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INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

First Session
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TRADITIONAL KNOWLEDGE AND THE NEED TO GIVE IT ADEQUATE INTELLECTUAL PROPERTY PROTECTION

WIPO COMMITTEE ON THE RELATIONSHIP BETWEEN INTELLECTUAL PROPERTY, GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE

documents submitted by the Group of Countries of Latin America and the Caribbean (GRULAC)

1. In a Note dated September 14, 2000, the Permanent Mission of the Dominican Republic to the Office of the United Nations and other International Organizations in Geneva submitted two documents on behalf of the Group of Countries of Latin America and the Caribbean (GRULAC) to the WIPO General Assembly, Twenty-Sixth (12th Extraordinary) Session as part of the debate on item 15 of the Agenda, "Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore."

2. The documents entitled "Traditional Knowledge and the Need to Give it Adequate Intellectual Property Protection" and "WIPO Committee on the Relationship between Intellectual Property, Genetic Resources and Traditional Knowledge" were reproduced and

published as Annexes I and II respectively to document WO/GA/26/9.

3. The Note mentioned included the request, in the name of GRULAC, to reproduce the following paragraphs:

> "The documents are submitted as a contribution to the discussion of the subject under the agenda item concerned. As such, the documents reflect the high level of agreement within GRULAC, without prejudice to the individual stances of countries. It is submitted as a follow-up to the statement made by GRULAC on the occasion of the thirty-fourth series of meetings of the Assemblies of the Member States of WIPO in 1999, with a view to the creation of a committee on intellectual property, genetic resources and traditional knowledge. GRULAC likewise supports the initiatives made by the Director General of WIPO in search of agreement on the procedure for the creation of such a committee.
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> "At the same time it is understood that neither this contribution nor the handling of the agenda item referred to above implies any replacement or limitation of the consideration of some of those questions in other multilateral fora where they are or may be subjected to analysis or negotiation."

4. The WIPO General Assembly noted and commented on the contents of document WO/GA/26/9. It was proposed that this document be included among the papers to be considered at the first session of the Intergovernmental Committee. Accordingly, the documents submitted on behalf of GRULAC appear as Annexes I and II respectively to this document.

5. The Committee is invited to take note of this document and the Annexes to it.

[Annex I follows]

ANNEX I

TRADITIONAL KNOWLEDGE AND THE NEED TO GIVE IT ADEQUATE INTELLECTUAL PROPERTY PROTECTION

Document presented by GRULAC

I. Background

Intellectual property is a legal system that confers exclusive rights on individuals and companies for the protection of their immaterial assets in a competitive environment. Those rights have been justified mainly by economic factors, among others, that give the individuals or companies the possibility of recovering the capital and effort that they have invested. This system has been gradually refined as the products, processes and works of mankind have become more sophisticated. At present, in the era of new technology, many potential beneficiaries of intellectual property protection have been marginalized owing to a lack of an adequate protection system and the inapplicability of existing systems to the characteristics and peculiarities of the knowledge, innovations and practices of indigenous and local communities.

In a world of globalization, the promotion of technological innovation has to benefit all possible owners or users of the technology, regardless of their particular characteristics. And yet all that technical knowledge lacks one single form of creation, or alternatively uniform criteria governing its creation. Such is the case of the knowledge, innovations and practices of indigenous and local communities. There are some who ask themselves why intellectual property protection should be conferred on "primitive" activities when science and technology are so advanced. The reply to this is that much knowledge, even without the strict application of scientific methods, is capable of offering solutions to problems that have as yet not been solved in the modern world. Examples of this are natural healing processes or natural medicine, and cures like acupuncture, which are generally used to complement, or as substitutes for, mainstream medicine when it becomes inadequate, inaccessible or ineffective. Apart from that, the knowledge and innovations of indigenous and local communities represent intellectual added value in relation to the natural state of the product or process that is presented, whether by an individual or by a group.

In the field of folklore there is great concern in a number of different communities regarding the reproduction of this form of expression. It has been found that protection by the copyright route can be difficult or indeed impossible to achieve, and for a number of reasons, including the difficulty of identifying the copyright owners[1] and the fact that copyright protects only original expression, not actual concepts, ideas or styles. This has the effect of

[1] Examples of these being tribes, families, communities or populations in a given geographical area but without any particular organization.

leaving outside its scope certain aspects that are of great interest to the communities with which these manifestations originate, in the sense that there is nothing to prevent unauthorized third parties from adopting or copying the styles of certain communities and exploiting them commercially. One exception to this is constituted by certain manifestations of folklore that have the advantage of copyright registration or recording, and as a result receive a degree of protection by virtue of copyright legislation.

Over and above the actual intellectual content or value of the knowledge and innovations of indigenous and local communities, there are certain concepts in legal literature and comparative legislation that make it possible for forms of protection or compensation to be devised whereby the intrinsic commercial value of that knowledge and those innovations may be realized. The following among them could be mentioned:

– Licenses of right or "domaine public payant." One could contemplate introducing a system that imposes the obligation to pay a fee or contribution to a particular beneficiary specified in the legislation (which may be a community or other corporate entity, or a representative institution) whenever an expression of the traditional or indigenous culture of any people is exploited commercially. Beneficiaries (communities or peoples who have produced and who preserve an expression of culture) would not, as they would under a conventional industrial property right, have the right to object to the use or exploitation of works in the public domain. They would, however, be entitled to compensation or remuneration according to the exploitation.

