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

Tenth Session
Geneva, November 30 to December 8, 2006

CIRCULATION OF COMMENTS RECEIVED ON
DOCUMENTS WIPO/GRTKF/IC/9/4 AND WIPO/GRTKF/IC/9/4

Document prepared by the Secretariat

1. The World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') reached the following decision at its ninth session that took place from April 24 to 28, 2006:

> "381. On the basis of the indications of delegations that they would be submitting written comments on the contents of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, the Chair proposed, and the Committee agreed, that Committee participants be invited to submit such written comments to the Secretariat before July 31, 2006, so that the comments could be circulated prior to the tenth session of the Committee."

2. This document includes the comments provided in English to the Secretariat by the members of the Committee, and by observers accredited to the Committee. Complementary documents will provide the comments given in other working languages of the Committee.

3. The Committee is invited to take note of the comments contained in the Annex of this document.

[Annex follows]

ANNEX

COMMENTS IN THE ORDER RECEIVED

APPENDIX

NORWAY

1. DOCUMENTS WIPO/GRTKF/IC/9/4 AND WIPO/GRTKF/IC/9/5

Document WIPO/GRTKF/IC/9/12 was submitted by Norway before the ninth session regarding documents 9/4 and 9/5. The objective of document 9/12 is to contribute to the discussions in the IGC regarding the policy objectives and principles for the protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE) in order to proceed within the renewed mandate period. The first parts of the document is proposed to focus on trying to find areas where there seems to be consensus or emerging consensus, instead of focusing on issues where the discussions have been polarized so far. Following this track the paper presents suggestions on how to divide the objectives and guiding principles in the annexes of documents 9/4 and 9/5 into two categories; (1) objectives with a preambular or contextual character and (2) objectives/principles that may be more suitable for being dealt with in international substantive provisions. Finally, the document presents a proposal on the possible use of article 10bis in the Paris Convention as a model for a future instrument for the protection of TK.

Document 9/12 reflects Norway's point of view on how the Committee should be dealing with documents 9/4 and 9/5. We would like to emphasize that document 9/12 simply presents one idea on how the Committee could move ahead to reach an outcome within the present mandate period, and that Norway at this stage does not exclude any final outcome of the deliberations of the IGC.

2. A MANDATORY OBLIGATION TO DISCLOSE THE ORIGIN OF GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE IN PATENT APPLICATIONS

The proposal in document 9/12 should be seen in connection with Norway's proposal in the WTO to amend the TRIPS agreement to introduce a mandatory obligation to disclose the origin of genetic resources and traditional knowledge in patent applications (Norway's communication to the TRIPS council in June is attached).

In the communication to the TRIPS council Norway supports an amendment of the TRIPS Agreement in introducing a mandatory obligation to disclose the origin of *genetic resources and traditional knowledge* in patent applications. The disclosure requirement should provide that patent applications should not be processed unless the required information has been submitted. However, non-compliance with the disclosure obligation that is discovered post-grant should not affect the validity of the patent.

In Norway's opinion such an obligation should apply to all patent applications (international, regional and national). Therefore Norway considers that also the relevant treaties under the auspices of WIPO; namely the Patent Cooperation Treaty and the Patent Law Treaty should be amended in a similar manner. It is important that the treaties should be mutually supportive. Norway intends to present a more detailed proposal on this matter at a later stage.

Attachment to comments of Norway:

WTO document WT/GC/W/566, TN/C/W/42, IP/C/W/473 (14 June 2006)

The relationship between the TRIPS Agreement, the Convention on Biological Diversity and the protection of traditional knowledge

Amending the TRIPS Agreement to introduce an obligation to disclose the origin of genetic resources and traditional knowledge in patent applications

Communication from Norway

The following communication, dated 13 June 2006, is being circulated to the General Council, to the TNC and to the Regular Session of the Council for TRIPS at the request of the Delegation of Norway.

I. INTRODUCTION

1. The TRIPS Agreement and the Convention on Biological Diversity (CBD) can and should be implemented in a mutually supportive manner. However, the interaction between the two treaties would be enhanced by introducing a mandatory obligation in the TRIPS Agreement to disclose the origin of genetic resources and traditional knowledge in patent applications. This communication outlines the key principles Norway believes must be taken into account in this context.

2. An obligation under the TRIPS Agreement to disclose the origin of genetic resources when applying for patent protection would ensure transparency as regards the origin of biological materials that are to be patented. This would make it easier for parties to enforce their rights to their own genetic resources when these are the subject of a patent application, which in turn would make the CBD provisions on prior informed consent and benefit-sharing more effective. Furthermore, such a disclosure obligation would be a significant step towards giving effect to Article 16.5 of the CBD, which provides that the Contracting Parties should cooperate to ensure that intellectual property rights are supportive of and do not run counter to the objectives of the CBD. A disclosure requirement would ensure that novelty criteria are met, which accords with the basic intentions and principles of the patent system and increases its credibility.

3. An equivalent disclosure obligation should apply where the claimed invention relates to or applies traditional knowledge, even where the traditional knowledge is not directly linked to genetic resources. The CBD only applies to traditional knowledge linked to genetic resources. However, a general obligation to disclose any traditional knowledge upon which an invention is based would help to prevent patents being wrongfully granted.

II. KEY PRINCIPLES FOR A DISCLOSURE OBLIGATION

4. Norway is of the opinion that such a disclosure obligation should be based on the following key principles:

(a) A binding international obligation should be introduced to include information on the supplier country (and the country of origin, if known and different) of genetic resources and traditional knowledge in patent applications. The supplier country (or country of origin, if relevant) of traditional knowledge must be disclosed even if the traditional knowledge has no connection with genetic resources. If the national law of the supplier country or country of origin requires consent for access to genetic resources or traditional knowledge, the disclosure obligation must also encompass a duty to state whether such consent has been given. If the country of origin is unknown, that fact must be disclosed.

(b) The disclosure obligation should apply to all patent applications (international, regional and national).[1]

(c) If the applicant is unable or refuses to give information despite having had an opportunity to do so, the application should not be allowed to proceed.

(d) If it is subsequently discovered that incorrect or incomplete information has been given, this should not affect the validity of the granted patent, but should be penalised in an effective and proportionate way outside the patent system.

(e) A simple notification system should be introduced, under which patent offices send all declarations of origin they receive to the CBD Clearing-House Mechanism.

III. REASONS FOR THIS PROPOSAL

5. A disclosure of origin obligation as described above would support the aims of the CBD, and in particular the aim to secure an equitable sharing of the benefits of exploiting genetic resources. A disclosure obligation would make it easier to verify whether genetic resources have been collected in accordance with national rules requiring consent, and whether the conditions for such consent have been met. The disclosure obligation would also make patent applicants aware of the importance of complying with the CBD, as implemented by the various states. The same would apply where states have rules requiring consent for exploitation of traditional knowledge independently of the CBD.

6. Information on origin would also make it easier to ascertain whether the patentability requirements in the TRIPS Agreement have been met, and e.g. help to prevent patenting in cases where the novelty or inventive step requirements have not been met (even where genetic resources are not involved). A disclosure obligation would, therefore, also be useful in ensuring that patents are not granted contrary to the fundamental principles of patent law.

[1] The specific provisions of the disclosure obligation should be fully compatible with the International Treaty on Plant Genetic Resources for Food and Agriculture and the Multilateral System established under it.

IV. FURTHER DETAILS ON THE EFFECTS OF NON-COMPLIANCE WITH THE DISCLOSURE OBLIGATION

7. At the application stage, a breach of the disclosure obligation should be treated as a formal error, i.e. the application should not be processed until the required information has been submitted. Where appropriate, the application could eventually be rejected.

8. If, however, the breach of the disclosure obligation is discovered only after the patent has been granted, it should not in itself affect the validity of the patent, but rather be subject to appropriate and effective sanctions outside the patent system, for example criminal or administrative penalties. If the applicant has acted in good faith, the fact that incorrect or incomplete information has been given may have no consequences at all. Upholding post-grant patent protection despite non-compliance with the disclosure obligation is important to avoid creating unnecessary uncertainty in the patent system. Moreover, revoking a patent as a consequence of non-compliance with the disclosure obligation would not benefit those who consider themselves to be entitled to a share of the benefits of the invention. Once patent protection is revoked, there are no exclusive rights from which benefits could be derived.

9. A patent can be revoked if the substantive patentability criteria have not been met, for example if a patent does not differ from traditional knowledge to the degree required to constitute a patentable invention. In such a case, it would be the lack of inventive step that constitutes the reason for invalidity, and not the breach of the disclosure obligation.

V. HOW SHOULD THE TRIPS AGREEMENT BE AMENDED TO INTRODUCE A MANDATORY DISCLOSURE OBLIGATION?

10. The TRIPS Agreement is commonly understood to *permit* Members to introduce disclosure of origin obligations in their national legislation. In order to *oblige* Members to introduce a mandatory disclosure obligation, the TRIPS Agreement would need to be amended. The obligation to disclose origin is linked to the patent application, but does not constitute a substantive patent criterion. In Norway's opinion, it would therefore be most appropriate to introduce a new provision in the TRIPS Agreement immediately following Article 29, which contains provisions on the disclosure of information related to the invention.

VI. SUMMARY

11. Norway supports the amendment of the TRIPS Agreement to introduce a mandatory obligation to disclose the origin of genetic resources and traditional knowledge in patent applications. Such a disclosure obligation should be introduced in a new Article 29*bis* and should provide that patent applications should not be processed unless the required information has been submitted. However, non-compliance with the disclosure obligation discovered post-grant should not affect the validity of the patent.

BRAZIL

Brazil submits below the comments to documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. As both the draft provisions and the comments related thereto may have significance in terms of the interpretation of the instruments discussed in the framework of the IGC, Brazil' s remarks address also issues raised in the text of the comments to the draft articles.

Document WIPO/GRTKF/IC/9/4

General comments:

Protection of Traditional Cultural Expressions (TCE) and Expressions of Folklore (EF) must not be confined to the realm of intellectual property alone. Whatever international instrument to result from the activities of the IGC, nonetheless, should restrict itself to the competences of the Organization, without prejudice to using intellectual property rules to confer some kind of protection to the aforementioned expressions.

The instrument(s) to be produced as a result of IGC' s discussions must address the question of TCE/EF produced by immigrants - thus considering the mobility of the populations.

The duty to require compliance with prior informed consent (PIC) from local or indigenous communities shall not be conditioned upon registration. Prior Informed Consent must be sustained as a general principle, irrespective of the status granted on cultural expressions or traditional knowledge.

Registration shall not be a condition for enforcement of rights (as seems to be proposed by draft articles 3 (a) and 7), neither as a condition for counting the term of protection (as proposed by draft article 6(i)). In this connection , the draft instrument on TCE/EF should adopt provision similar to the one contained in article 11.1 of the draft on traditional knowledge (TK) ("Eligibility for protection of traditional knowledge against acts of misappropriation should not require any formalities").

References to the expression "particular value or significance" should be suppressed from the draft instrument (eg, articles 3 and 7). Traditional expressions should be eligible for protection by the mere fact that they are part of the cultural heritage of indigenous and local communities.

Specific Comments:

I - Objectives:

(iv) Clarification would be appreciated as to the meaning of the expression "derivatives of cultural expressions", which is also found in other parts of the document (eg, articles 3 and 10)

(vii) Add "natural and cultural" before "the environment"

(ix) Include "acording to the prior informed consent" after "promote"

II - General Guiding principles:

Item “b”: Considering that the main guiding principle concerning the protection of TCE/EF is the right to deny access to these expressions, it is not acceptable to adopt the principle of balance between the interests of the holders of the expressions and those of the users.

III - Substantive provisions

Article 1 (comments to):

Article 1 (a)(bb) sets out as one of the criteria for the protection of TCE/EF the idea that the expressions be “characteristic of a community’ s cultural and social identity and cultural heritage”. The use of the term “characteristic” suggests that TCE/EF must be both “authentic” and “genuine”. Considering that the Brazilian experience recognizes the dynamic and iterative (in the sense that it represents a process) nature of the cultural expressions, this idea should be reflected in the draft, contrary to the idea convened by the current version of the document.

Brazil would appreciate some clarification as to the meaning of “tacit consent” (“Criteria for protection, ii) in the text of the comments, as well as possible means to assess the actual occurrence of such “consent” in concrete cases.

Brazil does agree with the comment presented under item (iii) according to which “expressions that may characterize more recently established communities or identities established would not be covered.”

Article 3:

(a): Enforcement of rights by the custodians of TCE/EF shall not be conditioned upon registraton.

Although reference is made to PIC under item (a), there is no such reference under the other items. Brazil understands that the requirement for PIC should be incorporated for all the other categories of expressions, regardless of previous registration.

Article 4:

The draft article should address those cases in which an expression is under the custody of more than one community.

The provision requiring compliance with PIC should turn redundant the expression “when required in these provisions” (item (a))

Article 5:

Item (a)(iii): Delete the items “reporting news and current events” and “incidental uses” as these cases refer to too broad instances.

Article 6:

Term of protection should only be related to the fulfillment of the criteria for protection. Once a TCE meets these criteria, protection should be accorded without need for any further requirement.

Article 7:

Brazil does not agree with the need for registration as a condition for protection of the right over TCE/EF by its custodians.

(iv): Brazil has concerns with the use of ADR in order to solve disputes relating to TCE/EF and proposes to suppress reference to this sort of dispute settlement from the draft instrument.

Article 9:

This provision should also permit the application of the protection over rights previously acquired in a manner inconsistent with the other provisions of the draft instrument.

Document WIPO/GRTKF/IC/9/5

General comments:

Brazil is of the view that protection of TK is not contingent upon the consent by the interested communities and that it has a mandatory nature.

The draft instrument on TK should clearly incorporate a provision requiring PIC and benefit-sharing as a condition for access to TK.

The draft instrument must contain a provision whereby intellectual property applications should disclose the origin of the TKs, any associated genetic resources, as well as evidence of compliance of PIC and benefit-sharing from the country of origin.

Specific comments:

I - Policy objectives:

(iv): Add to the last part of this item the following: "... and promote measures aimed at conservation and protection of natural and cultural environments."

