply distils and structures the existing legal mechanisms and the extensive practical experience with protection of TCEs/EoF that have already been widely discussed by the Committee, and draws essentially on the Committee's own deliberations and the various materials put to the Committee." This document therefore drew on the reported and documented national and regional experience with the protection of TCEs/EoF, of countries and communities in many geographical regions, at every level of economic development, that had been surveyed extensively in previous sessions of the Committee.

4. The document included drafts of:

(i) policy objectives, which could set common general directions for protection and provide a consistent policy framework;

(ii) general guiding principles, which could ensure consistency, balance and effectiveness of substantive principles; and

(iii) specific substantive principles, which could define the legal essence of protection.

5. The Committee decided to deal with the international dimension integrally with its work on the protection of TCEs. Supplementary documents WIPO/GRTKF/IC/6/6 and WIPO/GRTKF/IC/8/6 set out various considerations concerning the international dimension of the work of the Committee. These documents were provided as information resources for the Committee and remain potentially relevant to its work. For instance, WIPO/GRTKF/IC/8/6 provides information that may be relevant to the international context of the draft objectives and principles.

6. Committee members generally supported the draft objectives and principles in WIPO/GRTKF/IC/7/3 as a basis for continuing work on the protection of TCEs/EoF.[58] A revised version was then prepared, on the basis of the extensive comments made at the seventh session, as well as the comments and specific suggestions for wording, which were provided by a wide cross-section of Committee participants during the intersessional commentary process established by the Committee. This revised version was circulated as the Annex to WIPO/GRTKF/IC/8/4.

7. At the Committee's eighth session, a number of delegations supported the revised version of the provisions (WIPO/GRTKF/IC/8/4) as the basis for continuing work (although not suggesting that the document was necessarily adequate or close to a final form), and a number expressed opposition to further discussion of and consultation on the revised version of specific substantive principles (Part III of the Annex to WIPO/GRTKF/IC/8/4).

8. The Committee agreed at its eighth session that there was broad support for the process and work being undertaken within the Committee on TCEs. However, the Committee "noted the diverse views expressed" on this issue[59] and no specific directions were given concerning the specific basis for the future work of the Committee under this agenda item. The WIPO General Assembly subsequently agreed in October 2005 to renew the mandate of the Committee to continue its current mandate for the 2006-2007 biennium.

[…]

[58] WIPO/GRTKF/IC/7/15.
[59] WIPO/ GRTKF/IC/8/15 Prov, para 163.

ANNEX
[OF DOCUMENT WIPO/GRTKF/IC/9/4]
REVISED PROVISIONS
FOR THE PROTECTION OF
TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE

POLICY OBJECTIVES AND CORE PRINCIPLES

CONTENTS

N.B. These draft provisions are reproduced unaltered from the Annex of document WIPO/GRTKF/IC/8/4, considered by the Intergovernmental Committee on Intellectual Property and Genetic Resources and Folklore ('the Committee') at its eighth session. Committee members have expressed diverse views on the acceptability of this material as a basis for future work, in particular regarding certain passages of Part III: Substantive Principles. WIPO/GRTKF/IC/8/15 sets out these diverse views in full.

III. SUBSTANTIVE PRINCIPLES

1. Subject Matter of Protection
2. Beneficiaries
3. Acts of Misappropriation (Scope of Protection)
4. Management of Rights
5. Exceptions and Limitations
6. Term of Protection
7. Formalities
8. Sanctions, Remedies and Exercise of Rights
9. Transitional Measures
10. Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion
11. International and Regional Protection

I. OBJECTIVES

The protection of traditional cultural expressions, or expressions of folklore,[60] *should aim to:*

Recognize value

(i) *recognize that indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;*

Promote respect

(ii) *promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;*

Meet the actual needs of communities

(iii) *be guided by the aspirations and expectations expressed directly by indigenous peoples and by traditional and other cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;*

Prevent the misappropriation of traditional cultural expressions/expressions of folklore

(iv) *provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and derivatives therefrom, control ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;*

Empower communities

(v) *be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and traditional and other cultural communities to exercise rights and authority over their own traditional cultural expressions/expressions of folklore;*

Support customary practices and community cooperation

(vi) *respect the continuing customary use, development, exchange and transmission of traditional cultural expressions/expressions of folklore by, within and between communities;*

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[60] In these provisions, the terms "traditional cultural expressions" and "expressions of folklore" are used as interchangeable synonyms, and may be referred to simply as "TCEs/EoF". The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

Contribute to safeguarding traditional cultures

(vii) *contribute to the preservation and safeguarding of the environment in which traditional cultural expressions/expressions of folklore are generated and maintained, for the direct benefit of indigenous peoples and traditional and other cultural communities, and for the benefit of humanity in general;*

Encourage community innovation and creativity

(viii) *reward and protect tradition-based creativity and innovation especially by indigenous peoples and traditional and other cultural communities;*

Promote intellectual and artistic freedom, research and cultural exchange on equitable terms

(ix) *promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and traditional and other cultural communities;*

Contribute to cultural diversity

(x) *contribute to the promotion and protection of the diversity of cultural expressions;*

Promote community development and legitimate trading activities

(xi) *where so desired by communities and their members, promote the use of traditional cultural expressions/expressions of folklore for community-based development, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations;*

Preclude unauthorized IP rights

(xii) *preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions/expressions of folklore and derivatives thereof;*

Enhance certainty, transparency and mutual confidence

(xiii) *enhance certainty, transparency, mutual respect and understanding in relations between indigenous peoples and traditional and cultural communities, on the one hand, and academic, commercial, governmental, educational and other users of TCEs/EoF, on the other.*

[Commentary on Objectives follows]

COMMENTARY

OBJECTIVES

Background

This section contains suggested policy objectives for the protection of TCEs/EoF, which draw on past submissions and statements to the Committee and relevant legal texts. Such objectives could typically form part of a preamble to a law or other instrument.

As the Committee has noted several times, protection of TCEs/EoF should not be undertaken for its own sake, as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities and for promoting national, regional and international policy objectives. The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. A key initial step, therefore, of the development of any legal regime or approach for the protection of TCEs/EoF is to determine relevant policy objectives.

Revisions as compared with previous draft in document WIPO/GRTKF/IC/7/3

Several changes have been made to the original draft objectives annexed to WIPO/GRTKF/IC/7/3, in the light of interventions made at the seventh session of the Committee and the written comments received from, amongst others, Colombia, the Islamic Republic of Iran, New Zealand, the United States of America, *l'Organisation africaine de la propriete intellectuelle (OAPI)*, the Saami Council, the Inuit Circumpolar Conference (ICC), the Assembly of First Nations, and the International Trade Mark Association (INTA).

Some of the previous objectives are more in the nature of general guiding principles rather than objectives as such, and have been transferred to that section (see below).[61] These include the objectives relating to respect for and cooperation with relevant international agreements, and complementarity with the protection afforded to TK *stricto sensu*. Some new objectives have been added, such as an objective relating to preventing the misappropriation of TCEs/EoF, as suggested by more than one Committee participant.[62] Two Committee participants in particular suggested that a distinction be made between those objectives more directly related to the protection of TCEs/EoF at the IP interface and other objectives relating to other policy areas which the provisions should take into account and not run counter to.[63] While such objectives may not have been formally set apart in the draft, certain have been rephrased to take these comments into account.

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61 As noted for example by the Islamic Republic of Iran at the seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov. par. 78).

62 For example, China at the seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov. Par. 75), and comments by Colombia and the Saami Council.

63 See intervention by ARIPO at the seventh session (WIPO/GRTKF/IC/7/15 Prov. Par. 89) and comments by New Zealand.

GENERAL GUIDING PRINCIPLES

(a) Principle of responsiveness to aspirations and expectations of relevant communities

(b) Principle of balance

(c) Principle of respect for and consistency with international and regional agreements and instruments

(d) Principle of flexibility and comprehensiveness

(e) Principle of recognition of the specific nature and characteristics of cultural expression

(f) Principle of complementarity with protection of traditional knowledge

(g) Principle of respect for rights of and obligations towards indigenous peoples and other traditional communities

(h) Principle of respect for customary use and transmission of TCEs/EoF

(i) Principle of effectiveness and accessibility of measures for protection

[Commentary on General Guiding Principles follows]

COMMENTARY

GENERAL GUIDING PRINCIPLES

Background

The substantive provisions set out in the next section are guided by and seek to give legal expression to certain general guiding principles which have underpinned much of the discussion within the Committee since its inception and in international debate and consultations before the Committee's establishment.