– Repression of unfair competition. The legislation and case law of a number of countries recognize that "parasitic" conduct consisting in the improper appropriation of another's work may in certain cases by considered contrary to proper practice and give rise to a restraining injunction. One could consider the recognition by countries of standards of conduct according to which the marketing of expressions of traditional culture without prior informed consent is considered unfair.

– Enrichment without cause. This concept applies in cases where a person is improperly enriched at the expense of another, in which case the former is obliged to indemnify the latter within the limits of his own enrichment and the impoverishment of the other.[2]

When one seeks to reconcile the knowledge, innovations and practices of indigenous and local communities with intellectual property, the main problem seems to be a lack of recognition of the special interests of the indigenous communities and the design of systems for monitoring the use of their works according to criteria suited to the subject matter to be protected. In the same line of thought, it is also important to take due account of the principles of justice and equity that should preside over the sharing of benefits of any practical, commercial or industrial result that might emerge from the intellectual efforts of indigenous and local communities.

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[2] An example of this is the case of the standard employment contract of a worker under which the employee is obliged to deliver all the products of his work to his employer. Where for instance the person in question works on an assembly line (which has no connection at all with the company's research and development work), and during his working hours makes an improvement to the running of the assembly line by means of some physical input, the employer could, in the situation mentioned, claim ownership of the improvement. For his part, however, the worker could sue his employer for enrichment without cause on the ground that he, the worker, was not specifically recruited for research work.

In economic terms, an intellectual property system for the knowledge and innovations of local and indigenous communities is a fundamental necessity if adequate means of wealth creation are to be provided and if there is to be any certainty in the economic relations between those communities and companies that consider that knowledge to be useful and marketable. Apart from that, traditional knowledge can lessen major research and development expenditure by identifying, or relating to each other, possible practical solutions to existing problems.

There are also environmental elements to be taken into consideration, as in the case of the preservation of biodiversity and the maintenance of sustainable agricultural production methods. Many communities in various parts of the world have for centuries been using plant species and varieties that are still not used to their full advantage in the modern world, but which may possess considerable nutritional, medicinal or cosmetic properties. That for instance is the position of the communities of the Andean Altiplano, which have helped preserve a large number of potato varieties that were unknown until quite recently.

II. Objectives

An intellectual property system for traditional knowledge and associated innovations and practices would seek to do the following in particular:

(1) promote respect for and the preservation and protection of traditional knowledge and innovations;

(2) promote the fair and equitable distribution of the benefits deriving from that knowledge;

(3) promote the use of that knowledge and those innovations for the benefit of mankind;

(4) order and organize the administration of that knowledge;

(5) promote the creation of legal and economic systems that will permit the sustainable development of the communities that possess that knowledge;

(6) help maintain traditional biodiversity conservation schemes.

III. International Background

There are a number of precedents at the international or regional level that lay down principles for the knowledge, innovations and practices of communities. Of those, the following are worth mentioning:

1. Convention on Biological Diversity.[3] Article 8(j) of the Convention provides as follows:

"[Each Contracting Party shall, as far as possible and as appropriate:]

[3] Convention signed in Rio de Janeiro on July 5, 1992, under the auspices of the United Nations.

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices"[.]

2. Report of the UN Secretary General on the Intellectual Property of Indigenous Peoples.[4] This was produced under an agreement within ECOSOC; it is an analytical summary of the concerns of indigenous peoples with respect to intellectual property and traditional knowledge; it mentions the draft declaration of the rights of indigenous peoples in the paragraph that recognizes their right to special measures for the protection of their traditional expressions of culture by means of intellectual property.[5] Likewise it presents a set of conclusions whose purpose is to reaffirm the need for better understanding of the problem, the lack of specific provisions in existing property agreements and the need to revise those agreements in order to contemplate specific protection.

3. WIPO-UNESCO Model Law on Folklore.[6] This Model Law establishes some definitions and criteria, the contents of which could be very useful in subsequent work.

4. Proposals to the World Trade Organization. In the preparatory meetings for the Seattle Ministerial Conference (1999), a number of groups of countries submitted proposals for the revision of Article 27.3(b) of the TRIPS Agreement, or for the introduction of a new negotiation mandate in the WTO that would allow *sui generis* protection for the traditional knowledge of local or indigenous communities. Proposals to that end were presented by Kenya on behalf of the African Group (document WT/GC/W/302), by Bolivia, Colombia, Ecuador, Nicaragua and Peru (WTO document IPJW/165) and by Cuba, Honduras, Paraguay and Venezuela (document WTO WT/GC/W/329).

IV. National Precedents

There are some examples of recognition and protection at the national level of the knowledge and traditional innovations, or of the indigenous communities themselves.

(a) National constitutions

Three examples of national constitutions that refer to the subject can be mentioned.

1. Constitution of the Republic of Venezuela of 1999. Articles 119 and 124 of the Constitution provide as follows:

"Article 119. The State shall recognize the existence of indigenous peoples and communities, their social, political and economic organization, their cultures, usage's and customs, their languages and religions."