(vi): Brazil has concerns with the language found in this item as it could convene the idea, which is not acceptable for Brazil, that TK protection should seek to facilitate the transmission of the knowledge ("respect and facilitate...").

(vii): This provision could benefit from language already set out by the CBD, article 10 (c) , which elaborates the underlying idea from item (vii) in a clearer fashion.

(ix): The title of this provision should be changed in order to be in line with the title in the index of the Annex ("Concord with relevant international agreements and processes")

(xi): The word “existing” should be deleted.

(xii):

1. The verb “promote” should be replaced by “ensure”;

2. The expression “other applicable international regimes” should be replaced by “relevant national and international regimes”;

3. The final part of the provision (starting from “and including...”) should be suppressed.

4. After the suppression proposed in number 3 above, the following expression should be inserted: “in particular the Convention on Biological Diversity”.

(xiii):

1. The language of the provision should make clear that the expression “if so desired” assumes compliance with PIC;

2. The following expression should be deleted: “...for, authentic products of traditional knowledge and associated community industries.”

II - General Principles (comments to):

Item (a) - suppress the last sentence of the text, starting from “Measures for...”, taking into account that contrary to what is suggested, measures for protection of TK shall not be deemed voluntary nor have their applicability conditioned upon manifestation on the part of the holders of such rights.

Item (c) - The last part of the comments on this item suggests that enforcement measures are optional. Brazil thus proposes to replace this last part of the comments for the following: “(c) Measures for protecting traditional knowledge should be effective in achieving the objectives of protection, and should be understandable, affordable, accessible and not unjustifiably burdensome for their intended beneficiaries , taking into account of the cultural, social and economic context of traditional knowledge holders. National and international measures should be available in order to provide appropriate enforcement procedures that permit action against misappropriation of traditional knowledge and violation of the principle of prior informed consent.”

Item (e)
First paragraph: delete the paragraph as it stands and, instead, rephrase it making it clear that the principle of equity may lead at time to treatment more favourable for the TK holders, as this idea does not seem clear enough from the language used in the last sentence of this paragraph (“In reflecting these needs...”).

Second Paragraph: Replace the paragraph by the following: “As a means of ensuring that the intellectual property regime is equitable and responsive to broader societal interests, the rights of TK holders over their knowledge should be fully recognized and safeguarded. Respect for prior informed consent should be ensured, and holders of TK should be entitled to the fair and equitable sharing of benefits 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 the sharing of benefits arising from the utilization of genetic resources.”

Item (f)
1. Suppress the final part of the title starting from "...governing...";
2. Replace "the applicable law" for "national and international regimes";
3. Add a second paragraph, as previously proposed by Brazil, in the following terms: "Measures should be adopted with a view to ensuring that existing intellectual property systems operate in a manner that is consistent and does not run counter to the objectives of traditional knowledge protection."

Item (g) - Delete the first paragraph of the comments.

Item (h) - Brazil would appreciate clarification as to the part of the text starting from "if so desired...".

Item (j) - Delete the part of the text starting from "including, for example,..."

III - Substantive provisions:

Article 1:

Paragraph 2:
- add "or illicit" between "unfair" and "means" (second last sentence of the draft provision);
- replace, all along the paragraph, the terms "acquisition" and "acquired" for other that does not convey the idea of "appropriation"

Paragraph 3:
- In the heading: Replace "prevent" for "suppress";
- (iv): delete the expression "if the traditional knowledge has been accessed"
- (iv): replace "compensation" for "benefit-sharing";
- (iv): delete the last part, starting from"when such use" until "knowledge";
- (iv): add "according to the national and international regimes" as the final part of the provision;
- (v): delete the word "willful".
- Add the following as small roman (vi): "The granting of patent rights for inventions involving traditional knowledge and associated genetic resources without the disclosure of the country of origin of the knowledge and resources, as well as evidence that prior informed consent and benefit-sharing conditions have been complied with in the country of origin."

Article 2:

Add in any one of the paragraphs explicit reference to the possibility of a "sui generis" system, as it is mentioned among the General Guiding Principles.

Article 3:

Paragraph 2 (last part): Replace "and knowledge associated with genetic resources" for "or any other knowledge associated with genetic resources", as knowledge related to, inter alia, medicine, agriculture and environment are also comprised within TK associated to genetic resources.

Article 4:

(ii): Brazil would like to request clarification about the treatment to be accorded to any cases that might not fall under items (i) through (iii);
(iii): replace “integral to the cultural identity” for “related to the cultural identity”.

Article 5:

It is suggested that, for the sake of clarity of the text, the provision be split into two.

Article 6:

Paragraph 1: The provision should incorporate language indicating that the use of the TK requires, apart from compliance with PIC, respect for mutually agreed terms regarding benefit-sharing.

Paragraph 1: Add “according to national legislation of countries of origin”, or the like, at the beginning of the paragraph.

Paragraph 2: Replace “only give” for “mainly give” as TK holders should be free to require benefits of whatever kind as a condition for the use of the knowledge.

Article 7:

Paragraph 1: delete “...from its traditional holders...”;

Paragraph 3: add the word “unjustifiably” (or the like) before “burdensome”;

Article 8:

Paragraph 1(ii): Replace the expression “use in government hospitals” for “use by public health system”, in order to accomodate national systems, such as the one in Brazil, in which private hospitals may be included in the public health system;

Paragraph 2: suppress the paragraph, in view of the broad language used in it.

Article 9:

Paragraph 2: Replace “specify the duration of protection” for “prevail”, with the aim of ensuring that, under the case provided for under this paragraph, the national law is the one to be applied.

Article 10:

Delete the word “acquisition” (second and third lines);
Add, after “good faith”, the following: “as well as fair and equitable benefit-sharing with traditional knowledge holders, according to national legislation of countries of origin.”

Article 11:

Paragraph 2: Replace “in the interests of” for “to enhance...”, considering that registration is only one of the measures that can ensure transparency, certainty and conservation of TK.

Article 12:

Include language stating clearly that the national legislation to be respected is the one from the country where knowledge holders are located.

INTERNATIONAL CHAMBER OF COMMERCE (ICC)

Comments on WIPO paper:
"The protection of traditional knowledge: revised objectives and principles"

Prepared by the Commission on Intellectual Property

Summary

The discussion on protection of Traditional Knowledge (TK) has given rise to two documents, considered at the ninth meeting of the Intergovernmental Committee (IGC). One (WIPO/GRTKF/IC/9/5: The Protection of Traditional Knowledge: Revised Objectives and Principles) deals with objectives and principles for the protection of TK: the second (WIPO/GRTKF/IC/9/INF/5: The Protection of Traditional Knowledge: Updated Draft Outline of Policy Options and Legal Mechanisms) with policy options and legal mechanisms.

ICC supports initiatives to explore options for the protection of traditional knowledge, whether within the existing intellectual property framework or through development of new types of rights. However, ICC believes it is premature to take definitive positions on TK protection before having a clearer idea of what is included in this concept and how it is defined. Only when these points are clarified can an informed judgement be made as to whether there is a need for TK protection at an international level and what the scope of any such protection should be. To date, ICC has not reached any conclusion on these questions. ICC has raised a number of questions about TK protection in its paper ''Protecting Traditional Knowledge"(12 January 2006) . These questions for the most part have not yet been adequately addressed by the IGC.

ICC's view is that objectives, principles, policy options and legal mechanisms form a natural hierarchy. Objectives must be broadly agreed before principles are settled: from these flow the policy and laws to implement them. In ICC's view, more discussion of objectives and a much greater measure of agreement about them is required before progress can be made. As ICC has maintained since the Committee was set up, the objectives to be reached must largely determine the form of the laws to implement them. Until consensus is reached on objectives, it is vain to expect progress. For these reasons, ICC limits its comments to the policy objectives of document WIPO/GRTKF/IC/9/5, and feels it is premature to update other sections of the document.

Objectives

Document WIPO/GRTKF/IC/9/5 lists sixteen possible policy objectives, as follows:

(i) Recognize value
(ii) Promote respect
(iii) Meet the actual needs of traditional knowledge holders
(iv) Promote conservation and preservation of traditional knowledge
(v) Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems

(vi) Support traditional knowledge systems
(vii) Contribute to safeguarding traditional knowledge
(viii) Repress unfair and inequitable uses
(ix) Concord with relevant international agreements and processes
(x) Promote innovation and creativity
(xi) Ensure prior informed consent and exchanges based on mutually agreed terms
(xii) Promote equitable benefit sharing
(xiii) Promote community development and legitimate trading activities
(xiv) Preclude the grant of improper intellectual property rights to unauthorized parties
(xv) Enhance transparency and mutual confidence
(xvi) Complement protection of traditional cultural expressions

It is not in every case clear from the titles alone what is meant by each objective, but each is further elaborated subsequently - still, it may be said, not always fully clarifying what is meant. The listed objectives are not of equal weight: they overlap in some degree, but they may also conflict. The commentary says "The listed objectives are not mutually exclusive but rather complementary to each other. The list of objectives is non exhaustive… the Committee members may supplement the current list with additional objectives.. "(2nd paragraph, page 6). It is not clear to what extent they are generally accepted by members of the Committee. In ICC's view, the list as it stands is unsatisfactory. It must be clarified, supplemented and, most importantly, prioritised. Without a substantial measure of agreement on the underlying objectives, further discussion will be fruitless.

Priorities

The Intergovernmental Committee meets at WIPO because it recognizes that rights for TK, if implemented, will have strong affinities with existing intellectual property rights. WIPO's expertise is in IP laws. This influences the objectives, and how they should be selected. Compare TRIPs, and in particular, Article 7 (Objectives).

> "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

As with IP rights, traditional knowledge rights cannot be absolute - they must balance the interests of holders with those of the rest of society. Knowledge has value, including, though not limited to, economic value. However, economic value depends on the balance of supply and demand- once knowledge is public, its supply is difficult to control. The presumption has to be that public knowledge is available to all unless made subject to specific prior rights of which the public have notice. Thus, if it were to be accepted that holders of traditional knowledge have the right to control its use, a balance of obligations requires holders to assume corresponding responsibilities. This may imply that holders have an obligation (like that of inventors who seek patents) to disclose their knowledge to the public, both so that the public know what is protected and how they may (subject to the holder's rights) make use of and derive benefit from it.

ICC believes that any implementation of TK rights must involve a balance of rights and obligations. This provides a criterion for organizing, prioritising, amending and supplementing the objectives suggested in document WIPO/GRTKF/IC/9/5.

Commentary on listed objectives

Objective (i) 'Recognising value' should be understood as directed primarily to economic value, since other values are not directly influenced by IP laws. So limited, (i) is an important objective, with the potential (if fully realized) to improve the economic circumstances of indigenous peoples and promote development.

Objective (ii) 'Promoting respect' is more tenuous. This might be the happy result of legislation, but it is difficult to legislate directly for respect, particularly in laws of this kind.

Objective (iii) 'Meet the actual needs of traditional knowledge holders' is an irreproachable objective, but begs the question of what these needs are. Further explanation (document WIPO/GRTKF/IC/9/5 Annexe, p3) indicates that these are seen as contributions to their welfare and reward for their contributions, together with respect for their rights as holders - and thus largely coincide with objectives (i) and (ii).

Objective (iv) 'Promote conservation and preservation of traditional knowledge' aligns closely with objectives (vi) 'Support traditional knowledge systems' and (vii) 'Contribute to safeguarding traditional knowledge', and must be considered a subsidiary objective, though important. It is subsidiary because the interest of the public at large is not in supporting TK systems as such, but only in supporting those that offer benefits capable of being generally shared.

Objective (v) ' Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems' comes in two parts: 'Empowerment' will follow from objective (i) 'Recognising value'. As to 'acknowledge the distinctive nature of traditional knowledge systems', if this means defining enforceable legal rights while acknowledging the distinctive nature of TK, it is not so much an objective as a necessary restriction on the form rights can take.

Objective (viii) 'Repress unfair and inequitable uses' goes with (xiv) 'Preclude the grant of improper intellectual property rights to unauthorized parties', both proper and important objectives, but requiring a common understanding of what constitutes unfairness, and when IP rights are to be considered improper. For example, it must be wrong to acquire patent rights claiming known uses of TK but there is sharp disagreement about whether patent rights may be claimed on improvements of such known uses (as ICC believes should generally be the case), or whether the permission of the holder is required. Such questions can only be resolved when there is agreement on the objectives. Thus, it is premature to address what constitutes unfair or inequitable uses, or improper intellectual property rights, before agreeing objectives.

Objective (ix) ' Concord with relevant international agreements and processes', like (v) (second part), is not an objective in itself but a limitation on the form protection might take. Certainly it is an important limitation. TK rights need to be consistent with

obligations in widely adopted international conventions, including for example the CBD and TRIPs.

Objective (x) 'Promote innovation and creativity' is important because the whole of society - not just TK holders - benefit if this objective is achieved.

The remaining objectives (xi) to (xvi) are worthy but not perhaps fundamental to the project.

Additional Objectives or Constraints
ICC proposes adding two further objectives, as follows:
(xvii) Maintenance of the public domain
(xviii) Proportionality to the ends to be achieved

Maintenance of the Public Domain
ICC regards it as a vital part of any balanced TK protection system that the public domain should be preserved and not encroached upon. To remove existing public knowledge from the public domain requires strong justification. People are entitled to retain knowledge they already have, and to make appropriate use of it. In particular, it is both unjust and incovenient to prevent or control existing uses begun in good faith, perhaps widespread and of many years' duration. Rights should therefore not be awarded or asserted retroactively.

Proportionality
The measures to be instituted must be proportional to the ends to be attained. The effect of this objective will not be clear until other objectives are agreed. But it could notably affect the way objectives are realized. For example, it has been suggested to implement objective (viii) 'Suppress unfair and inequitable uses' by a requirement that all patent applications should state the country of origin of genetic resources used in the invention. That requirement however would be disproportionate, given that in many cases the genetic resources are widely available, or are obtained in countries that allow free access to such resources: in such cases the requirement, though burdensome to the applicant, does nothing to promote the objective of suppressing unfair use.