(a) Principle of responsiveness to aspirations and expectations of relevant communities

This principle recognizes that protection for TCEs/EoF should reflect the aspirations and expectations of indigenous peoples and traditional and other cultural communities. This means, in particular, that the protection of TCEs/EoF should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection measures, address both cultural and economic aspects of development, prevent insulting, derogatory and offensive acts in particular, promote cooperation among communities and not engender competition or conflicts between them[64], and enable full and effective participation by these communities in the development and implementation of protection systems. Measures for the legal protection of TCEs/EoF should also be recognized as voluntary from the viewpoint of indigenous peoples and other communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their TCEs/EoF. It means that external legal protection against the illicit acts of third parties should not encroach upon or constrain traditional or customary laws, practices and protocols.

(b) Principle of balance

The need for balance has often been emphasized by the diverse stakeholders taking part in discussions concerning the enhanced protection of TCEs/EoF. This principle suggests that protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and sustain TCEs/EoF, and of those who use and benefit from them; the need to reconcile diverse policy concerns; and, the need for specific protection measures to be proportionate to the objectives of protection, actual experiences and needs.

(c) Principle of respect for and consistency with international and regional agreements and instruments

TCEs/EoF should be protected in a way that is respectful of and consistent with relevant international and regional instruments, and without prejudice to specific rights and obligations already established under binding legal instruments, including human rights instruments.[65] Protection for TCEs/EoF should not be invoked in order to infringe human rights guaranteed by international law or to limit the scope thereof.

(d) Principle of flexibility and comprehensiveness

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[64] See Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, 1993, paragraph 2.5, for example.

[65] Comment of the Saami Council.

This principle concerns a need to recognize that effective and appropriate protection may be achieved by a wide variety of legal mechanisms, and that too narrow or rigid an approach at the level of principle may constrain effective protection, conflict with existing laws to protect TCEs/EoF, and pre-empt necessary consultation with stakeholders and holders of TCEs in particular. It concerns the need to draw on a wide range of legal mechanisms to achieve the intended objectives of protection. In particular, experience with TCEs/EoF protection has shown that it is unlikely that any single "one-size-fits-all" or "universal" international template will be found to protect TCEs comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of traditional communities in all countries. An indigenous organization has put it best: "Any attempt to devise uniform guidelines for the recognition and protection of indigenous peoples' knowledge runs the risk of collapsing this rich jurisprudential diversity into a single 'model' that will not fit the values, conceptions or laws of any indigenous society."[66]

The draft provisions are therefore broad and inclusive, and intended, while establishing that misappropriation and misuse of TCEs/EoF would be unlawful, to give maximum flexibility to national and regional authorities and communities in relation to which precise legal mechanisms may be used to achieve or implement the provisions at the national or regional levels.[67]

Protection may accordingly draw on a comprehensive range of options, combining proprietary, non-proprietary and non-IP measures, and using existing IP rights, *sui generis* extensions or adaptations of IP rights, and specially-created *sui generis* IP measures and systems, including both defensive and positive measures. Private property rights should complement and be carefully balanced with non-proprietary measures.

This is a relatively common approach in the IP field and previous documents gave examples of IP conventions which establish certain general principles and which give scope for wide variation as to implementation within the laws of the signatories. Even where international obligations create minimum substantive standards for national laws, it is accepted that the choice of legal mechanisms is a matter of national discretion. It is also an approach found in instruments concerning indigenous peoples, such as ILO Convention 169.[68]

(e) Principle of recognition of the specific nature and characteristics of cultural expression

Protection should respond to the traditional character of TCEs/EoF, namely their collective, communal and inter-generational character; their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and their constantly evolving character within a community. Special measures for legal protection should also recognize that in practice TCEs/EoF are not always created within firmly bounded identifiable "communities".

TCEs/EoF are not necessarily always the expression of distinct local identities; nor are they often truly unique, but rather the products of cross-cultural exchange and influence and

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66 Four Directions Council, 'Forests, Indigenous Peoples and Biodiversity,' Submission to the Secretariat for the CBD, 1996.

67 See interventions at seventh session of the Committee by, amongst others, Azerbaijan, Japan and the Syrian Arab Republic, and the comments by the Australia, Islamic Republic of Iran and New Zealand.

68 Article 34.

intra-cultural exchange, within one and the same people whose name or designation may vary on one side or another of a frontier. Culture is carried by and embodied in individuals who move and reside beyond their places of origin while continuing to practice and recreate their community's traditions and cultural expressions.

(f) Principle of complementarity with protection of traditional knowledge

This principle recognizes the often inseparable quality of the content or substance of traditional knowledge *stricto sensu* (TK) and TCEs/EoF for many communities. These draft provisions concern specific means of legal protection against misuse of this material by third parties beyond the traditional context, and do not seek to impose definitions or categories on the customary laws, protocols and practices of indigenous peoples and traditional and other communities. The Committee's established approach of considering the legal protection of TCEs/EoF and of TK *stricto sensu* in parallel but separately is, as previously discussed, compatible with and respectful of the traditional context in which TCEs/EoF and TK are often perceived as integral parts of an holistic cultural identity.

(g) Principle of respect for rights of and obligations towards indigenous peoples and other traditional communities

This principle suggests that any protection of TCEs/EoF should respect and take into account certain over-arching rights and obligations, particularly international human rights and systems of indigenous rights, and not prejudice the further elaboration of such rights and obligations. See further below under "Comments received on earlier version of the general guiding principles (WIPO/GRTKF/IC/7/3)".

(h) Principle of respect for customary use and transmission of TCEs/EoF

Protection should not hamper the use, development, exchange, transmission and dissemination of TCEs/EoF by the communities concerned in accordance with their customary laws and practices. No contemporary use of a TCE/EoF within the community which has developed and maintained it should be regarded as distorting if the community identifies itself with that use of the expression and any modification entailed by that use. Customary use, practices and norms should guide the legal protection of TCEs/EoF as far as possible.

(i) Principle of effectiveness and accessibility of measures for protection

Measures for the acquisition, management and exercise of rights and for the implementation of other forms of protection should be effective, appropriate and accessible, taking account of the cultural, social, political and economic context of indigenous peoples and traditional and other cultural communities.

<u>Comments received on earlier version of the general guiding principles (WIPO/GRTKF/IC/7/3)</u>

These revised general guiding principles were prepared in the light of comments received from, amongst others, Colombia, the Islamic Republic of Iran, New Zealand, the United States of America, the Assembly of First Nations, *l'Organisation africaine de la propriété intellectuelle* (OAPI), the Saami Council, the Inuit Circumpolar Conference (ICC) and the International Trademark Association (INTA).

As already noted, commentators observed that some objectives are more in the nature of general guiding principles. They have accordingly been transferred to this section. These include objectives relating to respect for and cooperation with relevant international agreements and complementarity with the protection afforded to TK.

In addition, the new principle (g) follows directly a proposal made by the Tulalip Tribes at the Committee's seventh session[69]. Comments from the Inuit Circumpolar Conference (ICC) and the Saami Council made similar points, which have also been taken into account in the revision of the objectives. The wording of the suggested principle has been drawn from that suggested by the Tulalip Tribes, with adjustments for editorial consistency with the other general guiding principles. The commentary seeks to explain and amplify the principle, again drawing directly from the wording used by the Tulalip Tribes. However, it is not assumed that the suggested wording of principle (g) necessarily fully captures the essence of the wording proposed by the Tulalip Tribes, which was: "Nothing in the application of any principle shall release the State from respecting existing rights and obligations towards holders of TCEs/EoF and TK or prejudice the further elaboration of these rights and obligations."

[69] WIPO/GRTKF/IC/7/15 Prov. Par. 97.

III. SUBSTANTIVE PROVISIONS

ARTICLE 1:

SUBJECT MATTER OF PROTECTION

(a) "Traditional cultural expressions" or "expressions of folklore" are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

(i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;

(ii) musical expressions, such as songs and instrumental music;

(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances,

whether or not reduced to a material form; and,

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

which are:

- *(aa) the products of creative intellectual activity, including individual and communal creativity;*
- *(bb) characteristic of a community's cultural and social identity and cultural heritage; and*
- *(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.*

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.

[Commentary on Article 1 follows]

COMMENTARY

ARTICLE 1: SUBJECT MATTER OF PROTECTION

Background

The suggested article describes the subject matter covered by the provisions. Paragraph (a) sets out both a description of the subject matter itself ("traditional cultural expressions" or "expressions of folklore") as well as the substantive criteria which specify more precisely which of those expressions would be protectable. The Committee's discussions have clarified the distinction between description of the subject matter in general, and the more precise delimitation of those TCEs/EoF that are eligible for protection under a specific legal measure. As has been pointed out, not every expression of folklore or of traditional cultures and knowledge could conceivably be the subject of protection within an IP framework.[70]

The suggested article draws upon the WIPO-UNESCO Model Provisions for National Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions, 1982) and the Pacific Islands Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 (the Pacific Model, 2002), as well as existing national copyright laws which provide *sui generis* protection for TCEs/EoF.