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4 United Nations, Economic and Social Council, document EICN.41Sub.2/1992/30 of July 6, 1992.

5 Idem, paragraph 2.

6 The Model Law was included in the report of the WIPO-UNESCO Working Group on the Protection of Aboriginal Folklore in 1981.

"Article 124. The collective intellectual property of indigenous knowledge, technology and innovations is guaranteed and protected. Any work on genetic resources and the knowledge associated therewith shall be for the collective good. The registration of patents in those resources and ancestral knowledge is prohibited."

2. Constitution of the Federative Republic of Brazil of 1998.

"Article 231. The Indians shall be accorded recognition of their social organization, customs, languages and traditions and the original rights in the lands that they occupy by tradition, it being the responsibility of the Union to demarcate them, protect them and ensure respect for all their property."

3. Constitution of the Philippines of 1987. Section 17, Article XIV, provides as follows:

"The State shall recognize, respect and protect the rights of the indigenous cultural communities to preserve and develop their cultures, traditions and institutions."

(b) Legislative and case law development

Certain legal texts and creative case law have recognized certain rights associated with the intellectual property of local and indigenous communities in a number of countries. One of those is the common regime on Access to the Genetic Resources of the Andean Community of Nations, D.391, the 1994 Law on Biodiversity of Costa Rica, the 1996 Peruvian Law on Industrial Property, and the 1997 Philippine Law on the Rights of Indigenous Communities, and also a number of rulings handed down in Australia[7] under the umbrella of copyright which have sought solutions to specific problems and cases.

The Peruvian Industrial Property Law provides in its Article 63 for a substantial program of legislative action. The Article provides as follows:

"By a Supreme Decree, issued on the advice of the Ministry of Industry, Tourism, Integration and International Trade Negotiations, special provisions may be enacted for the protection and where appropriate the registration of the knowledge and skills of indigenous and rural communities."

There are also legislative proposals for a protection regime for the collective knowledge of indigenous peoples in a draft that was presented as an annex to document WIPO/IPTK/RT/99/6B of October 19, 1999 in connection with the Round Table on Intellectual Property and Traditional Knowledge held by WIPO in 1999. In the case of the 1997 Philippine Indigenous Peoples Rights Act, an explanatory document was also circulated at the same Round Table under document number WIPO/IPTK/RT/99/6A, dated October 27, 1999.

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[7] Two examples of these being: (1) Milpurrurru v. Indofurn Pty 91-116 CCH – Australian Intellectual Property cases 39,051 (1995). (2) Bulum Mulum and Another v. R and T Textiles Pty Ltd. 1082 FCA (1998).

V. Elements of "traditional" knowledge (in the broad sense)

Before we can analyze this subject, we have to differentiate between its component elements, owing to their particular nature and characteristics. These include the following:

1. Traditional knowledge (in the strict sense): this is a non-limitative reference to knowledge and practices associated with plants and animals, natural medicines and medical treatments, nutritional and cosmetic knowledge, knowledge of perfumery, etc., that embody intellectual added value and are in the public domain.[8] In that case what should be investigated is the introduction of ownership rights that are either collective[9] or individual,[10] based on a right to compensation for their use. It does not seem right to look for any right of exclusion as in the case of intellectual property, as the subject matter of protection is in the public domain. It would be better to concentrate on the system whereby fair compensation or equitable distribution of profits from third-party use or marketing may be secured and channeled towards the legitimate originators of the knowledge.

2. Innovations: these are the same knowledge and practices as described above, except that they are not in the public domain.[11] Such information should enjoy at least the same treatment as is given to undisclosed information (like an industrial secret), which is protected under unfair competition provisions. Access to such technologically valuable innovations or knowledge should be on the basis of prior informed consent and private contractual negotiation (licensing).

3. Distinctive signs: the reference here is to signs and symbols used for the identification of tribes, families, products and the like, and also to those that are used in religious or mystical ceremonies. So here what has to be ensured and preserved is respect for and the integrity of the subject matter, and also the exclusive right of the indigenous and local communities to apply for their registration as trademarks. In that connection the draft Decision of the Andean Community on Industrial Property provides that registration as a trademark is not available for those signs among others that consist of the names of indigenous, African-American or local communities or the names, words, letters, characters or signs used to distinguish their products or services or the manner in which they are processed,

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8 In this subject area the expression "public domain" could be different from what is generally known as "public property" in the patent field. In the case of traditional knowledge it would be more appropriate to apply the novelty criterion defined in Article 6 of the 1991 Convention for the Protection of New Plant Varieties (UPOV):

> "Article 6 – Novelty.
> (1) [*Criteria*]. The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety …"

Example: There may be knowledge that is widely known to the tribe that created it, or to two or more tribes or communities at the same time as a result of traditional exchanges of the barter variety. In that specific case one could not speak of the subject matter being in any sort of "public domain."