Two pragmatic reasons may be advanced for protecting TK: its value to its holders and its value to society as a whole. The first is primarily the concern of the holders: the value of TK to rightholders supports conserving TK, but not necessarily recognizing rights in it that limit its wider use. Its value to society may support limiting its use in order to provide benefits to the originators which encourage them to preserve and share it. Alternatively, starting with fundamental principle rights in TK may be proposed as a requirement of justice for those who hold them: but if so, such rights, like other IP rights, must still be balanced with those of the rest of society. This will require a proper respect for the principle of public domain. ICC suggests that the list of objectives should be pruned and amended with these points in mind, so as to establish a consensus. Unless there is consensus about the objectives, it is unrealistic to expect agreement about policies for implementing them, let alone detailed implementing provisions.

INTERNATIONAL TRADEMARK ASSOCIATION (INTA)

The International Trademark Association (INTA) appreciates that its previous comments to the WIPO secretariat on the draft policy objectives and core principles for the protection of traditional cultural expressions (TCEs) /expressions of folklore (EoF) (document WIPO/GRTKF/IC/7/3) were considered in comparing the revised draft provisions for protection of TCEs/EoF (document WIPO/GRTKF/IC/9/4) ("revised draft"). As the WIPO secretariat is aware, INTA represents the interests of trademark owners, and we have reviewed the revised draft document in this context and by reference to our previous articulated concerns. Our comments are limited in this regard and our specific comments follow. However, as a preliminary matter we make the observation that the provisions adopt and merge language from various intellectual property regimes but mainly find their precursors in copyright. This heavy reliance on copyright language creates concerns for trademark owners. The definition of TCEs/EoF includes within its ambit "words, signs, names and symbols", which are the most common material for trademarks. Most countries' trademark systems include a mechanism for managing conflicts between trademarks with a level of international uniformity. In addition, a body of associated jurisprudence has developed to address many of the issues thought to be of concern. Much of the language and principles sought to be adopted within this document are foreign to the trademark owner and generally not appropriate to the intellectual property regime whose purpose is to encourage free and fair competition within a transparent operating system.

SPECIFIC COMMENTS

1. Objective (iv): Prevent the misappropriation of traditional cultural expressions/ expressions of folklore We note inclusion of this new objective. While INTA empathises with the challenges faced by the various indigenous communities and peoples for the recognition and protection of their TCEs/EoF, INTA strongly believes that in seeking to provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including enforcement measures, to prevent misappropriation, it would be inappropriate to create a separate system which would conflict with current intellectual property regimes, and in particular trademark law. Most countries' trademark laws, to the extent that they are TRIPS compliant, provide adequate remedies within the statutory framework to prevent the registration and/or use of symbols or other marks or badges of origin if their use by the proposed registrant/user would create a likelihood of deception or confusion. Mechanisms also exist to prevent bad faith trademark registrations. Furthermore, there exists in most trademark systems an opportunity for the collective community to own and register marks to obtain the benefit of statutory protection. To the extent that existing and tested intellectual property systems have not been fully utilized by indigenous peoples for the protection of their TCEs/EoF, it appears counter-intuitive to create a new system over which there is no experience or knowledge of operation. It would seem more appropriate for, and INTA would encourage, indigenous communities being informed about and encouraged to use existing systems.

2. Objective (xii): Preclude unauthorised IP rights

We note that the term "curtail" used in the earlier draft of the stated objectives has been replaced by the term "preclude". The use of such mandatory language is of concern to

INTA, particularly with the use of the word “derivatives” in this context. The term “derivatives” has no established meaning in trademark law and in this context is ambiguous in its scope for those who create trademarks and may draw their inspiration from various sources. The apparently infinite scope of the term “derivative” is problematic, particularly when the revised draft simultaneously seeks to provide specific groups certain absolute property rights in TCEs/EoF. If that term were adopted, a trademark owner would be required to determine what constitutes a TCE/EoF and then face with the uncertainty of the extent of protection of the infinite variations that may be legitimately considered to be “derivates”. For example, if the TCE comprises common geometric shapes or combinations of such shapes, to what extent would this inhibit the legitimate use of such shapes in other contexts, solely on the basis of a claim that the shapes are derivative? Only by including an assessment of such subsequent use on the basis of “likelihood of confusion” can the legitimate interests of all parties be properly defined and balanced.

Furthermore, the terminology in relation to assessing the likelihood of deception or confusion is familiar to the trademark community, has an accepted meaning, and has been used effectively for many years to protect consumers. Similarly, there is significant experience in handling trademark applications which may have been made in bad faith.

3. Article 1: Subject Matter of Protection

It is noted in the commentary that accompanies this section that further consideration may be given to deletion of the criterion to be applied to determining what comprises a TCE/EoF (paragraph bb) on the basis that it may impose too heavy a burden of proof on communities. INTA notes that the acquisition of rights as foreshadowed by this document - that is, to be used to “preclude” other parties’ activities, surely must be based on the ability to establish some objective and clearly articulated criterion. Anything less creates confusion and uncertainty and does not have the requisite level of transparency of process.

4. Article 3: Acts of Misappropriation (Scope of Protection)

We note the reference first to TCEs/EoF “which have been registered or notified as referred to in Article 7”. INTA’s experience with alternate registers, such as registers of well-known trademarks, has highlighted concerns of trademark owners in establishing separate recordal systems. While transparency and certainty are important, practices in the establishment of such registries need to be considered. For this reason, it is INTA’s preference that in relation to indicia that may form trademark material, the established trademark registers be used for protection purposes. However, if separate registers are pursued, we urge that guidance be sought from those WIPO members who have experience with both the establishment of registers of well-known marks and the registration systems adopted by many States in relation to the protection of geographical indications. While INTA acknowledges that different standards have been sought to be established in relation to varying levels of disclosure by indigenous people of their TCEs/EoF, we note that the revised draft continues to seek criminal and civil sanctions in relation to such symbols which have not been notified as of significance (Article 3(b)(ii)). It seems extraordinary that such sanctions could be envisaged without adequate disclosure and establishment of rights. There are already sufficient avenues for protection for false and misleading conduct in the legal system and no need to seek to

introduce additional penalties without requiring full disclosure of the rights upon which there is reliance.

Furthermore, we note with concern the continued reference to "or derivatives thereof" particularly in the context of words, signs, names and symbols. Because these are the kinds of signs that trademark owners are most likely to seek to adopt, the use of the term "derivatives" in this context without further limitation again causes uncertainty. Article 3(b)(ii) contains a caveat – "any distortion, mutilation or other modification of, or other derogatory action" – which implies again a subjective assessment. To provide for criminal sanctions against an action for which there is no notice and appears to be indeterminate creates unnecessary uncertainty and would seemingly contravene any notion of due process. Concern continues in relation to that material which is to be kept secret (Article 3(c)). As a matter of natural justice, it seems that no rights should be enforced against a third party who has, without malicious intent, adopted a TCE/EoF with no knowledge that it existed, as protection for it has not been sought. Having made a decision to retain certain elements as secret, to then seek enforcement over third parties using such materials in good faith puts an unfair, unnecessary and unworkable burden on intellectual property rights holders and undermines the role that such systems have within the commercial context. While it is noted that the mechanism for identification or registration is to be left for regional determination, INTA reiterates its concerns regarding the setting up of any kind of regional system which would be seen to grant rights without taking into consideration the established intellectual property principles of territoriality, exclusivity, priority and, where applicable, notice.

5. Article 6: Term of Protection

Regarding Article 6(ii), a term of protection in relation to secret rights as long as they remain secret has no scope for certainty, and thus is clearly prejudicial to the legitimately obtained protection and enforcement of other intellectual property rights such as trademarks.

6. Article 9: Transitional Measures

We note the reference to "continuing acts" in paragraph (b). This terminology is unclear as to the scope of acts it is meant to encompass. With no linkage to Article 1, the reference begs the question whether this expands the manner of use of the TCEs/EoF, for example, in relation to a cultural expression which has become commercial, or indeed to cover the situation where in fact there is no ongoing use notwithstanding the reference back to Article 1. In short, the term "acts" is ambiguous in this context. While the phrase "subject to respect for rights previously acquired by third parties" has been included, it is by no means certain that this phrase is intended to support the general principle of "first in time, first in right" to which INTA strongly adheres.

7. Article 10: Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion

Notwithstanding amendment, Article 10 continues to provide for special protection of TCEs/EoF via use of complementary protection mechanisms. As previously stated, INTA opposes any proposal which would seek to grant special trademark status to TCEs/EoF for the reasons previously noted. While it is recognised in the commentary that the mechanism for identification and "registration" of a TCE/EoF is to be left for

regional determination, INTA is concerned that insufficient thought has been given to the implementation mechanisms or the general principles for the protection of TCEs/EoF within such systems. Quite clearly, it is the implementation of many of these principles which will be of concern, and careful consideration as to their implementation may avoid subsequent issues arising from vague guidelines, particularly when these may conflict with existing intellectual property systems, the users of which require certainty and consistency. While it is important to recognise and protect the TCEs/EoF of indigenous communities and people, it is not necessary to provide such protection by creating vague or over-reaching rules, or by applying a different standard for what is protectable (and the level and sanctions applicable) under the intellectual property laws of the region in question. The failure to fully consider in the preparatory phases the full impact and ramifications of such a process could ultimately undermine the original desired intent of formulating a doctrine of general protection so as to foster wider community awareness of the inherent value of indigenous heritage and associated traditional cultural expressions.

KENYA

PROPOSED AMENDMENTS TO WIPO/GRTKF/IC/9/5.

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, <u>claiming or asserting</u> 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, <u>commercial or industrial use</u> of traditional knowledge without <u>just and appropriate compensation</u> 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) Wilful offensive use of traditional knowledge of particular moral or spiritual value to its holders <u>by third parties outside the customary context</u>, 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 <u>Article 10bis of the Paris Convention</u>. 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 that discredit the products or services of traditional knowledge holders.

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.

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.

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.

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) Or indigenous community or people that preserve and transmit it between generations; and

(iii) *Integral to the cultural identity distinctively associated with the tradition of an indigenous or traditional community or people that are recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. Customary or traditional practices, protocols or laws may express this relationship formally or informally.*

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.

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.

COMMENT: Akwe: Kon Guidelines on lands occupied by indigenous communities.

[- To recognise that DEVELOPMENTS proposed to take place on LANDS and WATERS traditionally occupied by indigenous and local communities are sensitive to their concerns since this has been a source of these communities environmental, agricultural, medicinal concerns and, because of the potential long term negative impacts on their lively hoods and traditional knowledge that could be associated with such developments. This should be part of impact assessment for development in areas traditionally used as a source of genetic resource for these communities.]

SOUTH AFRICA

Please find attached South Africa's comments on the documents for the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in accordance with the decision at the 9th Session of the IGC.

The following documents are attached:

- Comments on the overview of the Committee's work on Genetic Resources
- Comments on Document 9/4
- Overall review on Folklore
- Document 9/5 with Amendments
- South African response to 9/5 on TK Protection

Comments on the overview of the Committee's work on Genetic Resources

Document WIPO/GRTKFL/IC/8/9 describes the past work on IP and genetic resources in WIPO and other relevant international fora with which the Committee has cooperated closely since its inception. Three clusters of substantive questions have been identified in the course of this work, namely technical matters concerning:

- defensive protection of genetic resources;
- disclosure requirements in patent applications for information related to genetic resources used in the claimed invention;
- IP issues in mutually agreed terms for the fair and equitable sharing of benefits arising from the use of genetic resources.

Finally, proposals are put forward to address the substantive issues. Below, please find comments on these proposals and where appropriate further issues to be considered.

Guidance on disclosure requirements

The proposed options should be supported.

These options are however limited to assisting member countries to adopt appropriate legislation to ensure alignment between access and benefit sharing (ABS) measures for genetic resources and patent law. Further analyses are required to elucidate the identified gaps in the conceptual linkages between the various fora dealing with ABS on Genetic Resources and specific IP agreements. This would then inform guidelines and or models as proposed by the Committee.

Consideration should also be given to some mechanism to harmonise and align the overlapping issues addressed in the relevant international fora.

IP and Mutually agreed terms for fair and equitable benefit-sharing

The proposed options should be supported.

The activity proposed for the disclosure requirements (e.g. the guidelines on the interaction between patent disclosure and ABS framework) and the terms for fair and equitable benefit sharing should be mutually supportive.

A more recent development is the adoption of the Standard Material Transfer Agreement (SMTA) under the International on Plant Genetic Resources for Food and Agriculture (ITPGRFA). Using the implementation of the ITPGRFA as a model case study (for mutually agreed terms and fair & equitable benefit-sharing) would be particularly useful for developing countries who are also Contracting Parties to the ITPGRFA.

FOLKLORE

1. Traditional Cultural practices an important foundation for Community Identity and Social Cohesion.

2. This has implications for our constitution, particularly as it pertains to Customary Law, customary marriages are recognized by the constitution, but the Western notions seem to take precedence.

3. This is a complex matter, one way or the other, our inputs should take into account the position taken by Traditional Leaders on some of these issues. We need to be cautions about the implications of ratifying such a convention, as it opens up a seriously suppressed issue of the position of traditional leadership in the politics of this country.

4. The angle of human rights - this is critical, only traditional Cultural practices that are in line with human rights should be protected.

5. Individuals are an important element of protecting and promoting Traditional Cultural Expressions, there should be institutional incentives that encourage people to impart this knowledge to other members of the community.

6. Most Traditional Cultural Expressions transcended national boundaries, its protection should therefore be located both at community, National and Regional levels. This means that National policies and legislations should be aligned.

7. Traditional Cultural Expressions were basis of contemporary Cultural or art forms, where possible this needs to be highlighted. We need to guard against ghettoizing Traditional Cultural Expression.

COMMENTS ON DOCUMENT WIPO/GRTKF/IC/9/4

The following points identified are made within the context of the IKS Policy which falls within our competencies. Every attempt has been made to provide reasoning for the comments and suggested changes.

Policy objectives and Core principles

i. Objectives

We recommend the inclusion of “affirmation” in bullet point (i) which is consistent with working document 9/5. The statement now reads as “Recognize and affirm value.”
We suggest that in bullet (iii) communities be defined. Hence we recommend the inclusion of “indigenous and local.” The bullet point now reads as “Meet the actual needs of indigenous and local communities.”