Description of subject matter

The words "or combinations thereof" in paragraph (a) are intended to demonstrate that TCEs/EoF can be both tangible and intangible and have both tangible and intangible components ("mixed expressions"), as has been suggested.[71] Paragraph (a) also makes it clear that oral (non-fixed) expressions would also be protectable, responding to the often oral nature of traditional cultural expression. Fixation would therefore not be a requirement for protection.[72] The protection for "architectural forms" could contribute towards the protection of sacred sites (such as sanctuaries, tombs and memorials) to the extent they are the object of misappropriation and misuse as covered by these provisions.

Criteria for protection

In terms of the criteria set out in paragraphs (a) (aa) to (cc), the suggested provision is to the effect that protectable TCEs/EoF should:

(i) be intellectual creations and therefore "intellectual property", including both individual and communal creativity. Differing versions, variations or adaptations of the same expression could qualify as distinct TCEs/EoF if they are sufficiently creative (much like different versions of a work can qualify as copyright works if they are each sufficiently original);

(ii) have some linkage with a community's cultural and social identity and cultural heritage. This linkage is embodied by the term "characteristic" which is used to denote that the expressions must be generally recognized as representing a communal identity and

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70 Intervention by Nigeria (WIPO/GRTKF/IC/6/14, par. 43).

71 Comments and previous statements by the Islamic Republic of Iran.

72 See comments by Colombia.

heritage. The term "characteristic" is intended to convey notions of "authenticity" or that the protected expressions are "genuine", "pertain to" or an "attribute of" a particular people or community. Both "community consensus" and "authenticity" are implicit in the requirement that the expressions, or elements of them, must be "characteristic": expressions which become generally recognized as characteristic are, as a rule, authentic expressions, recognized as such by the tacit consensus of the community concerned;[73]

(iii) still be maintained, developed or used by the community or its individual members.

The notion "heritage" is used to denote materials, intangible or tangible, that have been passed down from generation to generation, capturing the inter-generational quality of TCEs/EoF; an expression must be "characteristic" of such heritage to be protected. It is generally considered by experts that materials which have been maintained and passed between three, or perhaps two, generations form part of "heritage".[74] Expressions which may characterize more recently established communities or identities would not be covered.[75]

Contemporary creativity/individual creators

As discussed in previous documents,[76] many expressions of folklore are handed down from generation to generation, orally or by imitation. Over time, individual composers, singers and other creators and performers might call these expressions to mind and re-use, re-arrange and re-contextualize them in a new way. There is, therefore, a dynamic interplay between collective and individual creativity, in which an infinite number of variations of TCEs/EoF may be produced, both communally and individually.

The individual, therefore, plays a central role in the development and re-creation of traditional cultural expression. In recognition of this, the description of the subject matter in Article 1 includes expressions made by individuals. In order to determine what is or what is not a TCE or EoF, it is therefore not directly relevant whether the expression was made collectively or by an individual. Even a contemporary creative expression made by an individual (such as, for example, a film or video or a contemporary interpretation of pre-existing dances and other performances[77]) can be protected as a TCE/EoF, provided it is characteristic of a community's cultural and social identity and heritage and was made by the individual having the right or responsibility to do so in accordance with the customary law and practices of that community. In so far as the *beneficiaries of protection* are concerned, however, the primary focus of these draft provisions is on communal beneficiaries rather than on individuals. Communities are made up of individuals, and thus communal control and

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73 See Commentary to the Model Provisions, 1982. See also comments of Colombia.

74 For example, discussions with Professor Edi Sedyawati and others at National Consultation Forum on Intellectual Property and Traditional Knowledge and Cultural Expressions/Folklore, Indonesia, November 30 and December 1, 2004 and UNESCO Expert Meeting on 'Inventorying Cultural Heritage', Paris, March 17 and 18, 2005.

75 See, for example, the concerns in this regard of the International Publishers Association (IPA) as reflected in their comments.

76 See in particular WIPO/GRTKF/IC/6/3.

77 See comments by the Inuit Circumpolar Conference (ICC) which support this approach and provide these examples. See also paras. 2.2 and 2.5 of the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, 1993. Discussions with members of the Scientific Committee of OAPI refer.

regulation of TCEs/EoF ultimately benefits the individuals who make up the relevant communities (see further Article 2 "Beneficiaries").

Choice of terms

Member States and other stakeholders have called for flexibility in regard to terminology, amongst other things. Many international IP standards defer to the national level for determining such matters. Hence, to allow for appropriate national policy and legislative development, consultation and evolution, the suggested sub-paragraph (b) recognizes that detailed decisions on terminology should be left to national and regional implementation.

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

Previously, the description of the subject matter and the criteria for protection were set out in two provisions, B.1 and B.2. However, B.1 was drawn almost directly from the Model Provisions, 1982, and contained some criteria which overlapped with B.2, as some commentators pointed out. Thus, the former B.1 and B.2 have been consolidated into one provision.

Previous discussions also suggested that the definition in the Model Provisions, 1982 was, while a useful starting point, dated and in need of further consideration. The revised article draws from the Model Provisions, 1982 but also more directly from other more recent models, such as the Pacific Model, 2002. The word "folk" has been removed as suggested, and other refinements to the language and structure have been made in response to various comments and other inputs. A specific reference to body-painting has been added because of the importance of this form of expression to communities and possible uncertainty as to whether it is sufficiently "tangible" to qualify as a tangible TCE/EoF.[78]

The revised provision is intended to be more precise and clear, in response to comments that the scope of subject matter appeared too wide and imprecise.[79] The criteria that determine which TCEs/EoF are protectable further delimit this scope; in addition, the nature of the protection provided by the provisions, notably in Article 3 'Acts of Misappropriation (Scope of Protection)', further clarify the reach of the provisions.

One country suggested deletion of the criterion in paragraph (ii) of the former provision B. 2 (which read: "characteristic of a community's distinctive cultural identity and traditional heritage developed and maintained by it"), because it would impose too heavy a burden of proof on communities.[80] This suggestion certainly merits further consideration.

Previous discussions have also addressed the place and role of individuals in the creation and "ownership" of TCEs/EoF. Certain comments also did so, as did other inputs received.[81]

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78 See discussions in WIPO/GRTKF/IC/5/3.

79 For example, comments of the European Community and its Member States and the International Publishers Association (IPA).

80 See comments of Colombia.

81 For example, see discussions at WIPO Asia and the Pacific Regional Seminar on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Daejeon, Republic of Korea, October 11 to 13, 2004 and at fifth and sixth sessions of the Committee; comments of the United States of America; and discussions with members of the Scientific Committee of OAPI, in particular, on this point, with Professor Kouliga Nikiema, Burkina Faso.

The provisions and commentary have been adjusted in an effort to deal more adequately with these issues, but further reflection might be necessary.

More generally, Colombia suggested that it would be useful to produce a glossary of terms in order to make the provisions easier to understand and to achieve a unified understanding of the articles. OAPI also suggested a definitions section.

Several other changes were made to the previous B.1 and B.2, taking into account comments made by, amongst others, Australia, Colombia, the European Union and its Member States, the Islamic Republic of Iran, the United States of America, the Assembly of First Nations, the International Publishers Association (IPA), *l'Organisation africaine de la propriete intellectuelle* (OAPI), the International Trade Mark Association (INTA) and the Saami Council.

ARTICLE 2:

BENEFICIARIES

Measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities:[82]

(i) in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and

(ii) who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.

[Commentary on Article 2 follows]

82 The broad and inclusive term "indigenous peoples and traditional and other cultural communities", or simply "communities" in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

COMMENTARY

ARTICLE 2: BENEFICIARIES

Background

Many stakeholders have emphasized that TCEs/EoF are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals. Some laws for the protection of TCEs/EoF provide rights directly to concerned peoples and communities. On the other hand, many vest rights in a Governmental authority, often providing that proceeds from the granting of rights to use the TCEs/EoF shall be applied towards national heritage, social welfare and culture related programs. The African Group has stated that principles for the protection of TCEs/EoF should 'Recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore.'[83]

The suggested provision is sufficiently flexible to accommodate both approaches at the national level – while the beneficiaries of protection should directly be the concerned peoples and communities, the rights themselves could be vested either in the peoples or communities, or in an agency or office (see also Article 4 "Management of Rights").

Article 2, and the provisions as a whole, contemplate that more than one community may qualify for protection of their TCEs/EoF in line with the criteria in Article 1. Existing *sui generis* laws provide for this possibility, such as the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001 ("the Panama Law")[84], and the Peruvian Law of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources ("the Peru Law, 2002").[85] This also touches upon the allocation of rights or distribution of benefits among communities which share the same or similar TCEs/EoF in different countries (so-called "regional folklore").[86] This is dealt with further in Articles 4, "Management of Rights" and 7, "Formalities".