9 Applicable to communities that are organized or not organized, with or without legal personality.

10 Applicable in the case of individuals such as witch doctors or medicine men.

11 Here too we could apply a novelty concept comparable to or having a simi lar effect to that of the 1991 UPOV Convention.

or that constitute an expression of their culture or practice, except where the application is filed by the community itself or with its express consent.[12]

4. Folklore: this is constituted by creations and cultural expressions that are handed down from generation to generation and may be held by an individual or by whole communities. In order to define what creations or expressions would be understood to be folklore, the same criteria could be employed as Article 2(1) of the Berne Convention[13] to define the terms "artistic and literary works," with the aid of a non-exhaustive list of examples that includes those needing to be mentioned. Examples are dances, tales, oral traditions, legends and myths, non-religious ceremonies, craft works, paintings, etc. Account could also be taken of the definition given by the WIPO and UNESCO Group of Experts on the Protection of Aboriginal Folklore in 1985, which reads as follows:

> i. "Folklore (in a broader sense, traditional and popular folk culture) is a group-oriented and tradition-based creation of a group of individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity; its standards and values are transmitted orally by imitation or by other means. Its forms include among others language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts."

Folklore could be protected by means of a system similar to copyright that took into account essential particularities such as collective ownership and the moral rights of authorship and integrity,[14] the lack of a fixed form and the exclusion of styles from protection, and which at the same time introduced remedies against abuse, improper use and unauthorized exploitation. Those rights could, but need not, be made subject to temporary limitations in particular cases.

5. Guarantee of origin of artefacts: often the styles and craft designs of communities, tribes or ethnic groups are copied and then attributed to them as being original products. In order to avoid practices that cause confusion in the minds of consumers, one could advocate the use, subject to adaptation as necessary, of the present systems for the protection of geographical indications, especially appellations of origin, or alternatively the use of certification marks. Something should also be done to achieve express multilateral recognition of the need to control false indications of source on the basis of the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods.[15]

6. Protection of craft designs: the design, shape and visual characteristics of craft products could be protected by the means of the industrial design protection system. Where the craft products are of a utilitarian nature and cannot be considered works of art and therefore eligible for copyright protection, industrial design protection becomes essential. It would be advisable to consider the possibility of adopting, in those countries that do not yet have one, a simple and economical system for the deposit and registration of industrial designs, which could be used to good effect by indigenous craftsmen and communities for the protection of

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12 Andean Decision 344 of 1993, Andean Community of Nations.

13 Berne Convention for the Protection of Literary and Artistic Works, Paris Act 1971, as amended in 1979.

14 The latter right is very important in the case of expressions of folklore, as there can be very delicate religious or mythological elements.

15 Adopted on April 14, 1891. The Agreement is administered by WIPO.

their products against unauthorized copying. Industrial design protection systems that involve a complex, long and costly procedure, especially those that include a substantive examination of the industrial designs, are not going to be suitable for the protection of handicrafts. A relevant provision in that connection is Article 25.2 of the TRIPS Agreement, concerning the simplification of procedures for textile designs. The same kind of solution could be promoted for any kind of design originating in indigenous communities.

VI. Protection system

In recent decades there has been an increase throughout the world in the adoption of *sui generis* systems for the protection of the intellectual property rights in various kinds of subject matter. The trend has been noted in national and regional legislation, and in some cases it has won recognition at the international level. Examples of this are given in WTO documents IP/W/1 65 and IPIW/1 66, the former submitted by Bolivia, Colombia, Ecuador, Nicaragua and Peru and the latter by Cuba, Honduras, Paraguay and Venezuela. Even now discussions are going on within the WIPO Standing Committee on Copyright regarding the possibility of introducing intellectual property protection for non-original databases, for which it is hard to claim any intrinsic intellectual added value.

Possible " sui generis" solutions

A. Common Regime for Access to Genetic Resources of the Andean Community of Nations (Decision 391 of 1996): this common system regulates the conditions governing access to genetic resources, including material derived from genetic resources. It also provides that access contracts have to consider the rights and interests of the providers of the genetic resources and derived subject matter and also intangible elements. The latter are defined as any individual or collective knowledge, innovation or practice having actual or potential value that is associated with the genetic resource, or derived products, or with the biological resource that contains it, whether or not it is protected under intellectual property provisions. Where there is a resource that has an intangible component, the Decision requires: (a) identification of the provider of the genetic resource and its derived subject matter having an intangible component, and (b) incorporation of an appendix to the access contract in which provision has been made for the equitable distribution of the benefits resulting from access to the elements mentioned.

B. 1994 Law of Costa Rica on Biodiversity: this introduces broad protection provisions for biodiversity that cover, in addition to the variability of live organisms, certain derived intangible elements such as individual or collective traditional knowledge, innovation and practice having intrinsic value or a value associated with biochemical and genetic resources, whether or not they are protected by intellectual property systems or *sui generis* registration systems. This Law clearly establishes that there has to be the informed consent of the representatives of the place in which the access is had, and that of the authorities competent for the subject matter concerned, and also a guarantee of equitable distribution of the profits.

C. Draft protection regime for the collective knowledge of the indigenous peoples of Peru: this system would function through optional registration of the collective knowledge of the indigenous peoples that are associated with biological resources. Access to the information contained in the register entry would be subject to authorization by the indigenous people, with the exception of information that deals with the uses that the indigenous communities make of the genetic resources, and also that identifying the communities in question. As for a possible commercial use of the knowledge, the system would allow it only where a license

contract has been entered into between the communities and those interested in the use. The draft likewise offers a number of interesting definitions of collective knowledge, indigenous peoples, the public domain, biological resources and other things in an attempt to demarcate precisely the constituent elements of the regime.