We support the inclusion of “ethical research” and “fair and equitable” in bullet point (ix). The statement now reads as, “Promote intellectual and artistic freedom, ethical research and cultural exchange on fair and equitable terms.”

We would like to flag the need for the inclusion of the principles of governance which is consistent with our comments on 9/5.

ii. General Guiding Principles

In bullet point (a) we recommend the deletion of “relevant” and support the inclusion of indigenous and local. The bullet point now reads as, “Responsiveness to aspirations and expectations of indigenous and local communities.”

We recommend the deletion of “traditional” in support of “indigenous.” Our assertion is based on the premise that there is a horizontal resonance with global trends that “Indigenous” is a term used on many international platforms and fora. There is also a global momentum for the development and protection of Indigenous Knowledge, which South Africa can contribute to, and benefit from. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (June 1993), the Julayinbul Statement on Indigenous Intellectual Property Rights (November 1993), and the Kari-Oca Declaration and Indigenous Peoples Earth Charter (May 1992) make explicit statements on indigenous knowledge rather than traditional knowledge. Although these statements, unlike the ILO Convention 169, do not have binding force, they nonetheless provide an important discourse that can guide terminology. By introducing relevant provisions concerning Indigenous Knowledge, South Africa could provide some lead in the context of international progress in the implementation of a legal binding instrument.

In bullet point (h) we favour the inclusion of “practice.” The statement now reads as, “respect for customary practice, use and transmission of TCE’s/ EoF

(iii) Substantive Principles

We recommend the inclusion of words “civil and criminal” in bullet point (8), the statement now reads as, “Sanctions, civil and criminal remedies and exercise of rights.”
We further recommend under this section the inclusion of “national” in bullet point (11). The statement now reads as, “International, regional and national protection”

OBJECTIVES

We once again recommend the inclusion of “affirmation” in bullet point (i) which is consistent with our comments on working document 9/5. The statement now reads as “Recognize and affirm value.”

In bullet point (iv) we favour the inclusion of “distortion that may result from their use,” also this comment should be read in tandem with document 9/5 regarding “misappropriation” The heading statement now reads as, “Prevent the misappropriation of traditional cultural expression/ expression of folklore, and the distortion that may result from their use.”
Under bullet point (ix) we once again support the inclusion of “ethical research” and “fair and equitable” in bullet point (ix). The statement now reads as, “Promote intellectual and artistic freedom, ethical research and cultural exchange on fair and equitable terms.”

Under bullet point (xi) we recommend the inclusion of “and exclude competitors from free exploitation” at the end of the statement.

GENERAL GUIDING PRINCIPLES

We once again in bullet point (a) recommend the deletion of “relevant” and support the inclusion of indigenous and local. The bullet point now reads as, “Principle of responsiveness to aspirations and expectations of indigenous and local communities.”
We once again further recommend under this section the inclusion of “national” in bullet point (c). The statement now reads as, “Principle of respect for and consistency with international, regional and national agreements and instruments.”

ARTICLE 1

Consistent with our comments on document 9/5 we favour the inclusion of “cosmological” and in subsection (a)(i) we recommend the inclusion of “spiritual” and “dreams,” the statement now reads as “verbal and spiritual expression, such as stories, dreams, epics, legends poetry, riddles and other narratives, words, signs, and symbols
We support the inclusion of medicine and agriculture to the list of tangible expression subsumed in section (a)(iv).

ARTICLE 2

We take cognizance of footnote 23 on page 16. However we implore the WIPO secretariat to expedite its efforts in defining “Indigenous Peoples.”

ARTICLE 3

We once again reiterate our recommendation for the inclusion of “distortion” under this article. The heading of the article now reads as “ACTS OF MISAPPRORIATION AND DISTORTION”

Under (b)(i) we suggest the inclusion of the following statements:
1. That no willful representation of the traditional cultural expression/ EoF
2. That no distortion of the expression in a manner prejudicial to honour, dignity or cultural interest of the indigenous and local community.

ARTICLE 4

Under this article we suggest the following provisions be made regarding:
1. the source/ place and or community from where the traditional cultural expression/ EoF utilized has been derived;
2. when a community cannot be identified who are owners of identified traditional cultural expression/ EoF;
3. when traditional cultural expression/ EoF straddles countries
4. when a particular traditional cultural expression/ EoF in a given area may not be same in another community.

ARTICLE 5

While we broadly endorse sections and subsections of this article we are concerned with phrase “incidental use,” we request the secretariat of WIPO to define incidental use as a footnote. We make the argument that in its broadest sense it could imply willful misappropriation/misuse.

We fully support the insertion of “customary law” in (a)(i) given that South African constitution provides for customary law and that the courts in South Africa apply customary law when the law is applicable.

ARTICLE 6

We support ownership of traditional cultural expression/ EoF to exist in perpetuity. Whilst the tenor of this article alludes to perpetuity we implore the secretariat to state this condition of protection explicitly.

In terms of (ii) we further implore the secretariat to make the distinction between “secret” and “sacred.” Within this context we recommend the inclusion of “sacred.” The statement now reads as “in so far as sacred and secret TCEs/EoF are concerned, their protection as such shall endure for as long as they remain sacred and secret.

ARTICLE 7

We fully support the tenor of this article as we are of the opinion that the desire for enforcement is lost in bureaucracy.

It is anticipated that by the insertion of the provisions of this article the prohibitive costs in involved in registration and maintenance of ownership of traditional cultural expression/ will be avoided.

In respect of subsection (iv) South Africa has already established an office referred to as the National Office of IKS which is mandated to commence with the process of registration of holders and practitioners of IKS. In addition the office is charged with assisting indigenous and local communities in matters of dispute as envisaged in Article 8.

ARTICLE 8

Whist we support WIPO’s dispute- resolution and enforcement mechanisms consideration must be given to customary dispute-resolution and enforcement mechanisms. Equally important within the customary context are sanctions and remedies.

ARTICLE 9

We concur and support this article.

ARTICLE 10

Whist we support the instrument to be complementary and mutually supportive of other intellectual property protection, however we note with concern that conventional intellectual property protection fails indigenous and local communities on many levels.

ARTICLE 11

Whilst we take cognizance that there are real contradictions in essential points of existing international instruments we support the harmonization of these instruments. We base our assertion on the premise that not all countries are signatories of particular instruments hence affording rights to foreigners may be problematic.

We also seek clarity on the term “eligible foreigner.” Who determines the eligibility of a foreigner.

COMMENTS ON WIPO/GRTKF/IC/9/5

Purpose

The National Office on Indigenous Knowledge Systems thanks the DFA for the responsibility to coordinate the comments on WIPO-GRTFK-IC 9-4; 9-5 and 9-6.

The input from NIKSO on WIPO-GRTKF-IC 9-5 will be in three parts. The first will comprise documents that we developed collectively in Geneva which were served on Dr. Seleti’s machine. The second will be a preamble raising comments that apply to the whole document. The third part of the report will comprise specific comments that are marked in the document and are tracked.

The Documents Submitted to the IGC Assembly in Geneva

Three documents will be attached to the submission. These are the African Group opening document on 25 April 2006. The second document is the South African Delegation opening statement to the IGC delivered on 25 April 2006. The third document is the African Group submission/address on 28 April 2006.

Preamble Comments

There are a number of comments that have relevance to the whole document and instead of repeating them through out the document we have discussed them here in the preamble.

1. The use of the phrase “Traditional Knowledge”

The South African policy document prefers the use of Indigenous Knowledge and Indigenous Knowledge Systems to Traditional Knowledge and Traditional Knowledge Systems.

After much debate within the South African policy development on IKS context the Minister of Science and Technology ruled in favour of the use of the concept “Indigenous Knowledge and Indigenous Knowledge Systems” against “Traditional Knowledge and Traditional Knowledge Systems”. The argument took cognizance of the genesis of the use of traditional as against modern. It rejects the dichotomy that was created to diminish the significance of indigenous knowledge system when counter-posed against modernity. The South African delegation choice of Indigenous Knowledge to Traditional Knowledge would the apply to the whole document. However, the change has not been effected in the document.

2. Expansion of the phrase of “traditional knowledge holders

This is a proposal that whenever the phrase “traditional knowledge holders” is used it should be expanded to read “traditional knowledge holders and practitioners”. This has been effected in the document and rack change has been utilized to assist with tracking the changes.

3. Expansion of the phrase “recognize value”

This is another proposal that requests that whenever the phrase recognize value appear in the document it should be expanded to read as “recognize and affirm value”.

4. Expansion of the use of the concept of misappropriation
The proposal is that the word misappropriation when used in this document it leaves out some other meanings. It is proposed that it should be expanded to read “misappropriation, misuse and exploitation.

5. The use of the phrase “Traditional context” should be changed
It is suggested that the use of the phrase “traditional context” in the document be changed and be replaced by the following phrase “customary and local context”.

Comments on the Document 9-5
The specific comments on document WIPO GRTKF 9-5 are imbedded in the text. The changes were made with track changes so that they could be visible. Do not accept the changes. The document should be sent with the track changes and comments.

Conclusion

The changes made to the text are consistent with the submissions/addresses by the African Group and the South African Delegation.

Note: for reasons of space, the revised version of document WIPO/GRTKF/IC/9/5 provided by South Africa is attached as an Appendix to this document.

TULALIP TRIBES

The Tulalip Tribes of Washington will focus its comments on the Revised Objectives and Principles for the Protection of Traditional Cultural Expressions/Expressions of Folklore (WIPO/GRTKF/IC/9/4) and the Protection of Traditional Knowledge: Revised Objectives and Principles(WIPO/GRTKF/IC/9/5).

WIPO/GRTKF/IC/9/4

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.

Comments of the Tulalip Tribes:

a. Illustration for teaching and learning: Indigenous and local communities may have few objections to sharing some of their knowledge for education. A Tulalip legislator in Washing State, for example, introduced legislation which has been adopted mandating the teaching of tribal history and culture in the public schools. The Tribes in Washington State largely see the value of sharing parts of their history and culture for wider education for intercultural understanding and sharing models for a sustainable society.

However, they do have concerns that the materials are limited to the contexts in which they are shared. The Tulalip Tribes has shared with the WGTKGR an instance where a tribal elder

shared a personal story with a classroom. The elder gave permission to the teacher to tape the story, thinking that it would be used by the teacher to prepare lessons related to the story. The teacher transcribed the story and published it. The elder was highly offended, since it was her personal story over which she held custodianship, and in the traditional context could only be told by her. Although people hearing the story were allowed to carry it in their memory and draw lessons from it, Tulalip custom forbids that they repeat the story to others.

b. Non-commercial research or private study: These activities can become conduits for expanding the availability of TCEs/EoFs to an ever-expanding sphere of third-party users, and can work against cultural privacy or cultural secrecy. Non-commercial research commonly leads to publication, outside of the direct control of the original holders of the TCEs/EoFs. Without extra legal provisions, published TCEs/EoFs then enter the Western copyright system, which inexorably leads to the public domain. Widely published and distributed information can change the legal presumptions about the status of the TCEs/EoFs, whether or not it was the intent of the original knowledge holders to make this information widely and publicly available. Greater availability also makes it more difficult to traditional knowledge holders to defend any recognized rights to control or benefit from the use of their TCEs/EoFs.

This broad principle may fail on two counts related to prior informed consent. The fist issue concerns the authority under which research materials are obtained (who has given the consent). Many researchers, for example, have obtained access to TCEs/EoFs through personal relationships with individual tradition holders. These individuals are embedded in a larger society that may claim collective rights of control over the knowledge. The collective governance system may allow individual tradition holders to disclose knowledge, or it may not.

The second leading issue is the determination of the circumstances of consent. Many indigenous and local communities live in primarily oral cultures. They may have had little, if any, exposure to the non-indigenous academic and publishing system. Unless publishing issues and potential third party access and use issues are addressed, consent is highly problematic. Holders of TCEs/EoFs may not be aware that published and disclosed knowledge takes on a life of its own and has a legal career towards the public domain.

The Tulalip Tribes has no objection to any indigenous or local community that makes the decision, through prior informed consent, to disclose, share, and allow its knowledge to be used for study or research. The rights acquired by researchers or students, and by third parties that encounter their published works should be limited unless released by express consent from the tradition holders.

c. Criticism or review: The objections here are covered in the objections raised above.

d. Reporting news or current events: In many cases, this may not be a problem. But a specific case should clarify potential problems.

In 1984, a reporter from the Santa Fe New Mexican flew over a sacred ceremony of the Pueblo of Santo Domingo, took pictures, and published them in the local newspaper labeled as a pow-wow (example discussed at length in Susan Scafidi, Who Owns Culture? Rutgers University Press, 2005 and Daniel Wugner, Prevention of Misappropriation of Intangible Cultural Heritage through Intellectual Property Laws, in J. Michael Finger and Philip Schuler (eds.). Poor People’s Knowledge: Promoting Intellectual Property in Developing Countries. World Bank, 2004).

The Santo Domingo Pueblo filed suit. Calling the sacred ceremony a “pow-wow” was highly offensive. But more damaging was that the overflight disrupted the ceremony and reduced its effectiveness, so that in the mind of the Pueblo members it damaged a spiritual ceremony required to renew their relationship with certain spiritual forces for the coming year. The publication of the photographs violated customary law related to this secret ceremony. The case was settled out of court, but the Pueblo probably would have lost any claim based on intellectual property protection. The ceremony was secret, and the Pueblo had taken pains to keep it so. But the fact that it was visible from above meant that the courts would have ruled that since there was no copyright in the ceremony, there could be no remedy since it was performed the public domain as the roof was open and unprotected. The open roof, however, is necessary for communication with the Creator and tribal spirits. To protect the ceremony, the Pueblo would have to alter custom to fit the Western IPR law and cover their ceremonial space.

e. Legal proceedings: Although TCEs/EoFs must necessarily be made available in legal proceedings, this needs to be limited. Many countries have laws that make legal proceedings part of the public record and public domain, so that in the act of defending rights indigenous and local communities may in fact be putting their TCEs/EoFs at greater risk of disclosure. States should be encouraged to ensure that any evidentiary use of TCEs/EoFs in tort disputes should be protected from public access and exempt from public domain laws.

f. Archival exceptions: Indigenous and local communities often do not have objections for archives of their TCEs/EoFs, if they are in control of access, care and follow-on uses of archived materials. The Tribes in the United States have collaborated with the Library of Congress, the Smithsonian Institution, the National Museum of the American Indian, and other institutions to archive and display many tribal TCEs/EoFs.