The term "cultural communities" is intended to be broad enough to include also the nationals of an entire country, a "nation", in cases where TCEs/EoF are regarded as "national folklore" and belonging to all of the people of a particular country.[87] This complements and accords with the practice in other policy areas.[88] Therefore, a national law could, for example, state that all nationals are the beneficiaries of protection.

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83 WIPO/GRTKF/IC/6/12. See also interventions at the seventh session of the Committee by, for example, Morocco (WIPO/GRTKF/IC/7/15 Prov. Para. 85).

84 Article 5, Decree.

85 Article 10.

86 See comments of the European Union and its Member States and the Russian Federation.

87 See statement by Egypt and Morocco at the Committee's seventh session (WIPO/GRTKF/IC/7/15 Prov.), paras. 69 and 85, and others.

88 See Glossary on Intangible Cultural Heritage, Netherlands National Commission for UNESCO, 2002 (". . . a nation can be a cultural community").

Communities/individuals

As discussed in relation to Article 1, these provisions are intended primarily to benefit communities, including in cases where a TCE/EoF is created or developed by an individual member of a community. The essential characteristics of "traditional" creations are that they contain motifs, a style or other items that are characteristic of and identify a tradition and a community that still bears and practices it. Thus, even where an individual has developed a tradition-based creation within his or her customary context, it is regarded from a community perspective as the product of social and communal creative processes. The creation is, therefore, not "owned" by the individual but "controlled" by the community, according to indigenous and customary legal systems and practices.[89] This is what marks such a creation as "traditional".

For these reasons, the benefits of the protection envisaged in these provisions accrue to communities and not individuals – this is what distinguishes this *sui generis* system from conventional IP law which remains available to the individual should he or she wish to take advantage of it (see Article 10). This approach accords with the view articulated by Committee participants that these provisions should aim to provide forms of protection for expressions of culture and knowledge not currently available under conventional and existing IP law.[90]

However, communities are made up of individuals, and thus communal control and regulation of TCEs/EoF ultimately benefits the individuals who make up the relevant community. Thus, in practice, it is individuals who will benefit, in accordance with customary law and practices.

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

As compared with the former B.3 in document WIPO/GRTKF/IC/7/3, changes have been made to this provision to take into account comments from, amongst others, Australia, the European Union and its Member States, the Russian Federation, the United States of America and *l'Organisation africaine de la propriété intellectuelle (OAPI*).

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89 See generally WIPO/GRTKF/IC/6/3, and in particular the intervention of the Tulalip Tribes of Washington, Committee Fifth Session (WIPO/GRTKF/IC/5/15, par. 56).

90 Interventions at Committee sessions by Nigeria and Japan, amongst others.

ARTICLE 3:

ACTS OF MISAPPROPRIATION (SCOPE OF PROTECTION)

Traditional cultural expressions/expressions of folklore of particular value or significance

(a) In respect of traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent the following acts taking place without its free, prior and informed consent:

(i) in respect of such traditional cultural expressions/expressions of folklore other than words, signs, names and symbols:

- the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;

- any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;

- any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and

- the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;

(ii) in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, any use of the traditional cultural expressions/expressions of folklore or derivatives thereof, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or derivatives thereof, which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute;

Other traditional cultural expressions/expressions of folklore

(b) In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that:

(i) the relevant community is identified as the source of any work or other production adapted from the traditional cultural expression/expression of folklore;

(ii) any distortion, mutilation or other modification of, or other derogatory action in relation to, a traditional cultural expression/expression of folklore can be prevented and/or is subject to civil or criminal sanctions;

(iii) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of a community, suggest any endorsement by or linkage with that community, can be prevented and/or is subject to civil or criminal sanctions; and

(iv) where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the Agency referred to in Article 4 in consultation with the relevant community; and

<u>Secret traditional cultural expressions/expressions of folklore</u>

(c) There shall be adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.

[Commentary on Article 3 follows]

COMMENTARY

ARTICLE 3: ACTS OF MISAPPROPRIATION (SCOPE OF PROTECTION)

Background

This draft article addresses a central element of protection, that is, the misappropriations of TCEs/EoF covered by the provisions and the rights and other measures that would apply in each case.

As Committee participants have stressed should be the case,[91] the article aims to provide forms of protection for expressions of culture and knowledge not currently available under conventional and existing IP law. These provisions are without prejudice to protection for TCEs/EoF already available under current IP law.[92] Conventional IP protection remains available. See further commentary to Articles 2 "Beneficiaries" and 10 "Relationship with Intellectual Property and Other Forms of Protection and Preservation".

The suggested provision seeks to address the kinds of IP-related uses and appropriations of TCEs/EoF which most often cause concern to indigenous and local communities and other custodians and holders of TCEs/EoF, as identified by them in earlier fact-finding and consultations (see paragraph 53 of document WIPO/GRTKF/IC/7/3). It draws from a wide range of approaches and legal mechanisms embodied in various national and regional laws (see paragraphs 54 to 56 of document WIPO/GRTKF/IC/7/3).

Summary of draft provision

In brief, the draft provision suggests three "layers" of protection, intended to provide supple protection that is tailored to different forms of cultural expression and the various objectives associated with their protection, reflecting a combination of exclusive and equitable remuneration rights and a mix of legal and practical measures:

(a) for TCEs/EoF of particular cultural or spiritual value to a community, a right of "free, prior and informed consent" (PIC), akin to an exclusive right in IP terms, is suggested, in terms of which the kinds of acts usually covered by IP laws, especially copyright, related rights, trademarks and designs, would be subject to the PIC of the relevant community.

(i) This layer of protection would be subject to prior notification or registration in a public register as provided for under Article 7 (see below). Registration or notification is optional only and for decision by relevant communities. There would be no need to register or notify secret TCEs/EoF because secret TCEs/EoF are separately protected under Article 3 (c). This registration option is applicable only in cases where communities wish to obtain strict, prior informed consent protection for TCEs/EoF which are already known and publicly available.

(ii) The right of PIC would grant a community the right either to prevent or authorize, on agreed terms including on benefit-sharing, the use of the TCEs/EoF. As such, PIC is akin to an exclusive IP right which may be, but need not be, licensed. These rights could be used positively or, which is more likely perhaps, defensively (to prevent any use and exploitation of these TCEs/EoF and acquisition of IP rights over them).

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91 Interventions at Committee sessions by Nigeria and Japan, amongst others.

92 See comments by Colombia.

(iii) Specific tailored forms of protection are suggested for words, names, symbols and other designations, drawing on trademark law and special measures already established in this regard in the Andean Community, New Zealand and the United States of America.

(iv) In respect of performances which qualify as TCEs/EoF (TCEs/EoF which are 'expressions by action': see Article 1), these may also be registered or notified and so be protected strongly, as suggested. The moral and economic rights proposed include rights modeled on the kinds of rights already provided to other performers, including by in particular the WIPO Performances and Phonograms Treaty, 1996 (WPPT, 1996). This form of protection is without prejudice to the protection available under the WPPT.[93] If such performances were not so registered or notified, they could be protected under (b) or (c) below, depending on the circumstances and the community's wishes.

(b) For TCEs/EoF not so registered or notified, their use would not be subject to prior authorization but protection would concern *how* the TCEs/EoF were used. These TCEs/EoF could be used, as a source of creative inspiration for example, without the need for prior consent or authorization, in furtherance of creativity and artistic freedom, a key objective as many have stated.[94] However, how the TCEs/EoF are so used would be regulated, drawing mainly upon moral rights and unfair competition principles, with civil and criminal remedies proposed, as well as the payment of an equitable remuneration or equitable benefit-sharing, to be determined by a competent authority. This authority could be the same Agency as referred to in Article 4 "Management of Rights". This approach is akin perhaps to a compulsory license or equitable remuneration approach, found in national *sui generis* laws concerning TCEs/EoF[95], as well as in conventional copyright law concerning musical works already fixed in sound recordings.[96]

(c) Finally, for secret, confidential or undisclosed TCEs/EoF, the suggested provision seeks to clarify that existing protection for confidential or undisclosed information covers TCE-related subject matter, building also upon case-law to this effect.[97] The Mataatua Declaration, 1993 recognizes, amongst other things, that indigenous peoples have the right to "protect and control dissemination" of [their] knowledge.[98]

Flexibility as to legal mechanisms for implementation

The provisions are broad and inclusive, and intended to give flexibility to national and regional authorities and communities in relation to which precise legal mechanisms may be selected at the national or regional levels to implement them.

To illustrate this point with a practical example – the suggested principle which states that there ought to be protection against false or misleading indications in trade as to the endorsement by or linkage with a community of tradition-based creations (a typical example is a handicraft sold as 'authentic' or 'Indian' when it is not) could be implemented in practice at the national level through *one or more* of the following: (i) the registration and use of certification trademarks by concerned communities; (ii) civil and/or criminal remedies

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93 See comments of Colombia.