D. System of *sui generis* databases: among the positions taken by legal writers,[16] there are some that tend to claim that the best way of protecting traditional knowledge, given its characteristics, variety and sheer scale, would be through the introduction of *sui generis* databases. Apart from the standard rights in databases that are original in terms of the selection or arrangement of their contents, these would be characterized by the following additional features:

- Protection of undisclosed information: protection of the arrangement of the information within the database would not be sufficient; there would have to be rights in the knowledge actually recorded. Without protection of the subject matter, there would be no incentive to pass it on in the case of innovations, or to organize it and refine it in the case of traditional knowledge.

- Right of exclusion applicable not only to reproduction of the information, but also to the use of registered information.

- No need for prior fixing of the information as a condition of the grant of protection.

These options are important initial efforts which aim to address clearly the problem of the lack of protection for the knowledge, innovations and practices of indigenous and local communities, and which must be thoroughly investigated and duly taken into account in the planning of a universal solution.

VII. Possible action to be taken by Member States of WIPO

Regardless of whether the *sui generis* route is taken or that of revision of existing intellectual property systems, it is necessary to examine and agree on the beginnings of a solution that will satisfy not only Member States and the public at large but also the indigenous and local communities themselves.

Consequently, the countries that sign this document request the creation of a Standing Committee on access to the genetic resources and traditional knowledge of local and indigenous communities. The work of that Standing Committee would have to be directed towards defining internationally recognized practical methods of securing adequate protection for the intellectual property rights in traditional knowledge.

[Annex II follows]

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16 "From the Shaman's Hut to the Patent Office: How Long and Winding is the Road? – II." Nuno Pires Carvalho, *Revista da ABPI,* No. 41, July-August 1999.

ANNEX II

WIPO COMMITTEE ON THE RELATIONSHIP BETWEEN INTELLECTUAL PROPERTY, GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE

Document presented by GRULAC

The Committee to be created within WIPO would have to do the following:

(a) consider and study the intellectual-property-related aspects, questions and problems associated with the use and exploitation of genetic resources and biodiversity and also traditional knowledge (including folklore), whether associated with genetic resources and biodiversity or not;

(b) consider and study the intellectual-property-related aspects of current legislation enacted at the national, the regional and the international level regarding and the use and exploitation of genetic resources and biodiversity and also traditional knowledge (including folklore), whether associated with genetic resources or biodiversity or not, in so far as they bear a relation to intellectual property;

(c) devise and draft proposals for legislative texts, including draft recommendations, resolutions, treaties and other instruments, for the regulation and standardization of principles and standards at the national or the international level on intellectual property aspects of the use and exploitation of genetic resources and biodiversity, and of the traditional knowledge referred to above;

(d) submit to the governing bodies of WIPO the results of the studies referred to in subparagraphs (a) and (b), and any conclusions and recommendations based thereon, in order that decisions may be taken on future action in those fields;

(e) submit to the governing bodies of WIPO the draft legislative texts referred to in subparagraph (c) in order that decisions may be taken on the procedure for their recognition and adoption by the Member States of WIPO;

(f) coordinate its action with that of other relevant intergovernmental organizations.

QUESTIONS AND ISSUES THAT COULD BE ADDRESSED

Questions concerning the use and exploitation of genetic resources and biodiversity and also traditional knowledge, whether associated with genetic resources and biodiversity or not, may be divided into two groups depending on whether they are currently recognized or being addressed by intellectual property in the international environment. The first group includes problems whose solutions could in principle be found in known intellectual property regimes. The second group comprises those aspects, questions and problems the settlement of which calls for recognition and acceptance of the values and interests whose protection is sought, and the creation of new disciplines and provisions so that their protection may be established at the international level. In both cases this document contains options that could be discussed by the Committee without prejudice to the eventual outcome of the discussions or to the positions taken by delegations or regional groups on the subject.

Questions that may be addressed within intellectual property

Many of the protection claims, needs and expectations expressed by the holders of genetic resources and traditional knowledge (including folklore) could be entirely or partly addressed by means of the systems and provisions currently available in the intellectual property field. The experience of those sectors that possess traditional knowledge indicates that many of the problems encountered in that field could be either entirely or partly solved if there were a better understanding, and if better advantage were taken, of the protection systems offered by industrial property and copyright (including related rights), and if machinery were set in motion that would give the potential beneficiaries practical access to those systems. The resources offered by intellectual property have not been sufficiently exploited by the holders of traditional cultural knowledge or by the small and medium-sized businesses created by them.

In this connection the work of the Committee should focus on activities that would make for better use of intellectual property resources and regimes by potential beneficiaries possessing genetic resources and biodiversity and also possessing traditional knowledge.

Among the intellectual property regimes of which better use could be made to that end, the following could be mentioned:

Copyright and related rights

Copyright can be used to protect the artistic manifestations of the holders of traditional knowledge, especially artists who belong to indigenous and native communities, against unauthorized reproduction and exploitation of those manifestations, which could include works such as the following:

- literary works: tales, legends and myths, traditions, poems;
- theatrical works: plays, dances;
- pictorial works: paintings, drawings;
- textile works: fabrics, garments, textile compositions, tapestries, carpets;
- musical works: songs, typical musical compositions;
- three-dimensional works: pottery and ceramics, sculptures, wood and stone carvings, artefacts of various kinds.