The archiving of some TCEs/EoFs may be objectionable. Indigenous and local communities may not be simply concerned with the commercial/non-commercial distinction, but are also concerned over the appropriateness of archiving. Customary law, for example, may forbid the storage of some forms TCEs/EoFs, particularly those that are highly sacred, secret, or restricted to certain individuals and practice.

It may be highly offensive, for example, to film, digitize and archive certain sacred ceremonies, dances, songs, and paintings. Many Navajo, for example, make sand paintings for trade or sale. But some sand painting are highly sacred, and are destroyed after use in ceremony. Archiving examples of these may be offensive, or even dangerous, as they involve strong spiritual powers.

A national urge to preserve national patrimony has in the past been used to justify archiving many TCEs/EoFs. Tradition holders in some cases disagree that these are part of the national patrimony. As the holders of the traditions, they believe they are the ones to make the decisions about their TCEs/EoFs. Some tribal elders have expressed the view that it is better for some knowledge to not be passed on or archived if the spiritual and traditional conditions for its transfer to the next generation are not met. It is a common indigenous worldview that this knowledge is not truly lost, as it comes through revelation by the Creator. If conditions are not right, the Creator may temporarly withdraw the gifts of knowledge, but these will be given again once the conditions are right.

In summary, the archiving exception should not be used to allow archiving activities that are against the wishes of the holders of the TCEs/EoFs when these can be identified, and there should be provisions for holders of TCEs/EoFs to challenge and claim rights to materials held in archives.

g. Incidental uses: These issues have been mostly addressed in previous and following comments. It will only be added that the use of even small portions of TCEs/EoFs and their incorporation into derivative works may be offensive and violate customary laws.

General Comments: For the Tulalip Tribes, the acceptability of the proposed exemptions will largely depend on national interpretation of the terms contained in the operational paragraph that places restrictions on the exemptions:

“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.”

“Fair practice”, if equated with fair use, can allow users of TCEs/EoFs to extract the ideas contained in the productions of indigenous and local communities as opposed to their expressions. This may be difficult for courts to determine, and it is likely that the presumption in national systems will often reflect national concepts of “fair use.” The idea/expression defense could possibly be used to justify significant amounts of appropriation.

On the issue of acknowledgement, it should be recognized the indigenous and local communities often seek control over their knowledge, rather than acknowledgement. The Tulalip Tribes has made a previous intervention that emphasizes that the concept of the public domain is foreign to many indigenous and local communities. Identifying the source communities as original holders of TCEs/EoFs is difficult, but not impossible. In the realm of physical objects, the United States has adopted provisions in the Native American Graves and Repatriation Act (NAGPRA) that has provisions for Tribes to petition for custodianship of human remains and sacred objects. They are required to present evidence to demonstrate direct historical connection to the human remains and sacred objects. Substantial portions of the objects cannot be affiliated with living descendents, and these fall outside of the scope of protection. Similar provisions could be modelled for TCEs/EoFs, allowing for the development of annexures to exceptions to exceptions.

The “offensiveness” standard is silent on who determines offensiveness. Those using TCEs/EoFs often claim that they are honoring traditions and their derivative works are in the spirit of cultural traditions. Tradition holders may see the derivative uses in a different light. Under customary law, many TCEs/EoFs are restricted to particular individuals, families, clans, moieties or other locally-defined groupings. They may traditionally be expressed at particular times of the year or in very narrow circumstances.

Differences in interpretation in the United States have been dealt with through the “Canons of Construction”, interpretive guidelines courts use to reach judgements. On strong principle in treaty interpretation is that treaties are to be interpreted according to how the tribes negotiating the treaties understood them at the time. In cases where this cannot be determined, the courts use an interpretation that is most favorable to the tribes.

Other commentators have voiced concerns about the need to preserve fair use, free speech, freedom of expression to create national and global reservoirs of ideas and expressions from

which further creations and innovations may be derived. Indigenous and local communities have expressed great concern over the imposition of external standards of fair use regarding knowledge governed by local traditions.

Free speech is partially a red herring, as many countries have defined a number of categories of speech that are forbidden, such as hate speech, seditious or treasonous expressions, slander, panic speech, and so on. Speech and expression is regulated in most, if not all, national cultures in many ways. The general rule is that limitations are carefully considered, not made overbroad, serve express purposes and not be made arbitrarily and capriciously.

The Tulalip Tribes believes that the limitations of fair use, freedom of speech and freedom of expression TCEs/EoFs argued above meet these criteria. They are narrow because they are not available to all citizens and generally apply to minority cultures within national systems. Many nations recognize indigenous rights to self-governance, and some recognize a stronger principle of tribal sovereignty based on prior rights to self-governance.

Resolution 2006/2 of the Human Rights Council contains a number of statements that reinforce this status for all indigenous peoples. Articles 11 and 31 of the current United Nations Draft Declaration on the Rights of Indigenous Peoples are particularly significant:

Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

The Tulalip Tribes does not believe that those objecting to the proposed limitations on standard exceptions have made their case that: a. The TCEs/EoFs of extant indigenous and local communities naturally "belong" to national or global heritage; or b. That protecting these will cause any large-scale or irreparable harm to national or global innovation systems. Indigenous and local communities have been sharing much of their traditions with national and global cultures. They generally do resist ideas that anyone, anywhere, at any time should have free access to their most sacred and private traditions, or that these traditions belong by default to the public domain. The vast majority of knowledge existing in the world is not derived from indigenous and local communities, and would not be affected by the limitations on exceptions proposed in these comments. These are not arbitrary and capricious limitations, in that they are based on internationally recognized rights to self-determination, cultural integrity, and right to "maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions".

WIPO/GRTKF/IC/9/5

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.

General arguments for WIPO/GRTKF/IC/9/4 Article 5 apply here. The Tulalip Tribes would like to further elaborate on 8(2). Reiterating previous arguments:

1. Indigenous peoples widely reject the legal concept that knowledge "already readily available to the general public" is in the public domain or can be exempted from their prior informed consent. They believe their knowledge and fundamental identity is regulated by customary law and tribal traditions. They are not only concerned about uncompensated use, or with the commercial/non-commercial use distinction. They are concerned with uses that deprive them of rights to self-identity and self-development. Indigenous peoples have repeatedly stressed that non-indigenous appropriation of knowledge can deprive them of identity and lead to moral offense and spiritual, physical harm if these uses violate their traditions.

They are also concerned that provisions protecting a public domain in "traditional knowledge readily available to the general public" goes too far in codifying a past history of injustice and non-recognition of prior rights. Indigenous peoples have not sought states to grant them these rights, but have consistently sought to have prior rights to traditional knowledge recognized by states. This approach has been formally recognized in a number of state constitutions and laws, and is the approach adopted in the current United Nations Draft Declaration on the Rights of Indigenous Peoples.

It also fails to provide scope for the repatriation of knowledge and the gradual removal of traditional knowledge from being "generally being available to the public". Some states, for example Australia and New Zealand, have created special collections within university and national libraries that isolate published works containing knowledge of special concern to their indigenous peoples. Access to these materials requires permission from the original knowledge holders.

Knowledge accessible to a general public is also dependent on their opportunities for access. Most books have a short shelf life, and rapidly go out of publication. Indigenous and local communities may also become more circumspect with those who they share their knowledge. Voluntary and policy measures can supplement these processes through the use of federal policy guidance, the increasing use of voluntary ethical codes by non-governmental organizations, professional societies, publishers, and museums related to traditional knowledge. If these processes are reinforced, the result will be that over time traditional knowledge will become less available to the general public. This will, over time, reinforce indigenous and local communities' rights to share their knowledge in a more controlled way, based on prior informed consent, and on more equitable terms.

In summary, the Tulalip Tribes believe WIPO needs to rethink its proposals for broad exemptions based on current intellectual property rights practices. A *sui generis* should be based on thorough respect for customary law and local traditions. In their right to self-determination, indigenous and local communities do not generally believe they are exempt from all national and international laws. Self-determination, for example, would not be supposed to give tribes the right to reproduce and market computer software protected under national intellectual property law and international treaty. But the Tulalip Tribes believe that existing national and international law demands reciprocity when addressing state obligations to respect traditional law related to indigenous traditional knowledge.

INTERNATIONAL PUBLISHERS' ASSOCIATION

WIPO/GRTKF/IC/9/4 Annex:
Revised Provisions for the Protection of
Traditional Cultural Expressions/Expressions of Folklore

The International Publishers Association (IPA) is the international federation of trade associations representing book and journal publishers worldwide. Established in Paris in 1896, it now speaks for 78 national, regional and specialised publishers associations from 66 countries. Its main goals are to promote freedom of expression and freedom to publish, to develop and defend intellectual property and to promote literacy and reading.

IPA welcomes the opportunity to submit its comments on the revised provisions for the protection of TCEs/EoF contained in the Annex to WIPO/GRTKF/IC/9/4 (the "Consultation Document").

IPA appreciates the importance of recognising traditional cultural expressions/expressions of folklore (TCEs/EoF).

As previously outlined, publishers play a crucial role in promoting and preserving TCEs/EoF within and between cultures. They do this in many ways, for example:

- Local publishers of children's books and school books may make reference in their works to the cultural context and environment of their readers.
- Academic publishers publish works of scientists describing ethnological observations.
- Similarly, many writers of fiction are inspired by their local customs, traditions and the social environment in which they were raised.

These examples not only delineate areas where publishing satisfies particular public needs, they also exemplify areas where the need to protect certain other public goods (e.g. freedom of expression, freedom of science and research) must be reconciled with the protection of TCEs/EoF. To ensure a balanced approach in this exercise, IPA has been actively participating in the discussions of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources (IGC) since its first session.

IPA's retains its position as set out in its previous submissions (relating to WIPO/GRTKF/IC/7/3 and/or 5). These regard in particular the need:

- For clearer and more concise definitions (e.g. with regard to the existence and scope of possible rights, the notion of "community", and the intended beneficiaries) for increased certainty;
- To respect the fundamental right of freedom of expression which may be unduly restricted by attempts to protect ideas or concepts, rather than specific forms of expressing ideas, and by calling for the establishment of (possibly state-controlled) authorisation mechanisms.
- Not to undermine the concept of the "public domain", according to which content can be used freely for further creative acts once the term of protection (in the field of intellectual property laws) has expired.
- To carefully consider any notion of compulsory "benefit sharing" reducing the flexibility given to rightsholders in other legal frameworks (e.g. intellectual property law) to freely negotiate the terms of use, and which may ignore the variety of forms in which a "benefit" can manifest itself and/or the risk of the user in investing in the development of traditional content.

These concerns remain valid in particular with regard to the newly added Objective I. (iv) ("Prevent the misappropriation of TCEs/EoF") which embodies many of our points of criticism:

- Traditions in the public domain cannot be misappropriated
- The protection of TCEs/EOF derivatives would prevent creative acts building upon existing subject-matter (whether protected or not), thereby impeding on one's freedom of expression. Scientific observations, educational books, anthologies all could be considered such "derivatives".
- The compulsory "equitable sharing of benefits" may ignore the risks taken by those investing in the use of traditional content, and the fact that benefits can take multiple forms.

The shortcomings of this Consultation Document as summarised above may impede publishers (from an administrative and possible also financial perspective), and make some publishing ventures impossible. We are deeply concerned that "traditional knowledge protection" can be used as a pretext to stifle scientific debate and academic dispute, for example, into tribal history or sociology, in particular in the case of critical authors, e.g. where a community can control whether or how one comments on, for example, its history (conflicts with another community). The exceptions contained in the Consultation Document in this respect are insufficient and vague.

In the light of the complexity of issues and the lack of international consensus on the aim of the IGC's work, IPA does not believe that the time is ripe for an attempt to develop treaty language, and we therefore urge WIPO to refrain from doing so in the next consultation documents. There is not enough consensus that can already be set into legal wording. IPA suggests that the IGC continues its discussions not on the basis of a document drafted in treaty-like language like the Consultation Document, but rather with the aim of building on more easily achievable aims. Consensus can more likely be achieved when carving out the very small and restricted, elements of TCEs/EoF for immediate protection (sacred content), or when calling for recognition of the value of TCEs/EoF in the form of industry guidelines or best practices.

The above comments are preliminary and part of the ongoing consultation process IPA undertakes with its constituency. We look forward to participating in the ongoing debate about these matters and look forward to a constructive solution of the issues outlined in our submissions.

RUSSIAN FEDERATION

Comments on the document “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” (WIPO/GRTKF/IC/9/4)

At the Ninth session of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, the Committee (IGC) supported the proposal of the Chairman concerning the submission to the Secretariat of the written comments on the document WIPO/GRTKF/IC/9/4 “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” for their further summary.

Russian Federation supports the development by the Secretariat of the draft provisions on the protection of Traditional Cultural Expressions (TCEs)/ Expressions of Folklore (EoFs), political objectives and general guiding principles of protection.

Russian Federation supposes that the development of the draft political objectives and general guiding principles provides for a solid basis for further constructive discussion of important issues of protection of TCEs/EoFs within the Committee.

In general, the document WIPO/GRTKF/IC/9/4 containing main text and Annex is built on the model and the basis of the document WIPO/GRTKF/IC/8/4. The main text of the document WIPO/GRTKF/IC/9/4 contains brief statement of the activities of the Committee on the issue of protection of traditional cultural expressions/folklore. We consider to be important the provision mentioned in Section III (p. 13) of the main text of the document WIPO/GRTKF/IC/9/4 stating that the results of the work of the Committee are not determined in advance by the mandate of the Committee neither in their form, nor in the status. Para 13 also contains possible approaches, many of which may be acceptable in the preparation of the results of the work of the Committee. Thus, the possibilities of the Committee in respect of the issues related to the protection of the traditional cultural expressions/folklore are broadened.