94 For examples, interventions by Azerbaijan and the European Community and its Member States, seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov.).

95 Such as the Bangui Accord, OAPI, as revised in 1999.

96 Article 13, Berne Convention, 1971.

97 Foster v. Mountford (1976) 29 FLR 233.

98 Article 2.1.

available under general trade practices and labeling laws; (iii) enactment of legislation specifically to provide this form of protection for TCEs/EoF; (iv) the registration and use of geographical indications; and/or (v) common law remedies for "passing off" and laws for the suppression of unfair competition.

Derivative works

Some key policy and legal questions pivot on the adaptation right, the right to make derivative works and on the setting of appropriate exceptions and limitations in this regard.[99]

The suggested provision suggests an adaptation right in respect of TCEs/EoF of particular cultural or spiritual value, subject to prior registration or notification. In respect of other TCEs/EoF, there would be no adaptation right as such, nor prevention of the obtaining of IP rights in the derivative work by its creator. Nor would, in either case, mere "inspiration" be prevented, as is also the case in copyright law, in line with the idea/expression dichotomy.[100] However, it is suggested there be regulation of how derivative works may be exploited, following the general approach of the Pacific Model Law, 2002.

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

Several structural, formatting and substantive changes were made to the earlier version of this article, which was B.5 in document WIPO/GRTKF/IC/7/3, in the light of interventions made at the seventh session of the Committee by, amongst others, Azerbaijan, Egypt and Japan, comments made by Australia, Colombia, the European Union and its Member States, the United States of America, the Assembly of First Nations, the Saami Council, the International Publishers Association, and the International Trademark Association (INTA), and during other discussions, with the Scientific Committee of OAPI for example.

Following comments made in particular by the African Group and Egypt at the Committee's seventh session, this article now more clearly refers to the term "misappropriation". The rights set out in the previous provision B.5 each corresponded to specific acts of misappropriation without using the term as such, and this has now been rectified.

Following interventions at the seventh session and other comments, performances which are TCEs/EoF are no longer treated as a distinct "layer" in the draft article. They may be protected either in accordance with one of the suggested "layers" in (a), (b) or (c) of the article, in accordance with the community's wishes; in addition, more conventional protection for performers of "expressions of folklore" remains available under the WPPT, 1996, as Colombia and others pointed out.[101]

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99 See also comments of Australia, and WIPO/GRTKF/IC/5/3 and subsequent documents.
100 Discussed in WIPO/GRTKF/IC/6/3.
101 See comments of Colombia.

ARTICLE 4:

MANAGEMENT OF RIGHTS

(a) Prior authorizations to use traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the community concerned where the community so wishes, or from an agency acting at the request, and on behalf, of the community (from now on referred to as "the Agency"). Where authorizations are granted by the Agency:

(i) such authorizations should be granted only in appropriate consultation with the relevant community, in accordance with their traditional decision-making and governance processes;

(ii) any monetary or non-monetary benefits collected by the Agency for the use of the traditional cultural expressions/expressions of folklore should be provided directly by it to the community concerned.

(b) The Agency should generally be tasked with awareness-raising, education, advice and guidance functions. The Agency should also:

(i) where so requested by a community, monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use as provided for in Article 3 (b); and,

(ii) establish the equitable remuneration referred to in Article 3 (b) in consultation with the relevant community.

[Commentary on Article 4 follows]

COMMENTARY

ARTICLE 4: MANAGEMENT OF RIGHTS

Background

This provision deals with how and to whom authorizations to use TCEs/EoF are applied for and related questions. The matters dealt with in this provision should apply regardless of whether communities or State-appointed bodies are the rights holders (see Article 2 "Beneficiaries" above).

The provisions as a whole envisage the exercise of rights by the relevant communities themselves. However, in cases where the relevant communities are not able or do not wish to exercise the rights directly, this draft article suggests a role for an "Agency", acting at all times at the request of and on behalf of relevant communities. A role for such an "Agency" is entirely optional, and only necessary and appropriate if the relevant communities so wish.

An agency fulfilling these kinds of roles is provided for in the Model Provisions, 1982, the Indigenous Peoples Rights Act of 1997 of the Philippines (the Philippines Law, 1997), the Pacific Model Law, 2002 and in many national laws providing *sui generis* protection for TCEs/EoF. Several Member States have expressed support for an 'authority' in such cases.[102]

An agency such as that suggested could be an existing office, authority or society, and also a regional organization or office. The African Regional Intellectual Property Organization (ARIPO) and *l'Organisation africaine de la propriete intellectuelle (OAPI)* have, for example, noted the possible role of regional organizations in relation to the protection of TCEs/EoF and TK.[103] Copyright collecting societies could also play a role.

This provision seeks to identify only certain core principles that could apply. Clearly the elaboration of such measures will depend greatly on national and community factors: options for more detailed provisions could be further developed at the national and community levels. Existing laws and models have detailed provisions that could be drawn from.

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

As compared with the corresponding provision B.4 in document WIPO/GRTKF/IC/7/3, changes have been made to take into account statements by, amongst others, Japan at the seventh session of the Committee, as well as the written comments of Colombia, the European Union and its Member States, the United States of America, the Assembly of First Nations and the Saami Council. Some of these interventions and comments had also indicated that provision B.4 had been too detailed and prescriptive. Colombia and the Saami Council in particular expressed serious reservations about any agency or authority acting on behalf of indigenous peoples. This underscores the need for any agency or authority to derive its entitlement to act from the explicit wishes and authority of the community concerned.

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[102] African Group (WIPO/GRTKF/IC/6/12); interventions at the seventh session of the Committee by the European Union and its Member States, Japan and Morocco (WIPO/GRTKF/IC/7/15 Prov.); comments of the European Union and its Member States.

[103] For example, intervention by ARIPO at seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov. Para. 89) and previously.

ARTICLE 5:

EXCEPTIONS AND LIMITATIONS

(a) Measures for the protection of TCEs/EoF should:

(i) not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices;

(ii) extend only to utilizations of TCEs/EoF taking place outside the traditional or customary context, whether or not for commercial gain; and,

(iii) not apply to utilizations of TCEs/EoF in the following cases:

- by way of illustration for teaching and learning;
- non-commercial research or private study;
- criticism or review;
- reporting news or current events;
- use in the course of legal proceedings;
- the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and
- incidental uses,

provided in each case that such uses are compatible with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community.

(b) Measures for the protection of TCEs/EoF could allow, in accordance with custom and traditional practice, unrestricted use of the TCEs/EoF, or certain of them so specified, by all members of a community, including all nationals of a country.

[Commentary on Article 5 follows]

COMMENTARY

ARTICLE 5: EXCEPTIONS AND LIMITATIONS

Background

Many stakeholders have stressed that any IP-type protection of TCEs should be subject to certain limitations so as not to protect them too rigidly. It has been suggested that overly strict protection may stifle creativity, artistic freedom and cultural exchanges, as well as be impracticable in its implementation, monitoring and enforcement.

In addition, the protection of TCEs/EoF should not prevent communities themselves from using, exchanging and transmitting amongst themselves expressions of their cultural heritage in traditional and customary ways and in developing them by continuous recreation and imitation, as has been emphasized.

This suggested provision puts forward certain exceptions and limitations for consideration:

(a) paragraph (a) implements objectives and general guiding principles associated with non-interference in and support for the continued use and development of TCEs/EoF by communities, while (b) affirms that these provisions would apply only to '*ex situ*' uses of TCEs/EoF, namely uses outside the customary or traditional context, whether for commercial purposes or not;

(b) paragraph (c) sets out exceptions drawn from the Model Provisions, 1982, the Pacific Islands Model Law, 2002 and copyright laws in general. Certain more specific comments include:

(i) Limitations and exceptions for teaching purposes are common in copyright laws. While these are sometimes limited to "face-to-face" teaching (as also in the Pacific Model, 2002), special limitations and exceptions to copyright and related rights for distance learning have also been raised for discussion. [104] The term "teaching and learning" is used for present purposes.

(ii) National copyright laws in some cases allow public archives, libraries and the like to make, for non-commercial safeguarding purposes only, reproductions of works and expressions of folklore and keep them available for the public[105], and this is envisaged. In this respect, appropriate contracts, IP check-lists and other guidelines and codes of conduct for museums, archives and inventories of cultural heritage are under development by WIPO. Specific limitations for libraries and archives in copyright law in general have also been raised for discussion.[106]

(iii) Not all typical copyright exceptions may be appropriate, however, as they might undermine community interests and customary rights – for example, incidental use

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104 See Proposal by Chile (SCCR/12/3) on the Subject "Exceptions and limitations to copyright and related rights", discussed at the 12th session of the WIPO Standing Committee on Copyright and Related Rights (SCCR), November 2004.