Related rights, being related to copyright, protect performers among others. This route could be used for the protection of the performances of singers and dancers and presentations of stage plays, puppet shows and other comparable performances.

Inventions

The patent system could be used for the protection of technical solutions that are industrially applicable and universally novel and involve an inventive step. With regard to genetic resources and traditional knowledge, patents may be taken out for instance for

products isolated, synthesized or developed from genetic structures, microorganisms and plant or animal organisms existing in nature. Patent protection may also be obtained for processes associated with the use and exploitation of those resources, and also processes known to the native communities that meet the same conditions. All the results of biotechnology applied to genetic and biological resources, and also undisclosed techniques for obtaining practical results, could in principle be protected with patents.

Plant varieties

New plant products, cultivars and varieties of all species of plants may be protected with plant breeders' certificates. To be protected, a variety has to be different from known varieties and uniform and stable in its essential characteristics, even after a number of reproduction cycles. Varieties developed by the possessors of traditional knowledge could also be legally protected in this way. Improvements to varieties representing the natural state of plant diversity could also constitute new varieties eligible for protection.

Industrial designs

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

Trademarks

All goods manufactured and services offered by manufacturers, craftsmen, professionals and traders in native and indigenous communities, or by the bodies that represent them or in which they are grouped (cooperatives, guilds, etc.), may be differentiated from each other with trademarks and service marks. The trademark is an essential element in the commercial promotion of goods and services both within the country and abroad.

Trade names

Any manufacturer, craftsman, professional person or trader in a native or indigenous community, including the bodies that represent such persons or in which they are grouped (cooperatives, guilds, etc.), may identify themselves with trade names. The trade name is also used to promote the activities of the person or entity that it identifies, both within and beyond the borders of the country of origin.

Geographical indications and appellations of origin

Geographical indications, especially appellations of origin, may be used to enhance the commercial value of natural, traditional and craft products of all kinds in so far as their particular characteristics may be attributed to their geographical origin. A number of products that come from various regions are the result of traditional processes and knowledge implemented by one or more communities in a given region. The special characteristics of those products are appreciated by the public, and may be symbolized by the indication of source used to identify the products. Better exploitation and promotion of traditional geographical indications would make it possible to afford better protection to the economic interests of the communities and regions of origin of the products.

Repression of unfair competition

The protection of undisclosed information is achieved by the repression of unfair competition. The provisions against unfair competition may also be used to protect undisclosed traditional knowledge, for instance traditional secrets kept by native and indigenous communities that may be of technological and economic value. Acknowledgement of the fact that secret traditional knowledge may be protected by means of unfair competition law will make it possible for access to that knowledge, its exploitation and its communication to third parties to be monitored. Control over the knowledge, and regulation of the manner in which it may be acquired, used and passed on, will in turn make it possible to arrange contracts for the licensing of secret traditional knowledge and derive profit from its commercial exploitation. It is necessary to publicize more, within the sectors and communities concerned, the opportunities that the secrecy regime offers for controlling the dissemination and exploitation of traditional knowledge.

Issues that might call for new intellectual property enactments

Many of the protection claims, needs and expectations expressed by the sectors that possess traditional knowledge and those that produce traditional cultural and artistic manifestations cannot be fulfilled within the framework of intellectual property as defined at present.

In some cases the demands for protection could be dealt with if intellectual property were developed further. Intellectual property could progress towards the definition of new *sui generis* regimes tailored to the subject matter for which protection is desired, as has been done in the past for the protection of new plant varieties and the topographies of integrated circuits, for instance. Intellectual property could also be developed by studying the possibility of adjusting or adapting its provisions as far as possible to accommodate and provide for certain subject matter deserving of protection that currently lacks it.

One of the tasks of the Committee could be to examine the protection needs and expectations of sectors that possess traditional knowledge and to determine the manner in which they require an adjustment of existing intellectual property regimes or the creation of new ones. The Committee might also consider it necessary to ascertain whether some of the protection claims were not completely outside the present or prospective framework of intellectual property.

With a view to the future development of intellectual property so that it may deal better with the implicit intellectual property aspects of the use and exploitation of genetic resources and biodiversity and also traditional knowledge (including folklore), whether associated with genetic resources and biodiversity or not, the Committee could settle the following matters among others.

Public domain and private domain

The notions of public domain and private domain are essential to intellectual property. Intellectual property allows certain protection subject matter defined by the law to be removed from the public domain. The law draws up a *numerus clausus* (or closed list) of subject matter that may be protected as intellectual property. Works, creations, ideas, solutions and other subject matter not included in the list cannot be protected as intellectual property, and remain subject to the general rules of the public domain. Works, creations, ideas and

solutions that are in the public domain may be copied and used industrially and commercially without the person with whom the work, idea or solution originated being able to object to it. On the other hand, those that enjoy intellectual property protection are in the private domain of the owner of the rights, and they may not be copied, used or exploited without the prior authority or consent of that owner for as long as his rights subsist.