The Annex to the main text of the document WIPO/GRTKF/IC/9/4 “Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore: Policy Objectives and Core Principles” is divided into three sections: objectives of the protection, principles for the provisions of the granted protection, and also substantive provisions.

According to Article 3 of the Basics of the Legislation of the Russian Federation on Culture folklore is considered to be a cultural value, one of the elements of the common cultural property of the peoples of the Russian Federation.

We suppose that the protection of the traditional culture or folklore expressions must be, among others, aimed at :

- recognition of value, promotion of respect to traditional culture, in particular, Russian Federation recognizes the equal value of cultures (i.e. recognition of their value and expression of respect), equal rights and freedoms in the field of culture for all the peoples of the Russian Federation and promotes the creation of equal conditions for preservation and development of these cultures;

support of traditional practices and cooperation of the community, barriers to illegal appropriation of traditional cultural expressions and expressions of folklore, promotion of preservation of traditional cultures, encouragement of innovation and creativity of communities, promotion of development of freedom of intellectual and artistic creativity, scientific and cultural exchange, promotion of development and protection of diversity of cultural expressions , and the increase of confidence, transparency and mutual trust. Thus, in Russian Federation everyone has the right for the protection by the state of his cultural identity. Every man is granted the right of participation in the cultural life, attribution and access to cultural values.

Peoples of the Russian Federation have the right to preservation and development of their cultural identity, protection, restoration and preservation of original cultural and historic habitat. At the same time the policy in the field of preservation, creation and distribution of cultural values of indigenous peoples must not be detrimental to the cultures of other peoples of the country.

Special attention in the Russian Federation legislation is paid to minority peoples. Russian Federation guaranties its patronage in respect to preservation and restoration of cultural and national identity of minority ethnic communities of the Russian Federation by means of protection and stimulation, provided for in the federal governmental programs.

We should also mention the Federal Law of April 4, 1999 #82-FL “On the Guaranties of the Rights of the Indigenous Minority Peoples of the Russian Federation”. The Russian Federation according to its legislation is responsible before the nationals for the securing of conditions for accessibility of cultural activities, cultural values and goods.

With an aim to secure the accessibility of cultural activities, cultural values and goods for all the nationals the executive and administrative bodies, and local governing bodies according to their competence should:

– encourage the activities of nationals on attraction of children to creativity and cultural development, self-education, amateur art, crafts;

– create conditions for wide esthetic upbringing and mass primary artistic education mainly through the humanitarization of the overall education system, support and development of a network of special institutions and organizations – art schools, studios, courses, amateur art (independent artistic creativity);

– provide patronage in the field of culture with respect to least economically and socially protected groups.

Besides, it is worth mentioning, that Russian Federation promotes increase in the number of participants of international cultural relations, encourages independent direct participation in cultural exchanges of individuals and cultural organizations, and also promotes the development of Russian culture abroad through relations with foreign co-countrymen and their descendants, by organizing cultural centers, by holding joint cultural activities.

In the Russian Federation everyone is responsible for the preservation of historic and cultural heritage.

At the same time, it seems that a distinction should be made between traditional and other cultural communities.

We also consider important the general guiding principles stated in Section 2 of the Annex to the document WIPO/GRTKF/IC/9/4, such as the principle of responsiveness to aspirations and expectations of relevant communities (peoples), the principle of balance, the principle of Respect for and consistency with international and regional agreements and instruments, the principle of Flexibility and comprehensiveness, the principle of Recognition of the specific nature and characteristics of cultural expression, the principle of Complementarity with protection of traditional knowledge, the principle of Respect for rights of and obligations towards indigenous peoples and other traditional communities, the principle of Respect for customary use and transmission of TCEs/EoF, the principle of Effectiveness and accessibility of measures for protection.

Given the abovementioned, we consider the provisions concerning the objectives and the general guiding principles, in general acceptable.

Clear determination of subjects of the granted protection, the scope of the rights given and the term of protection is important for the grant of protection to the intellectual property objects. In this connection, the provisions stated in the section 3 of the Annex to the document WIPO/GRTKF/IC/9/4 require a more detailed study and clarification.

Thus, for example, we can pay attention to the provision of Article 2 Section 3 (substantive provisions) of the Annex to the document WIPO/GRTKF/IC/9/4, stating that indigenous peoples and traditional and other cultural communities are considered to be the subjects of protection. The criteria of attribution of persons to the subject of rights is the entrustment to them of the safety, care and ensuring the guarantees for the traditional cultural expressions/expressions of folklore in compliance to their traditional laws and practices, and also the support, use and development of traditional cultural expressions and folklore as a distinctive feature of one’s cultural identity. The given provisions do not allow to sufficiently determine the subject of legal protection.

Besides, traditionally the protection granted to intellectual property items is always limited in time, however, the provisions of Section 3 of the Annex to document WIPO/GRTKF/IC/9/4 state that the protection granted, which in its essence is close to the protection of intellectual property objects, may turn out to be unlimited in time, which makes it reasonable to study more thoroughly the possible consequences of such protection.

RUSSIAN FEDERATION

Comments on the document “The Protection of Traditional Knowledge: Revised Objectives and Principles” (WIPO/GRTKF/IC/9/5

At the Ninth session of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, the Committee (IGC) supported the proposal of the Chairman concerning the submission to the Secretariat of the written comments on the document WIPO/GRTKF/IC/9/5 “The Protection of Traditional Knowledge: Revised Objectives and Principles” for their further summary.

Russian Federation supports the development by the Secretariat of the draft provisions on the protection of Traditional Knowledge (TK), political objectives and general guiding principles of protection. Russian Federation supposes that the development of the draft political objectives and general guiding principles provides for a solid basis for further constructive discussion of important issues of protection of TK within the Committee.

In general, the document WIPO/GRTKF/IC/9/5 containing main text and Annex is built on the model and the basis of the document WIPO/GRTKF/IC/8/5. The main text of the document WIPO/GRTKF/IC/9/5 contains brief statement of the activities of the Committee on the issue of protection of traditional knowledge. We consider to be important the provision mentioned in Section III (p. 14) of the main text of the document WIPO/GRTKF/IC/9/5 stating that the results of the work of the Committee are not determined in advance by the mandate of the Committee neither in their form, nor in the status. Para 14 also contains possible approaches, many of which may be acceptable in the preparation of the results of the work of the Committee. Thus, the possibilities of the Committee in respect of the issues related to the protection of the traditional knowledge are broadened.

The Annex to the main text of the document WIPO/GRTKF/IC/9/5 - Revised Provisions for the Protection of Traditional Knowledge: Policy Objectives and Core Principles is divided into three sections: objectives of the protection, principles for the provisions of the granted protection, and also substantive provisions.

We suppose that the protection of the traditional knowledge must be, among others, aimed at:

- recognition the holistic nature of TK and its social, spiritual, economic, intellectual, educational and cultural value,
- promotion respect for traditional knowledge systems for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders,
- meet the actual needs of holders of traditional knowledge,
- promote conservation and preservation of traditional knowledge,
- support traditional knowledge systems,
- repress unfair and inequitable uses
- respect for and cooperation with relevant international agreements and processes promote equitable benefit-sharing
- curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources,
- 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;

Peoples of the Russian Federation have the right to preservation and development of their cultural identity, protection, restoration and preservation of original cultural and historic habitat. At the same time the policy in the field of preservation, creation and distribution of cultural values of indigenous peoples must not be detrimental to the cultures of other peoples of the country.

Special attention in the Russian Federation legislation is paid to minority peoples. Russian Federation guaranties its patronage in respect to preservation and restoration of cultural and national identity of minority ethnic communities of the Russian Federation by means of protection and stimulation, provided for in the federal governmental programs.

We also consider important the general guiding principles stated in Section 2 of the Annex to the document WIPO/GRTKF/IC/9/5, such as: the principle of responsiveness to aspirations and expectations of relevant communities (peoples), the principle of balance, the principle of Respect for and consistency with international and regional agreements and instruments, the principle of Flexibility and comprehensiveness, the principle of Recognition of the specific nature and characteristics of cultural expression, the principle of Complementarity with protection of traditional knowledge, the principle of Respect for rights of and obligations towards indigenous peoples and other traditional communities, the principle of Respect for customary use and transmission of TK, the principle of Effectiveness and accessibility of measures for protection.

We also consider important the general guiding principles stated in Section 2 of the Annex to the document WIPO/GRTKF/IC/9/5, such as the principle of responsiveness to the needs and expectations of traditional knowledge holders, principle of effectiveness and accessibility of protection, principle of respect for and cooperation with other international and regional instruments and processes, principle of flexibility and comprehensiveness, principle of recognition of the specific characteristics of traditional knowledge, principle of providing assistance to address the needs of traditional knowledge holders.

Given the abovementioned, we consider the provisions concerning the objectives and the general guiding principles, in general acceptable.

Traditionally the protection granted to intellectual property items is always limited in time, however, the provisions of Section 3 of the Annex to document WIPO/GRTKF/IC/9/5 state that the protection granted, which in its essence is close to the protection of intellectual property objects, may turn out to be unlimited in time, which makes it reasonable to study more thoroughly the possible consequences of such protection, taking into account, that as it was already mentioned at the sessions of the Committee the rights of the TK holders must not have advantages over the already existing intellectual property rights.

We consider worthy further study the proposal of Norway concerning the use of the provisions of Article 10-bis [Unfair competition] of the Paris Convention on the Protection of Industrial Property as a model in respect to the protection of TK.

Clear determination of subjects of the granted protection, the scope of the rights given and the term of protection is important for the grant of protection to the intellectual property objects. In this connection, the provisions stated in the section 3 of the Annex to the document WIPO/GRTKF/IC/9/5 require a more detailed study and clarification.

AMERICAN BIOINDUSTRY ALLIANCE (ABIA)

Comments on WIPO/GRTK/IC/9/5,
"The Protection of Traditional Knowledge: Revised Objectives and Principles"

Introduction and Summary

The American BioIndustry Alliance (ABIA) welcomes the opportunity to comment on document WIPO/GRTK/IC/9/5 ("The Protection of Traditional Knowledge: Revised Objectives and Principles," January 9, 2006). ABIA members strongly support WIPO's work and believe that continued focused efforts in WIPO will bring greater clarity to the needs of biodiverse developing countries that seek both social and economic benefits from the sustainable use of genetic resources and associated traditional knowledge. Traditional Knowledge Digital Libraries (TKDL), databases, and registries are an area of particular promise where the work of WIPO has already been helpful. Much more, however, needs to be done.

To that end, the ABIA urges WIPO to expand the work program on traditional knowledge (TK) of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) both to develop a universal system to harmonize existing TK databases and digital libraries and also to ensure that their benefits reach the smaller developing country members of WIPO.

The ABIA was established in September 2005 as a non-profit, non-government organization to provide focused advocacy in support of the full patentability of biotechnology inventions and seeks enabling conditions for biotechnology in developed and developing countries through sustainable, mutually beneficial Access and Benefit Sharing policies.

The ABIA believes that WIPO's program to protect traditional knowledge (TK) should support measures that simultaneously (i) help all stakeholders achieve their Access and Benefit Sharing (ABS) objectives and (ii) provide incentives for research in provider countries. Countries as varied as Australia and Costa Rica have used this approach in developing measures that serve to leverage their rich biodiversity into a recognized capacity for innovation based on their GR and related TK assets

ABS Enforcement and the Patent System

The ABIA is of the view that enforcement of ABS should be separate from the administration of patent rights, which are critical to the generation of the potential benefits that all parties seek from any ABS scheme. The biotechnology industry is united in the view that strong patent rights remain essential for the successful commercialization of new biotechnology products.

Additional, mandatory patent disclosure would not provide any positive incentives for research by provider countries, or create benefits for developing countries. Instead, a patent-centric system for the enforcement of ABS would create uncertainty; discourage the very patent-related activity that developing countries seek to benefit from; and, in any event, would not effectively address the issue of access and benefit sharing.

Positive Alternatives for TK Protection

ABS Agreements

Over the past year, the ABIA has engaged with other stakeholders in developing positive alternatives to the patent-centric enforcement of access and benefit sharing of GR inventions and related TK. Such alternatives would simultaneously protect TK and provide up-front benefits to provider countries.

Such solutions include a system of ABS agreements, made on mutually agreed terms, which provide front-loaded benefits to provider countries. Under this approach, provider countries can gain highly important nonmonetary benefits that can have a positive impact on research budgets, staff training; empowerment of human resources; technology transfer/infrastructure support; and conservation efforts. In addition, they can gain legal certainty through protection of intellectual property, marketoriented policies and a commitment to science and research, all of which facilitate the transfer of technology from the North to the South. At the ABIA Side-Event held at the CBD Eighth Conference of the Parties (COP- 8), representatives from Australia and Costa Rica explained how, consistent with the sustainable use of their GR and protection of TK, they had used such ABS agreements to gain social and economic benefits from their biodiversity.[2]

Traditional Knowledge Databases, Registries and Digital Libraries

Another promising approach, which is the focus of this paper, involves the use of traditional knowledge databases, registries and digital libraries (TKDL). The issues related to TKDLs are complex. Yet, as explained in the United Nations University Institute of Advanced Studies report, The Role of Registers & Databases in the Protection of Traditional Knowledge," TKDLs can play a substantial role in protecting TK.[3]

TKDLs provide patent examiners with a search tool to avoid the issuance of "bad" patents based on prior art, while at the same time preserving biotech patent standards needed to generate continued R&D investment. The dual purpose of the TKDL has been recognized by Dr. R A. Mashelkar, Director General of India's premier independent research institute the Council of Scientific and Industrial Research (CSIR): To mitigate this problem [of non-original inventions], the creation of TKDL in the developing world would serve a bigger purpose in providing and enhancing its innovation capacity… It could act as a bridge between the traditional and modern knowledge systems. Availability of this knowledge in a retrievable form in many languages will give a major impetus to modern research in the developing world, as it itself can then get involved in innovative research in adding further value to this traditional knowledge."[4]

The role of TK data bases and digital libraries in generating meaningful benefits to stakeholders from genetic resources and related traditional knowledge was the subject of a

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2 Additional information on all ABIA side event speakers and presentations referenced in this paper can be found at http://www.abialliance.com/html/news.html

3 United Nations University Institute of Advanced Studies, The Role of Registers & Databases in the Protection of Traditional Knowledge, January 2003, page 38.