105 An example is the United Kingdom's Copyright, Designs and Patents Act, 1988, Schedule 2, par. 14.1.

106 See Proposal by Chile, above.

exceptions which allow a sculpture or work of artistic craftsmanship permanently displayed in a public place to be reproduced in photographs, drawings and in other ways without permission. Thus, exceptions which would be offensive are excluded.

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

There were relatively few comments on this provision, but comments were provided by Colombia, the European Union and its Member States, the Islamic Republic of Iran, the United States of America, and the Saami Council. Discussions held with members of the Scientific Committee of *l'Organisation africaine de la propriete intellectuelle (OAPI)* also identified difficulties with paragraph (c) of the previous provision B. 6 as it was felt that a general application of typical IP exceptions and limitations to TCEs/EoF was too imprecise.[107] The new formulation seeks to address this concern by providing greater precision, drawing from the Model Provisions, 1982, the Pacific Islands Model Law, 2002 and copyright laws in general. On the other hand, Colombia suggested a broader statement of principle (referring for example to cultural interest and/or the existence or otherwise of gainful intent), leaving it to Member States to establish those exceptions and limitations it wishes.

[107] Discussions with the Scientific Committee of *l'Organisation africaine de la propriete intellectuelle*; intervention by Morocco at the seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov. Para. 85).

ARTICLE 6:

TERM OF PROTECTION

Protection of traditional cultural expressions/expressions of folklore should endure for as long as the traditional cultural expressions/expressions of folklore continue to meet the criteria for protection under Article 1 of these provisions, and,

(i) in so far as TCEs/EoF referred to in Article 3 (a) are concerned, their protection under that sub-article shall endure for so long as they remain registered or notified as referred to in Article 7; and,

(ii) in so far as secret TCEs/EoF are concerned, their protection as such shall endure for so long as they remain secret.

[Commentary on Article 6 follows]

COMMENTARY

ARTICLE 6: TERM OF PROTECTION

Background

Many indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures. Calls for indefinite protection are closely linked to calls for retroactive protection (see Article 9 "Transitional Measures" below). On the other hand, it is generally seen as integral to the balance within the IP system that the term of protection not be indefinite, so that works ultimately enter the 'public domain'.[108]

The suggested provision embodies a trademark-like emphasis on current use, so that once the community that the TCE is characteristic of no longer uses the TCE or no longer exists as a distinct entity (analogous to abandonment of a trademark, or a trademark becoming generic), protection for the TCE would lapse. Such an approach draws upon the very essence of the subject matter of protection, it being recalled that at the heart of TCEs/EoF is that they are characteristic of and identify a community (see above). When a TCE ceases to do so, it ceases by definition to be a TCE and it follows that protection should lapse.

In addition to this general principle, specific provision is made for the term of protection of two categories, namely those TCEs/EoF which are registered or notified and those that are secret, undisclosed or confidential.

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

Several interventions during the seventh session of the Committee and some written comments suggested that a single term covering all TCEs/EoF was inappropriate and that different terms could be envisaged for different forms of TCE/EoF.[109] Indeed, different forms of IP are protected for different lengths of time. On the other hand, literary and artistic works and performances are generally protected for the same period, while marks are potentially protectable for an indefinite period. The suggested provision merges these ideas to suggest a potentially indefinite term for all three forms of TCE/EoF, subject to new specific provisions for certain TCEs/EoF, namely registered or notified TCEs/EoF and secret TCEs/EoF. However, this aspect, and the subject matter of the provision as a whole, requires further reflection, as several Committee participants have pointed out.[110]

A number of comments suggested removal of paragraph (b) of the earlier provision B. 7, and this change has been made.[111]

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[108] See for example the comments of the European Union and its Member States.

[109] See for example statements by Japan and Morocco (WIPO/GRTKF/IC/7/15 Prov., Paras. 68 and 85).

[110] See, for example, intervention of the Islamic Republic of Iran at the Committee's seventh session (WIPO/GRTKF/IC/7/15 Prov. Para. 78) and comments of the European Union and its Member States, the United States of America and the International Trademark Association (INTA). Discussions at the WIPO Asia and the Pacific Regional Seminar on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Daejeon, Republic of Korea, October 11 to 13, 2004 also identified a need for careful consideration of this provision.

[111] See comments of OAPI and the Assembly of First Nations.

Other comments relating to this provision were those from Colombia, the European Union and its Member States, the Russian Federation, the United States of America, the Assembly of First Nations, the Saami Council and the International Trademark Association (INTA).

ARTICLE 7:

FORMALITIES

(a) As a general principle, the protection of traditional cultural expressions/expressions of folklore should not be subject to any formality. Traditional cultural expressions/expressions of folklore as referred to in Article 1 are protected from the moment of their creation.

(b) Measures for the protection of specific traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance and for which a level of protection is sought as provided for in Article 3(a) should require that such traditional cultural expressions/expressions of folklore be notified to or registered with a competent office or organization by the relevant community or by the Agency referred to in Article 4 acting at the request of and on behalf of the community.

(i) To the extent that such registration or notification may involve the recording or other fixation of the traditional cultural expressions/expressions of folklore concerned, any intellectual property rights in such recording or fixation should vest in or be assigned to the relevant community.

(ii) Information on and representations of the traditional cultural expressions/expressions of folklore which have been so registered or notified should be made publicly accessible at least to the extent necessary to provide transparency and certainty to third parties as to which traditional cultural expressions/expressions of folklore are so protected and for whose benefit.

(iii) Such registration or notification is declaratory and does not constitute rights. Without prejudice thereto, entry in the register presumes that the facts recorded therein are true, unless proven otherwise. Any entry as such does not affect the rights of third parties.

(iv) The office or organization receiving such registrations or notifications should resolve any uncertainties or disputes as to which communities, including those in more than one country, should be entitled to registration or notification or should be the beneficiaries of protection as referred to in Article 2, using customary laws and processes, alternative dispute resolution (ADR) and existing cultural resources, such as cultural heritage inventories, as far as possible.

[Commentary on Article 7 follows]

COMMENTARY

ARTICLE 7: FORMALITIES

Background

It has been suggested that the acquisition and maintenance of protection should be practically feasible, especially from the point of view of traditional communities, and not create excessive administrative burdens for right holders or administrators alike.[112] Equally important, is the need, expressed by several stakeholders such as external researchers and other users of TCEs/EoF, for certainty and transparency in their relations with communities.

A key choice is whether or not to provide for automatic protection or for some kind of registration:

(a) a first option is to require some form of registration, possibly subject to formal or substantive examination. A registration system may merely have declaratory effect, in which case proof of registration would be used to substantiate a claim of ownership, or it may constitute rights. Some form of registration may provide useful precision, transparency and certainty on which TCEs are protected and for whose benefit;

(b) a second option would be to require automatic protection without formalities, so that protection would be available as of the moment a TCE is created, similar to copyright.

The suggested provision combines these two approaches.

First, paragraph (a) suggests as a general principle that TCEs/EoF should be protected without formality, following copyright principles and in an endeavor to make protection as easily available as possible.

Second, some form of registration or notification is, however, proposed for those TCEs/EoF for which, under Article 3 (a), would receive the strongest protection:

(i) registration or notification is optional only and a matter for decision by relevant communities. Registration or notification is not an obligation; protection remains available under Article 3 (b) for unregistered TCEs/EoF. There would be no need to register or notify secret TCEs/EoF because secret TCEs/EoF are separately protected under Article 3 (c). This registration option is applicable only in cases where communities wish to obtain strict, prior informed consent protection for TCEs/EoF which are already known and publicly available;

(ii) the provision draws broadly from existing copyright registration systems, the Database of Native American Insignia in the United States of America[113], the Panama Law, 2000, the Andean Decision 351, and the Peru Law, 2002 (see generally WIPO/GRTKF/IC/7/3 and earlier documents for information on these laws);

(iii) a regional organization could conceivably administer such a registration or notification system. ARIPO and OAPI have, for example, noted the role of regional

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112 See also comments of the Assembly of First Nations.