It is the role of the State to protect both intellectual property and the public domain. The interest of the public is in maximizing the material belonging to the public domain in order that there may be an environment of free market competition and so that the community may derive maximum benefit for minimum cost. However, in the interest of progress in art, technology and trade, which also works to the benefit of the public, intellectual property allows certain subject matter, which is precisely defined by the law, to be kept out of the public domain.

As the protection claims, needs and expectations expressed by the possessors of genetic resources and traditional knowledge (including folklore) call for the broadening of the present scope of intellectual property, subject matter that has hitherto been considered public property will cease to be so considered. That subject matter, which once was appropriated, used or exploited without any recognition of ownership, authorization or remuneration, would remain protected in such a way that access to it and its exploitation would be under the control of the person or entity holding the rights.

The Committee could consider the appropriateness and feasibility of recognizing rights in traditional works and knowledge currently in the public domain, and investigating machinery to limit and control certain kinds of unauthorized exploitation. Consideration could among other things be given to licenses of right and regimes comparable to the *domaine public payant* (fee-paying public domain), and also to systems for the collective management of the exploitation of the knowledge, including the creation of funds in which the proceeds from economic exploitation would be deposited.

Recognition of collective rights

Intellectual property is designed in terms of the ownership of exclusive rights that are accorded to an identified or identifiable natural person or legal entity. However, much traditional knowledge is generated, maintained and passed on in a collective fashion, by a specific community or by a group of communities within a nation. For instance, there are aspects of collective folklore that at present are insufficiently protected because the person entitled to the rights is not readily identifiable.

The fact of a traditional work or piece of knowledge being impossible to attribute directly to a person or to a definite number of persons must not be a reason for allowing unauthorized access to the work or knowledge and its reproduction and exploitation. The Committee could investigate ways of safeguarding the rights in collective traditional works and knowledge by considering machinery for limiting and controlling such unauthorized exploitation. Consideration could among other things be given to systems for the collective management of the exploitation of the knowledge, and the creation of funds in which the proceeds from economic exploitation of the works and knowledge would be deposited for subsequent distribution.

Use and exploitation of genetic and biological resources

The Committee could tackle the question of the use and exploitation of genetic resources and their potential for making products and processes that are eligible for intellectual property protection, especially patent protection. Among other things the Committee could produce the following for adoption by the governing bodies of WIPO:

– model provisions with which to control the use and exploitation of genetic and biological resources, and machinery for the equitable distribution of profits in the event of a patentable product or process being developed from a given resource;

– model contracts and clauses for the transfer of genetic and biological resources, the transfer being linked to future profits in the event of a marketable invention being developed on the basis of the resources.

Such model provisions and model contracts could embody the principles of prior informed consent and equitable distribution of profits in connection with the use, development and commercial exploitation of the material transferred and the inventions and technology resulting from it. The provisions and contracts could likewise be considered in terms of the possibility of *in situ* or *ex situ* access to the genetic and biological resources, due regard being had to the regime applicable to material preserved in *ex situ* collections acquired prior to the entry into force of the Convention on Biological Diversity.

This work could include the study of legislation and regulations in force or in the process of being adopted in various parts of the world, so that the options and solutions provided for in the instruments concerned might be compared as a first step in the design of international models.

Protection of undisclosed traditional knowledge

The Committee could deal with the question of protecting undisclosed traditional knowledge in order to define model provisions and model contracts or clauses that may be used by the possessors of such knowledge in their negotiations. An examination could be made of the extent to which the general principles of the protection of undisclosed information and business secrecy might be applied or adapted to the transfer or licensing of secret traditional knowledge, especially that which is of technological or commercial value.

That work could include a study of previous experience and previously concluded contracts for the licensing of traditional knowledge, which could be reproduced in order to enrich the information available on practical options and model agreements with a view to the aim to be achieved.

"Sui generis" systems for the protection of genetic resources and biodiversity

In concert with the secretariat of the International Union for the Protection of New Varieties of Plants (UPOV), the Committee could embark on the exploration of possible options for defining *sui generis* systems for the protection of genetic resources and biodiversity. The need to consider this matter has been raised by a considerable number of Members of WIPO and the WTO in connection with the provision contained in Article 27.3(b) of the TRIPS Agreement.

Protection afforded by the patent system

Some of the problems of lack of protection and "biopiracy" reported by the possessors of biological and genetic material and traditional knowledge in connection with its use seem to be the result of a regulatory system that is not capable of resolving certain situations that arise from the use and exploitation of biological or genetic material existing in nature, or of putting an end to certain practices that produce results prejudicial to those possessors. The Committee could join forces with the Standing Committee on Patents to engage in research on possible measures and solutions for dealing with the following questions:

- **Products from nature.** It should be emphasized that patents are only granted for the protection of inventions, in other words technical solutions devised by man. Patents must not be granted for subject matter that is claimed as existing in nature, as it is not the result of human intervention but a mere product of nature; such things should continue to be treated as discoveries, and not be claimed by anyone as his exclusive property. A reaffirmation of the consensus on this question at the international level would avert situations in which patents are successfully taken out for microorganisms, plants or other biological material encountered in nature. The same question should be studied in relation to new plant variety titles, in order to avoid any situation where woodland plants or discoveries in nature are appropriated by means of plant variety certificates.