4 "Intellectual Property Rights and the Third World," Current Science, vol. 81, No. 8, 25 October 2001.

side event that the ABIA sponsored at the fourth meeting of the ABS Working Group of the CBD in Granada, Spain. Presentations made by Dr. Shakeel Bhatti of the World Intellectual Property Organization (WIPO) and Dr. K. Gupta of the Council on Scientific and Industry Research (CSIR) of India, focused on the role of traditional knowledge databases, registries and digital libraries in providing positive benefits to stakeholders and in preventing issuance of patents lacking novelty or an inventive step by ensuring access to prior art. As Dr. Gupta explained, the TKDL database acts as a bridge between ancient verses in different local languages and patent examiners in other countries, since it provides information on modern as well as local names in a language and format understandable to patent examiners. He stressed that the TKDL does not seek to prevent scientific research in the area of medicinal plants; it only seeks to break barriers in language and format for existing codified knowledge available in the public domain. He concluded that the TKDL is an important tool both to prevent issuance of patents based primarily on prior art, as well as to promote new research.

The ABIA has contracted independent research on the role of the Indian TK Digital Library in encouraging innovative research by CSIR institutions on Ayurvedic and other traditional knowledge and/or medicinal plants. Between 1980 and 2005, TK-related innovation by CSIR scientists resulted in 725 granted or published US patents. Of the 161 nonbiotechnological patents that were directly related to TK and GR, 123 were herbal/medicinal applications; 24 involved plants and 14 involved microorganisms related to bioremediation. CSIR's US patents were informed by the TDKL, which provided both a road map to CSIR scientists as well as information on prior art to US patent examiners.

At the ABIA Side-Event in Granada in February, 2005, Dr. Bhatti of WIPO confirmed that, beyond India, there are a number of other developing countries in all regions that have adopted databases and registries for traditional knowledge and genetic resources, both individually and through regional initiatives. Among the databases that he cited were the Traditional Chinese Medicine (TCM) Patent Database of China; the system of national and local registers established under Peruvian Law 27811; and the Biozulua Data Base in Venezuela, which covers native medicines, ancestral technology and traditional agricultural knowledge. The development of TKDLs is not the exclusive domain of governments. For example, the American Association for the Advancement of Science Project on Traditional Ecological Knowledge, together with a group of nonprofit foundations and other non government organizations, has established the Traditional Ecological Knowledge Prior Art Database (T.E.K.* P.A.D.), which is an index and search engine of existing Internet-based, public domain documentation concerning indigenous knowledge and plant species uses. According to information found on its website,[5] TEK*PAD brings together and archives in a single location, various types of public domain data necessary to establish prior art. Data includes taxonomic and other species data, ethnobotanical uses, scientific and medical articles and abstracts, as well as patent applications themselves. ABIA members recognize the concerns raised by some that a public system of TK databases or digital libraries would provide a "license to steal" by cataloging GR and associated TK in a way that would be accessible to commercial researchers and scientists. The ABIA views the argument that the mere availability of TKDLs will lead to increased biopiracy as misleading. Such a view may be based on the incorrect assumption that the mere knowledge of the GR and/or TK is itself patentable. In fact, any TK that is known to a community and/or included in a TKDL would constitute prior art, and would thus not be patentable. This important and basic point is often overlooked in the TKDL debate. In this regard, the ABIA wishes to stress that, to the extent

[5] http://ip.aaas.org/tekindex.nsf

that any TKDL system encourages new, innovative research in the country of origin that uses, as its starting point, existing knowledge about GR/TK, it will benefit the biodiverse developing countries themselves. The recent independent research on India commissioned by the ABIA and presented at the CBD ABS Working Group in Granada demonstrates that R&D and patenting by CSIR scientists increased as a result of the development of the TKDL. At the same time, the TKDL did not result in issuance of "bad" patents by the U.S. PTO on Indian GR/TK.

Experience at the national level with TKDLs demonstrates their importance and utility in informing and facilitating the patent examination process and thus preventing "bad" GR/TK-related patents. The ABIA believes that the logical next step is the development of an inter-operable, integrated and comprehensive system of national TKDLs. Such an internationally integrated system, which, to some degree, would be publicly available, would make it easier for patent offices to prevent bad patent issuance. It is particularly important that there be a mechanism developed to benefit smaller countries so that they can "dock" to a larger TKDL system.

In this regard, the ABIA welcomes the recent submission of the Government of Japan[6] that proposed such data bases as an affirmative alternative to patent disclosure. The Japanese submission reflects the growing recognition and support by developing and developed countries alike of the utility of TKDLs in the ABS debate. The Japanese submission provides a thorough analysis of the relationship between the CBD and the patent system and comes to the conclusion that data bases related to GR and TK are "an effective solution . . . which is accessible by examiners in any country, in order to avoid the erroneous granting of patents for genetic resources and related traditional knowledge." Such "access-friendly" data bases, the GOJ contends, would create an environment that would enable examiners to perform efficient searches on a research basis. The GOJ paper calls for a "one-stop" system where GR and related TK can be researched once and comprehensively, rather than for a "system in which each data base created by each country has to be searched separately."

Conclusion

The ABIA recognizes that many WIPO members, especially among the smaller developing countries, do not currently have the capacity or expertise to establish TKDLs that would dovetail with existing systems found in countries such as India and China. It consequently urges the IGC to focus its efforts on assisting these countries to develop the necessary TKDL-related infrastructure and on providing a process for the ultimate development of interoperable systems. In that regard, the ABIA urges the IGC to use the points raised in the Japanese paper as the terms of reference for an expanded work program on TK both to develop a universal system to harmonize existing TK databases and digital libraries and also to ensure that their benefits reach the smaller developing countries.

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6 "The Patent System and Genetic Resources," WIPO/GRTK/IC/9/13, April 20, 2006.

SECRETARIAT OF THE PERMANENT FORUM ON INDIGENOUS ISSUES

Introduction

The following comments regarding WIPO's two documents The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles (WIPO/GRTKF/IC/9/4) and The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/9/5) are submitted by the Secretariat of the Permanent Forum on Indigenous Issues. The secretariat's comments are based on an analysis of the documents and are not, in any way, intended to represent the views of the members of the United Nations Permanent Forum on Indigenous Issues.

The Secretariat of the Permanent Forum on Indigenous Issues (SPFII) was established by the General Assembly in 2002. SPFII is based at UN Headquarters in New York in the Division for Social Policy and Development of the UN Department of Economic and Social Affairs (DSPD/DESA).

SPFII's main role is to:

- prepare for the annual sessions of the Permanent Forum each May. The secretariat
- also provides support to the Members of the UNPFII throughout the year;
- advocate for, facilitate and promote coordination and implementation within the UN system of the recommendations that emerge from each annual session;
- promote awareness of indigenous issues within the UN system, governments, and the broad public; and
- serve as a source of information and a coordination point for advocacy efforts that relate to the Permanent Forum's mandate and the ongoing issues that arise concerning indigenous peoples.

The SPFII acknowledges the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore over the past nine sessions. SPFII also acknowledges the previous work undertaken over several decades by the WIPO secretariat on the protection of Traditional Cultural Expressions/ Expressions of Folklore, its fact finding missions, extensive community consultations, surveys and analysis of existing national and regional legal mechanisms under existing intellectual property and other laws.

The revised policy objectives and principles of both documents are very comprehensive as they include policy issues, statements and debates from member states, indigenous peoples' organizations and other interested civil society organizations and parties. While it has been pointed out on numerous occasions in the past, by indigenous peoples' organizations, it needs to be stated again that having the two distinct draft objectives (Cultural Expressions/Expressions of Folklore and Traditional Knowledge) could be seen as overlooking the fact that that indigenous knowledge systems are holistic and interrelated. At the same time it is acknowledged that attempts have been made to make both areas complementary to each other.

The Protection of Traditional Cultural Expressions(TCEs)/Expressions of Folklore(EoF): Revised Objectives and Principles (WIPO/GRTKF/IC/9/4)

Policy Objectives

The policy objectives for the protection of TCEs and EoF are broad statements that cover a range of issues from recognizing the value of indigenous cultural heritage, empowering communities, to promoting intellectual and artistic freedom, research and cultural exchange on equitable terms. As broad statements, they should typically form part of a preamble to law or other instruments.

General Guiding Principles

Some of the principles in this section include issues that indigenous peoples have been advocating for a number of years. It is crucial that the protection of TCEs/EoF reflect the aspirations and expectations of indigenous communities and well as their customary laws and protocols. SPFII suggests that protection measures should be consistent with relevant binding legal instruments, United Nations declarations and human rights instruments.

Article 1: Subject Matter of Protection

Under the title Criteria for Protection, section iii, it is stated that "Expressions that characterize more recently established communities or identities would not be covered". It is acknowledged that this term refers specifically to the statement "where the collective has developed only in recent times, such as with modern religious sects" . SPFII suggests this issue requires further clarification because the situation of indigenous peoples is not static and is always changing. For example, migration of indigenous communities from their homelands across borders often results in the formation of new communities. Would the TCEs and EoF of these communities not be afforded protection?

Under the title Choice of Terms, SPFII agrees that there should be some flexibility in regards to terminology. However, detailed decisions on terminology at the national and regional level should be undertaken in partnership with indigenous peoples and communities.

Article 4: Management of Rights

The role of an "Agency" acting at the request and on behalf of relevant communities is an important concept but the question remains as to how realistic it would be for an agency to act on behalf of indigenous peoples and communities. In this regard, the reservations expressed by Colombia and the Saami Council are supported by SPFII.

Article 5: Exceptions and Limitations

SPFII agrees that exceptions and limitations in regards to copyright laws in general should be established by member states however, it should also be established in consultation with indigenous peoples and communities.

Article 6: Term of Protection

Indigenous peoples' desire for indefinite protection for some aspects of expression of their communities is extremely important and for this reason, the position of indigenous peoples is supported by SPFII in this provision.

Article 7: Formalities

SPFII agrees that as a general principle, TCEs/EoF should be protected without formality, similar to copyright. The issue of registration or notification for TCEs/EoF that require stronger protection requires further development. SPFII is of the opinion that an administrative organization dealing with the range of issues expressed in the provisional Article would need to be clear about its role to avoid a cumbersome workload due to the complexity of the issues.

Article 8: Sanctions, Remedies and Exercise of Rights

SPFII agrees that civil and criminal sanctions and remedies for breaches of rights, particularly where there has been community hurt and cultural harm should be considered under this provision. Further, indigenous peoples must be consulted at all levels in regards to any development on sanctions, remedies and enforcement.

Article 9: Transitional Measures

The statement that the concept of 'public domain' is not recognized by indigenous peoples was addressed by Victoria Tauli-Corpuz in her paper presented to the International Workshop on Traditional Knowledge in Panama City in September 2005 . In considering Ms Tauli-Corpuz's paper and the Tulalip Tribes' statement that the failure of governments and citizens to recognize and respect customary law, it is obvious that indigenous and non-indigenous peoples have different understandings of the concept of 'public domain'. Therefore SPFII agrees that the concept of 'public domain' and the options set out in this provision require further reflection.

Article 10: Relationship with Intellectual Property Protection and other Forms of Protection, Preservation and Promotion.

This provision includes a good compilation of IP laws as well as non-IP measures that could be used to protect TCEs/EoF.

The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/9/5)

Policy Objectives

As previously stated, the policy objectives are broad statements and should typically form part of a preamble to law or other instrument. There is however one issue that could be added to (vi) Support traditional knowledge systems; which includes the need to support the environment in which traditional knowledge is transmitted by and between traditional knowledge holders. SPFII is of the opinion that supporting the environment in which traditional knowledge is transmitted relates to wider issues of how traditional knowledge is carried, transmitted and maintained. For example, through

language and speech, hence indigenous languages must be maintained as they play a critical role in keeping traditional knowledge alive. Also, practices that keep traditional knowledge alive must also be supported such as fishing, hunting, gathering, ceremony and a wide range of community activities. Hence, what is under threat of extinction is not traditional knowledge itself but the opportunities for young people to learn, practice and respect the knowledge production and practices of their elders.

Section ix Respect for and cooperation with relevant international agreements and processes. This section discusses international and regional instruments and processes, making references to regimes that regulate access and benefit sharing. It does not specifically mention important instruments such as human rights instruments and the Declaration on the Rights of Indigenous peoples. SPFII suggests that these specific instruments and declaration be mentioned under this policy objective.

General Guiding Principles

The above statement about supporting the environment in which traditional knowledge is transmitted is also relevant in sections (h) and (i).

Article 1: Protection Against Misappropriation

SPFII agrees to the addition of 3 (v) because legal measures should prevent mutilation, distortion or derogatory modification of traditional knowledge which is of moral or spiritual value to traditional knowledge holders.

Article 6: Fair and Equitable Benefit-Sharing and Recognition of Knowledge Holders

This Article raises important issues in terms of commercialization of traditional knowledge and the possible benefits covering both monetary and non-monetary benefits as well as the development of contractual arrangements for the different uses as set out in the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization. While the discussion regarding this issue is still on-going and is still in the developmental stage, SPFII makes the suggestion that this section could include information that clarifies how these discussions are linked to the Convention on Biological Diversity's (CDB) work on protecting Traditional Knowledge and its proposed international regime on access and benefit sharing. This section could also include the distinction between the CDB's work on protecting genetic resources and WIPO's interest in the inventions derived from genetic resources (which falls under the Patents Act).

Article 7: Principle of Prior Informed Consent

The SPFII has always used the term free, prior and informed consent (FPIC) which is an integral component of indigenous peoples' rights to lands, territories and resources. Free, prior and informed consent also means that indigenous peoples should not only have the right to consent, but also the right to refuse consent. Contracts and agreements can be useful because they are flexible and enable all parties to an agreement with an opportunity to negotiate a range of terms and conditions. However, SPFII has concerns that contracts and agreements are often negotiated without any nationally consistent standards or guidelines. They can also have the potential to create a disincentive for governments to develop national laws on access and benefit sharing.