113 Described and discussed in previous documents, such as WIPO/GRTKF/IC/5/3.

organizations in this area.[114] While these provisions may have initial application at the national level, thus implying national registers or other notification systems, eventually some form of regional and international register could form part of possible eventual regional and international systems of protection. Such an international system of notification/registration could perhaps draw from existing systems such as Article 6*ter* of the Paris Convention or the registration system provided for in Article 5 of the Lisbon Agreement for the International Registration of Appellations of Origin, 1958;

(iv) it is suggested that the office or organization at which such registrations or notifications may be made, and which would seek to resolve disputes, should not be the same as the Agency referred to in Article 4;[115]

(v) it is made clear that it is only a community which claims protection of a particular TCE/EoF that can register or notify the TCE/EoF, or, in cases where the community is not able to do so, the Agency referred to in Article 4, acting at the request and in the interests of the community;[116]

(vi) in resolving disputes between communities, including communities from more than one country, the draft article suggests that the registration office or organization use customary laws and processes and alternative dispute resolution (ADR) as far as possible. These are suggested in order to achieve as far as possible objectives and principles relating to customary law and non-conflict between communities. In so far as taking existing cultural resources into account, the office or organization could refer also to cultural heritage inventories, lists and collections such as those established under the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003. There may, more broadly, be some opportunities for developing synergies between inventories established or being established for cultural heritage preservation purposes (such as States Parties are obliged to do under the UNESCO Convention referred to) and the kind of registers or notification systems suggested here. Indeed, measures could be developed to ensure that cultural heritage inventories, lists and collections could reinforce, support and facilitate the implementation of *sui generis* provisions for the protection of TCEs/EoF (and TK).[117] WIPO is working with relevant stakeholders in examining these questions further;

(vii) in order for the provision not to be too prescriptive however, further questions of implementation could be left to national and regional laws. Enabling legislation, regulations or administrative measures could provide guidance on issues such as: (a) the manner in which applications for notification or registration should be made; (b) to what extent and for what purposes applications are examined by the registration office; (c) measures to ensure that the registration or notification of TCEs/EoF is accessible and affordable; (d) public access to information concerning which TCEs/EoF have been registered or notified; (e) appeals against the registration or notification of TCEs/EoF; (f) the resolution by the registration office of disputes relating to which community or communities should be entitled to benefit from the protection of a TCE/EoF, including competing claims from communities from more than one country; and, (g) the legal effect of notification or registration.

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114 Intervention at seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov. Para. 89) and previously.

115 See comments by the European Community and its Member States on previous provision B.9.

116 See comments by the Saami Council.

117 See UNESCO Expert Meeting on Inventorying Intangible Cultural Heritage, March 17 and 18, 2005.

Recording, fixation and documentation of TCEs/EoF

The role of documentation, recording and fixation of TCEs/EoF and its relationship with IP protection has been discussed at length in previous documents and publications.[118] In brief, previous discussions have identified certain IP-related concerns with documentation initiatives. For example, copyright and related rights in the documentation, recordings and fixations would almost always vest not in the communities themselves but in those who undertake the documentation, recording or fixation. Second, documentation and recordal of TCEs/EoF, particularly if made available in digitized form, make the TCEs/EoF more accessible and available and may undermine the efforts of communities to protect them. For these reasons, the proposed article provides that any IP rights in recordings made specifically for registration purposes should vest in the relevant communities. Indeed, fixing in material form TCEs/EoF which would not otherwise be protectable, establishes new IP rights in the fixation and these IP rights could be used indirectly to protect the TCEs/EoF themselves (this strategy has been used for example to protect ancient rock art).[119] It is furthermore clear that the recording and documentation of TCEs/EoF is a valuable if not essential component of cultural heritage safeguarding programs. WIPO is undertaking further work on the IP aspects and implications of recording and documentation of TCEs/EoF in cooperation with other stakeholders. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, 1993 urges indigenous peoples *inter alia* to "develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge".[120]

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

The revised provision retains the basic "no formalities" approach, as many have argued for.[121] Some have, however, argued against such an approach, which requires further reflection.[122]

The previous provision B. 8 in WIPO/GRTKF/IC/7/3 also offered some form of registration or notification as an option. Based on interventions made at the seventh session of the Committee and on the written comments received, the revised provision suggests registration or notification as a requirement for the protection of TCEs/EoF of particular cultural or spiritual significance, for which strong PIC-based protection would be applicable.[123] Various other changes have been made taking into account comments from, amongst others, Colombia, the European Union and its Member States, the International Trademark Association (INTA), the Assembly of First Nations and the Saami Council.

Colombia in particular suggested specific wording taken from articles 52 and 53 of Andean Decision 351 on Copyright and Neighboring Rights. The wording suggested was: "The protection granted to TCEs/EoF and the works derived therefrom shall not be subject to any kind of formality. Consequently, the omission of recordal does not prevent the enjoyment

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118 See WIPO/GRTKF/IC/5/3, WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/7/3, for example.

119 See, for example, Janke, 'Unauthorized Reproduction of Rock Art' in Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions, WIPO, 2003.

120 Article 1.3.

121 See also comments of Colombia.

122 Comments of the United States of America.

123 Comments by the European Union and its Member States and the International Trademark Association (INTA).

or exercise of the rights recognized. Recordal is declaratory and does not constitute rights. Without prejudice thereto, entry into the register presumes that the facts and acts recorded therein are true, unless proven otherwise. Any entry does not affect the rights of third parties."[124]

[124] See comments of Colombia.

ARTICLE 8:

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

(a) Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.

(b) The Agency referred to in Article 4 should be tasked with, among other things, advising and assisting communities with regard to the enforcement of rights and with instituting civil, criminal and administrative proceedings on their behalf when appropriate and requested by them.

[Commentary on Article 8 follows]

COMMENTARY

ARTICLE 8: SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

Background

This provision concerns which civil and criminal sanctions and remedies may be made available for breaches of the rights provided.

Communities and others have pointed out that the remedies available under current law may not be appropriate to deter infringing use of the works of an indigenous copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use. References have also been made to the desirability of alternative dispute resolution (ADR) in this area.[125]

Member States have pointed out the necessity of appropriate guidance and practical experiences with sanctions, remedies and enforcement.[126]

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

Certain changes were made to the previous provision B.9 in document WIPO/GRTKF/IC/7/3, in the light of comments received from amongst others the Islamic Republic of Iran, the European Union and its Member States and the United States of America.

[125] GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p.9), Asian Group (WIPO/GRTKF/IC/2/10), African Group (WIPO/GRTKF/IC/3/15).

[126] See interventions by Kenya and Morocco (WIPO/GRTKF/IC/7/15 Prov. Paras. 80 and 85).

ARTICLE 9:

TRANSITIONAL MEASURES

(a) These provisions apply to all traditional cultural expressions/expressions of folklore which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.

(b) Continuing acts in respect of traditional cultural expressions/expressions of folklore that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties.

[Commentary on Article 9 follows]

COMMENTARY

ARTICLE 9: TRANSITIONAL MEASURES

Background

This provision concerns whether protection should operate retroactively or prospectively, and in particular how to deal with utilizations of TCEs/EoF that are continuing when the provisions enter into force and which had lawfully commenced before then.

As many Committee participants have pointed out, this question touches directly upon the notion of the " public domain". Previous documents have pointed out that a "clearer understanding of the role, contours and boundaries of the public domain is vital in the development of an appropriate policy framework for the IP protection of TCEs."[127] Committee participants have stated that the public domain was not a concept recognized by indigenous peoples and/or that as expressions of folklore *stricto sensu* had never been protected under IP they could not be said to have entered a " public domain." In the words of the Tulalip Tribes: "It is for this reason that indigenous peoples have generally called for the protection of knowledge that the Western system has considered to be in the 'public domain,' as it is their position that this knowledge has been, is, and will be regulated by customary law. Its existence in the 'public domain' has not been caused by their failing to take the steps necessary to protect the knowledge in the Western IP system, but from a failure from governments and citizens to recognize and respect the customary law regulating its use."[128]

Several options are apparent in existing laws:

(i) retroactivity of the law, which means that all previous, ongoing and new utilizations of TCEs would become subject to authorization under the new law or regulation;

(ii) non-retroactivity, which means that only those new utilizations would come under the law or regulation that had not been commenced before their entry into force; and

(iii) an intermediate solution, in terms of which utilizations which become subject to authorization under the law or regulation but were commenced without authorization before the entry into force, should be brought to an end before the expiry of a certain period (if no relevant authorization is obtained by the user in the meantime, as required).

Existing *sui generis* systems and models either do not deal with the question, or provide only for prospective operation. However, the Pacific Regional Model, 2002 follows in general the intermediate solution described above.

This intermediate solution is the approach of the draft provision. It draws particularly from the Pacific Regional Model, 2002 as well as wording found in article 18 of the Berne Convention for the Protection of Literary and Artistic Works, 1971.

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127 See for example WIPO/GRTKF/IC/5/3 and subsequent documents.

128 Statement at fifth session of the Committee, also available at http://www.wipo.int/tk/en/igc/ngo/ngopapers.html

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

This provision was revised in the light of statements on the " public domain" made at previous sessions of the Committee, statements made at the seventh session by *inter alia* New Zealand and Mr. Maui Solomon[129], and comments received from amongst others the European Union and its Member States, the United States of America, *l'Organisation africaine de la propriete intellectuelle* (OAPI), the Islamic Republic of Iran, the International Trademark Association (INTA) and the Saami Council. Certain comments drew attention to the complexity of these matters and urged further reflection by the Committee.