- **Absolute novelty.** Patent laws generally require an invention to be universally novel if it is to qualify for a patent. Where a product or process already forms part of the state of art at the time of the filing of the first patent application, a patent may not be granted as the subject matter lacks the required novelty. That principle is difficult to apply in practice, as the standard of what should be considered part of the state of the art for that purpose varies between the laws of the various countries and regions. In some cases, the only information regarded as being within the state of the art is that contained and disclosed in written or printed documentation accessible by certain media (printed matter, public access data bases, etc). On the other hand, what is not regarded as forming part of the state of the art is all material existing in nature that is not documented, and also undocumented traditional products, processes and knowledge that communities and peoples from various regions of the world have known and used for many years or even centuries. The shortcomings of the system for publicizing what is regarded as being within the state of the art has the practical effect allowing a third party to claim in a patent application products and processes that are already known and being used in various parts of the world. This may bring with it economic and commercial consequences for the traditional users of the subject matter, who might see themselves prevented from continuing or engaging in their industrial and commercial activities. The Committee could look into ways of devising a means of settling this problem at the international level in such a way as to include within the state of the art also that which has become known through use, traditional marketing, oral disclosure or any other means whereby a product or process has been made known to the public.

- **Legitimacy of use and exploitation of genetic resources and traditional knowledge.** The Committee could study means of allowing the legitimacy of use and exploitation of biological and genetic resources and traditional knowledge to be checked when an invention purporting to be developed from them is claimed. In addition to other sanctions that laws might provide to discourage or restrain illegal use and exploitation of biological

and genetic resources and traditional knowledge, the Committee could investigate the extent to which the unlawfulness of access might affect the acquisition of a patent for an invention developed on the basis of illegally acquired material or knowledge, or the validity of a patent granted in that way. It might also be necessary to define principles for the international harmonization of those criteria, in order that an unlawful act committed in one country may be recognized as being unlawful and sanctionable in other countries too. In the absence of central harmonization at the international level, biopiracy will be punished only in those countries that fall victim to the unlawful act, and not in those in which the products resulting from the act are commercially exploited.

- **Simplification of revocation and claim procedures.** In relation to the above, the Committee could apply itself to the study of means of simplifying and making more economical the process of revoking patents granted for inventions developed on the basis of genetic or biological resources or traditional knowledge illegally acquired in a foreign country, and also the process of claiming the rights in those resources and that knowledge. In many cases, the communities or nations directly affected by an unfair or unlawful act of access to or appropriation of their biological or genetic resources or traditional knowledge do not have the economic strength or adequate legal advice with which to enforce their rights by the administrative and judicial routes. This is all the more true where the proceedings have to be conducted abroad, especially in jurisdictional systems where *inter partes* or contentious proceedings are very costly.

Protection by means of the industrial designs system

Some of the problems of lack of protection and "cultural piracy" reported by the possessors of traditional knowledge and the creators of traditional manifestations of culture seem due to the inadequacy of the provisions in the protection regimes applicable to industrial designs. Textile designs in particular suffer in practice from a serious lack of protection, which could be alleviated if the substantive concepts of the industrial design and registration system were adapted to the interests, needs and expectations of the creators, and if design protection procedures were simpler and less costly. In particular the Committee could work together with the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications in the study of possible measures and solutions for dealing with the following questions:

- **Protection of styles.** Copyright protects works of the creative mind of their author against copying. Similarly, industrial designs law protects the industrial design of a product against unauthorized reproduction of the design itself, or against reproduction that gives the same visual impression to the observer as the original design. Nevertheless, various representative sectors of communities and groups that produce traditional manifestations of textile art and handicraft (pottery, sculptures, etc) have reported that their works and industrial designs are being subjected to more subtle copying than the imitation or plagiarizing of the style of the original art would be, but nonetheless equally prejudicial to their economies. Some works and designs of textile goods are produced using traditional methods of considerable antiquity. There have been situations in which persons alien to the place of origin of the art or the design have come to that place in order to learn traditional methods, but then reproduced them abroad, using handicraft or even industrial methods. In such cases, original designs are stylized in such a way that, although it is not possible to allege that any design or specific work has been copied, the style aspect of the product directly evokes the original products of the community or

region that originally created them. The Committee could consider the extent to which style, production methods and other specific characteristics of works of art and textile and three-dimensional craft could be recognized and protected against unauthorized copying, use and commercial exploitation.

- **Simplification of the procedure for registering industrial designs.** In many laws, the system for the registration of an industrial design is complex and costly, making it difficult to secure protection for large numbers of designs. As a result the designs remain unprotected, except where the subject matter qualifies for the protection offered by copyright. This situation is particularly critical in the case of textile designs, many of which originate in indigenous and native communities that need to secure protection economically against the copying of their designs. The Committee could study and recommend ways of streamlining the industrial design protection systems embodied in national and regional laws, inclining them towards procedures involving a deposit or registration without any novelty examination or anticipation search. Such simple deposits or registrations would constitute prima facie proof of the authorship or ownership of the industrial design, which the beneficiary could them invoke to defend himself against unauthorized copying. This work would likewise be consistent with the dictates of Article 25.2 of the TRIPS Agreement, which provide that Members of the WTO have to ensure that the cost and procedure (examination and publication) to which the industrial designs of textile products are subject to not make it difficult to secure their protection.

[End of Annex II and of document]