[129] WIPO/GRTKF/IC/7/15 Prov. Para. 70.

ARTICLE 10:

RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND OTHER FORMS OF PROTECTION, PRESERVATION AND PROMOTION

Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other intellectual property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.

[Commentary on Article 10 follows]

COMMENTARY

ARTICLE 10: RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND OTHER FORMS OF PROTECTION, PRESERVATION AND PROMOTION

Background

Relationship with IP laws

These provisions are intended to provide forms of protection for TCEs/EoF not currently available under conventional and existing IP laws.

It has been previously discussed that any special protection for TCEs/EoF should be concurrent with the acquisition of IP protection that might also be available under IP laws. Earlier discussions had recalled that some, if not many, of the needs and concerns of indigenous peoples and traditional and other cultural communities and their members may be met by solutions existing already within current IP systems, including through appropriate extensions or adaptations of those systems. For example:

(a) copyright and industrial designs laws can protect contemporary adaptations and interpretations of pre-existing materials, even if made within a traditional context;
(b) copyright law may protect unpublished works of which the author is unknown;
(c) the *droit de suite* (the resale right) in copyright allows authors of works of art to benefit economically from successive sales of their works;
(d) performances of "expressions of folklore" may be protected under the WIPO Performances and Phonograms Treaty (WPPT), 1996;
(e) traditional signs, symbols and other marks can be registered as trademarks;
(f) traditional geographical names and appellations of origin can be registered as geographical indications; and,
(g) the distinctiveness and reputation associated with traditional goods and services can be protected against "passing off" under unfair competition laws and/or the use of certification and collective trade marks.

Relationship with non-IP measures

It has also been discussed widely that comprehensive protection may require a range of proprietary and non-proprietary, including non-IP, tools. Non-IP approaches that may be relevant and useful include trade practices and marketing laws; laws of privacy and rights of publicity; law of defamation; contracts and licenses; cultural heritage registers, inventories and databases; customary and indigenous laws and protocols; cultural heritage preservation and promotion laws and programs[130]; and handicrafts promotion and development programs. In particular, as some Committee participants have suggested, opportunities for synergies between the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003 and these provisions could be further explored.

The suggested provisions are not intended to replace the need for such non-IP measures and programs. IP and non-IP approaches and measures are not mutually-exclusive options,

[130] The comments of the former Yugoslav Republic of Macedonia provided information on, amongst other things, its cultural heritage laws and programs.

and each may, working together, have a role to play in a comprehensive approach to protection.[131]

The provisions are intended to complement and work together with laws and measures for the preservation and safeguarding of intangible cultural heritage. In some cases, existing cultural heritage measures, institutions and programs could be made use of in support of these principles, thus avoiding a duplication of effort and resources. Which modalities and approaches are adopted will also depend upon the nature of the TCEs to be protected, and the policy objectives that protection aims to advance.

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

The previous provision B.11 has been modified to take into account also non-legal and non-IP measures as suggested by several Committee participants. The revised provision now also follows more closely the corresponding provision in the Model Provisions, 1982. More generally, comments on this provision were received from, among others, the European Union and its Member States, the former Yugoslav Republic of Macedonia, the Russian Federation, the United States of America, the Saami Council and the International Trademark Association (INTA).

[131] See also comments of New Zealand on WIPO/GRTKF/IC/7/3.

ARTICLE 11:

INTERNATIONAL AND REGIONAL PROTECTION

The rights and benefits arising from the protection of traditional cultural expressions/expressions of folklore under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.

[Commentary on Article 11 follows]

COMMENTARY

ARTICLE 11: INTERNATIONAL AND REGIONAL PROTECTION

Background

This provision deals with the technical question of how rights and interests of foreign holders of rights in TCEs/EoF would be recognized in national laws. In other words, on what conditions and in what circumstances foreign rights holders would have access to national protection systems, and what level of protection would be available to the benefit of foreign right holders. This question is more widely discussed in companion document WIPO/GRTKF/IC/8/6. For present purposes, and *simply as a starting point for discussion*, a provision based generally upon national treatment as is found in Article 5 of the Berne Convention is included as a basis for further consideration and analysis.

Broadly, but by no means exclusively, the question of how rights and interests of foreign holders of rights in TCEs/EoF would be recognized in national laws has been resolved in IP by reference to the principle of "national treatment", although this principle can be subject to some important exceptions and limitations. National treatment can be defined in terms of granting the same protection to foreign rightsholders as are granted to domestic nationals, or *at least* the same form of protection. For example:

(a) The Berne Convention (Article 5) provides that "(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention," and that "protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors";

(b) The Rome Convention, 1961, in so far as performers are concerned, provides as follows: "For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed: *(a)* to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory; . . National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention" (Article 2); and,

(c) The WPPT, 1996 states as follows: "Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty."

Instead of national treatment, or supplementing it, other international legal mechanisms have been used to recognize the IP rights of foreign nationals. Under "reciprocity" (or reciprocal recognition), whether a country grants protection to nationals of a foreign country depends on whether that country in turn extends protection to nationals of the first country; the duration or nature of protection may also be determined by the same principle. Under a "mutual recognition" approach, a right recognized in one country would be recognized in a foreign country by virtue of an agreement between the two countries. Another related mechanism for affording access to a national system is "assimilation" to an eligible nationality by virtue of residence. For example, the Berne Convention (Article 3(2)) provides that authors

who are not nationals of one of the countries of the [Berne] Union but who have their habitual residence in one of them shall, for the purposes of the Convention, be assimilated to nationals of that country.

Also of potential application to the recognition of rights of foreign rights holders, is the "most-favoured-nation" principle. The TRIPS Agreement provides (subject to exceptions) that: "[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a [WTO] Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."

While a national treatment approach would, in the light of precedent and past experience in the IP field, appear to be an appropriate starting point, the very nature of TCEs/EoF and the *sui generis* forms of protection being called for by many Committee participants, suggests that national treatment be supplemented by certain exceptions and limitations or other principles such as mutual recognition, reciprocity and assimilation, especially when this concerns the legal status and customary laws of beneficiaries of protection. For example, Article 2 of the suggested provisions above state that the beneficiaries of protection would be the communities in whom "the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with the customary laws and practices of the communities." Under one strict conception of national treatment, a foreign court in the country of protection would have recourse to its own laws, including its own customary laws, to determine whether a foreign community qualifies as a beneficiary. This may not satisfactorily address the situation from the community's viewpoint which would, reasonably, wish for its own customary laws to be referred to. Under mutual recognition and assimilation principles, a foreign court in the country of protection could accept that a community from the country of origin of the TCE/EoF has legal standing to take action in country A as the beneficiary of protection because it has such legal standing in the country of origin. Thus, while national treatment might be appropriate as a general rule, it may be that mutual recognition, for example, would be the appropriate principle to address certain issues such as legal standing.

The protection of foreign holders of rights in TCEs/EoF is, however, a complex question as Committee participants have pointed out. The Delegation of Egypt, for example, stated at the seventh session: ". . . TCEs/EoF were often part of the shared cultural heritage of countries. Their regional and international protection was therefore a complex issue and it was necessary to be very careful. Countries would have to consult with each other before adopting any legal measures in this regard."[132] Morocco noted the need for "wider consultation involving all interested parties before the establishment of legal protection mechanisms."[133] In view of this complexity, Committee discussions have thus far provided little specific guidance on this technical question and existing TCE *sui generis* national laws either do not protect foreign rightsholders at all or show a mix of approaches.

For present purposes, therefore, a provision based generally upon national treatment as is found in Article 5 of the Berne Convention, is proposed for further consideration and analysis.

Further drafts of these provisions could, depending on the Committee's wishes, explore more deeply the kinds of technical provisions found in international instruments, such as provisions dealing with points of attachment, assimilation, protection in the country of origin and independent protection. They could also address further the question of "regional

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132 WIPO/GRTKF/IC/7/15 Prov. Par. 69.
133 WIPO/GRTKF/IC/7/15 Prov. Par. 85.

folklore" and the practical relationship between the international dimension and the suggested registration/notification of TCEs/EoF (see Articles 3(a) and 7 above). As stated in the commentary to those articles, they currently refer to national registers, but there could eventually be envisaged some form of regional and/or international registers, drawing from, for example, Article 6*ter* of the Paris Convention or the registration system provided for in Article 5 of the Lisbon Agreement for the International Registration of Appellations of Origin, 1958.

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

As already noted, several interventions at the seventh session and comments observed that this is a complex issue requiring further careful consideration, as noted above. Few if any interventions or comments made specific proposals in regard to the technical question identified above.

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