Article 9: Duration of Protection

Given the transgenerational nature of traditional knowledge, SPFII supports the view that the period for protecting traditional knowledge against misappropriation should be unlimited.

Conclusion

The SPFII acknowledges that policies and debates regarding the protection of indigenous knowledge systems is a rapidly evolving area and for this reason there is no one solution that fits the large number of diverse indigenous communities not only at the international level but also at the national and local levels. There is also the recognition that this is a complex area and the challenge is to find solutions that do not place administrative burdens on indigenous communities that are already dealing with a myriad of agencies on many levels in regards to the multiple issues affecting them.

There is a view within indigenous communities that the current intellectual property rights regime is an alien and problematic construct and therefore should not be the only solution for protecting TCEs/EoF and Traditional Knowledge. Further, the burden of proof of how indigenous peoples maintain, practice and transmit traditional knowledge should not rest with indigenous peoples. Hence, the focus on establishing registers has to be considered carefully to avoid this any unnecessary burdens being placed on indigenous peoples. Indigenous peoples need to maintain their responsibilities in regulating traditional knowledge protection and practices including defining traditional knowledge within their communities. Therefore, the development of any protection measures must consider these wider issues.

IRAN (ISLAMIC REPUBLIC OF)

WIPO/GRTKF/9/4

– Article 1(a)(IV), Handicraft is a general term so the paragraph should be amended as follows:

(IV) Tangible expressions, such as Productions of Art and/or handicrafts….

– In the last line the word “handicraft” should be deleted.

– Article 2, in the chapeau after the cultural, the words “or local” should be added.

– Article 3(a) line 4 after the relevant Community, the words “and the owner” should be added. And Article 3 (c) after communities the words “and the owner” should be added.

– Article 4(a) line 3 after agency acting, the words “on the best of national Law” should be added.

– Article 4(i) line 2 after the decision-making, the words “in the framework of national procedures” should be added.

– Article 4(2), after the word directly, the words “or indirectly in accordance with National Law” should be added.

WIPO/GRTKF/9/4

On policy objectives – page 3

– (V) Line 6 after the sentence operate in a manner supportive of the protection of traditional knowledge, the words “and the sui generis systems” should be added.

– (VII) Line 5 after direct the word “indirect” also should be added.

– (VIII) The word repress should be replaced by the word “prevent”.

– (IX) The sentence should be amended as follows:
Operate consistenty with and supportive of …..

– (XIV) The sentence should be amended as follows:
“Curtail the grant or exercise of, and facilitate nullification of Intellectual Property Rights over traditional knowledge” ……”

SWITZERLAND

At its ninth session (24 - 28 April 2006), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Committee) decided to invite the Committee participants to submit written comments on the contents of documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 to the WIPO Secretariat before July 31, 2006, so that the comments could be circulated prior to the tenth session of the Committee.

The present submission contains the comments by Switzerland on documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. These comments complement the comments Switzerland provided during the discussions of the ninth session of the Committee on the two documents.

General Comments

In the view of Switzerland,
1. agreeing on the policy objectives and general guiding principles of the protection of traditional knowledge and of traditional cultural expressions (TCEs), and
2. establishing a working definition of the terms “traditional knowledge” and “TCEs”,

are two fundamental tasks that need to be carried out at the outset of any discussions of the Committee on traditional knowledge and TCEs.

The Committee has been discussing the policy objectives and general guiding principles at several of its previous sessions. Furthermore, the Secretariat put forward comprehensive definitions of the terms “traditional knowledge” and “TCEs” (see, e.g., WIPO/GRTKF/IC/3/9, para. 25, and WIPO/GRTKF/IC/8/4, Annex, p. 10), which provide an excellent basis for the Committee’s discussions on terminology. Up to now, however, the Committee’s work on these tasks has not been concluded. Accordingly, it is necessary for the Committee to continue discussing in greater detail and eventually agree upon these policy objectives and general guiding principles, and to establish working definitions of the two terms.

Only once these fundamental tasks have been carried out, can the Committee take further steps with regard to the protection of traditional knowledge and TCEs. Otherwise, the Committee’s work will leave out these fundamental and necessary steps. Accordingly, Switzerland agrees with those delegations who consider discussing possible substantive provisions on the protection of traditional knowledge and TCEs as are proposed in WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 to be premature at this point in time. We will therefore provide comments on the proposed substantive provisions only at a later stage in the discussions of the Committee on the protection of traditional knowledge and TCEs.

In contrast to what has been stated by some delegations at the ninth session of the Committee, continuing the discussions on the policy objectives and general guiding principles as well as establishing working definitions of the terms “traditional knowledge” and “TCEs” is not a futile exercise. On the contrary, Switzerland views

these discussions as a necessary prerequisite for any meaningful and result-oriented further work of the Committee on the protection of traditional knowledge and TCEs.

In light of these considerations, Switzerland considers it to be crucial that the Committee continues and intensifies its work on the policy objectives and the general guiding principles of the protection of traditional knowledge and TCEs as well as on relevant terminology. One important step in this process is the current compilation of written views on these objectives and general guiding principles.

Specific Comments

Switzerland considers the revised policy objectives and the general guiding principles as contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 to take the work of the Committee on the protection of traditional knowledge and TCEs one important step ahead.

Switzerland has more specific comments to offer on two draft policy objectives as set out in document WIPO/GRTKF/IC/9/5:

Switzerland supports the addition of policy objective roman 4 regarding the promotion of the conservation and preservation of traditional knowledge. It considers this to be a crucial aim of the protection of traditional knowledge and relevant to the work of the Committee, as far as it relates to intellectual property.
Switzerland does not support the revised wording of policy objective roman 14. Instead, preference is given to the retention of the wording contained in the previous version of the policy objectives and principles, that is, document WIPO/GRTKF/IC/7/5.

In the context of databases on traditional knowledge, Switzerland refers to its proposals for the establishment of an international internet portal for traditional knowledge. This portal would link electronically existing local and national databases on traditional knowledge, and could facilitate access by patent authorities to traditional knowledge stored in such databases. For more details on this proposal, reference is made to paras. 30 to 32 of WTO-document IP/C//W/400 Rev.1.

UNITED STATES OF AMERICA

The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Policy Objectives and Core Principles

Comments of the United States of America

The United States expresses its appreciation to the International Bureau for its work on "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles" in document WIPO/GRTKF/IC/9/4. We benefited greatly from the discussion of these objectives and principles at the ninth session of the IGC, and we look forward to continuing and deepening that discussion at the tenth session of the IGC, with a view toward enriching our understanding of these complex issues. In advance of the tenth session of the IGC, the United States submits these written comments.

The United States is extremely interested in learning from the experience of other IGC members, listening carefully to specific issues and concerns related to TCEs/EoF, and exchanging views, information, and best practices on preserving, promoting, and fostering an environment of respect for TCEs/EoF. The United States believes that such a sustained and focused discussion will lead to the kind of deep, mutual understanding that will inform and clarify the future work of the IGC

Building on a record of accomplishments in the IGC over the last several years, the United States believes that a shared understanding on many objectives and principles is beginning to emerge. In the view of the United States, recognizing the intrinsic value of and promoting respect for TCEs/EoF are of fundamental importance. Other very important values are reflected in a number of objectives and principles related to the role of communities in creating, sustaining, promoting, protecting and preserving TCEs/EoF, including customary practices, community cooperation, innovation, creativity and development.

In a world where the very survival of some TCEs/EoF is threatened, the United States believes that contributing to their safeguarding is of critical importance. The United States believes that the important values of intellectual and artistic freedom, research, and cultural exchange, which help to highlight and celebrate our cultural diversity, must co-exist with the values of protecting and sustaining TCEs/EoF in an environment that recognizes their intrinsic value.

Once a consensus has been reached around the policy objectives and core principles, the United States looks forward to a robust, focused and sustained discussion within the IGC of the application of these concepts to specific issues and concerns related to TCEs/EoF. Of these, measures related to preventing the misappropriation of traditional cultural expressions/expressions of folklore and precluding invalid IP rights will demand our full attention. The United States looks forward to exploring these and other issues in greater depth at the extended tenth session of the IGC, November 30 to December 8, 2006.

SAAMI COUNCIL

General observations

The Saami Council has previously commented extensively on the Policy Objectives and Core Principles contained in the Annex to Document 9/4, both during the IGC sessions and in written document submitted to the WIPO Secretariat, as requested. We essentially refer to these earlier submissions, and will here only offer comments on the most crucial issues contained in Document 9/4.

Generally speaking, we believe that the Traditional Cultural Expressions (TCEs) draft Policy Objectives and Core Principles have improved considerably during the cause of the IGC. We particularly appreciate the fact that many of the observations submitted by indigenous peoples' representatives have found their way into the Policy Objectives and Core Principles. As a result, it is the Saami Council's position that the Policy Objectives and Core Principles now contain several elements that – if adopted and implemented – could prove very useful for the protection of indigenous peoples' TCEs. Still, certain improvements are necessary for the Guidelines to be acceptable.

Chiefly, our concern is that the Guidelines are not sufficiently clear on who are the owners, holders and custodians of TCEs. In addition, further work is needed to address the matter of TCEs that conventional IPR-regimes regard to be in the so-called public domain.

Comments on the specific provisions in the Guidelines

The Saami Council can accept the "Objectives" of the Policy Objectives and Core Principles, as drafted in Document 9/4. We particularly underline the importance of principles (iii) – respect for indigenous peoples' human and other rights – and (vi) – respect for indigenous peoples' customary practices. These objectives are absolutely imperative in any regime on protection of TCEs.

Largely, we are also happy with the "General Guiding Principles". Here, we place particular importance on that the Commentary to the Principle of responsiveness to aspirations and expectations of indigenous peoples clarifies that the responsiveness includes respect for indigenous customary laws. We have concern, however, with the Principle of balance, as explained in the Commentary. Certainly, there is a need to take into account also the interests of TCE-users. Still, interests can never be balanced against rights of TCE-holders, such as for example to their right to consent or not consent. Naturally, a right – particularly a human right – always takes precedent over an interest.

The Saami Council is largely in agreement with most of the Substantive Provisions, too. We can support Article 1 and Article 2 as drafted, but with regard to the Commentary, we have to underline that the notion that our rights to TCEs should somehow be vested in a governmental office or agency is completely unacceptable.

With regard to Article 3, we can sympathize with the three layer approach proposed. Even though this is not the way we would ideally want it to be, today, being realistic, a protection system for TCEs, agreeable to all, probably will have to distinguish between various forms of TCEs, based on the value and importance of that particular element to

the originator of the TCE. We commend the inclusion of the reference to free, prior and informed consent, suggesting a right for indigenous peoples to exclusively determine over the central elements of our cultural heritage. That said, the Saami Council firmly believes that the lists contained in Article 3 (a) (i) and (ii) need to be enlarged, so that protection is extended to a larger part of indigenous TCEs, that conventional IPR-systems regard to be in the so called public domain. Further, we continue to have concern with the fact that protection for TCEs is made subject to registration in a public register. At least it should be clarified that the provision does not apply, should it be cultural sensitive for the people in question to register that particular element.

With regard to Article 4, we take comfort in the fact that the Commentary clarifies that a government agency only has a role to play in the management of TCEs if the people from which the TCE originates consents to such a process. We are concerned, however, that the actual Article 4 – referring merely to "Consultation" – does not clearly convey this demand for consent. The article needs to be redrafted accordingly.

On Article 5, the Saami Council finds ourselves in agreement with para. (a) (i) and (ii) as well as para. (b). The list in para. (a) (iii) is too inclusive, however. The reference to research is particularly troublesome, given that indigenous peoples traditionally have had – and continuous to have - a lot of problems with research institutions.

We are fine with Article 6.

With regard to Article 7, we have already flagged our concern with the demand for registration for protection of TCEs.

We are fine with Article 8, again, however, provided that it is clarified that the government agency gets involved in the enforcement of rights only to the extent indigenous peoples consent thereto.

As to Article 9, we can accept the intermediate solution chosen, acknowledging that it might take some time to bring IPR-legislation into conformity with the Objectives and Core Principles. Still, we need to see the reference to "respect for rights previously acquired by third parties" deleted.

We are fine with Article 10.

With regard to Article 11, we believe that this issue demands some further consideration. We would like to commend the WIPO Secretariat, however, for recognizing the role that indigenous customary legal systems must play a role also in cross-boundary protection of TCEs.

Conclusion

If the concerns outlined above are catered for, the Saami Council can support the adoption of the Policy Objectives and Core Principles, as well as the initiation of a process aiming at transferring the Guidelines into a legally binding document.

SAAMI COUNCIL

The WIPO IGC Revised Provisions for the Protection of Traditional Cultural Expressions – Policy Objectives and Core Principles

General observations

The Saami Council has previously commented extensively on the Policy Objectives and Core Principles contained in the Annex to Document 9/5, both during the IGC sessions and in written document submitted to the WIPO Secretariat, as requested. We essentially refer to these earlier submissions, and will here only offer comments on the most crucial issues contained in the Guidelines.

Generally speaking, we believe that the Traditional Knowledge (TK) draft Policy Objectives and Core Principles have improved during the cause of the IGC. We particularly appreciate the fact that some of the observations submitted by indigenous peoples' representatives have found their way into the Policy Objectives and Core Principles. As a result, it is the Saami Council's position that the Policy Objectives and Core Principles now contain elements that – if adopted and implemented – could prove very useful for the protection of indigenous peoples' TK. Still, a number of improvements are necessary for the Guidelines to be acceptable.

Comments on the specific provisions in the Guidelines

The Saami Council is largely in agreement with the Policy Objectives. We are concerned with, however, that the TK Policy Objectives are ambiguous as to who are actually the holders of TK, indeed considerably more ambiguous than the TCE Guidelines, that still also are far from perfect in this regard. For the Guidelines to be acceptable, we need to see it clarified that the right-holders to TK is the people from which the TK originates. Further, compared to the TCE Guidelines, the TK Policy Objectives place less emphasis on the importance of respecting the rights of the TK holders. We would need to see this corrected, as well.

We are generally in agreement with the General Guiding Principles too. However, in para. (b), the phrase "of indigenous peoples and local communities and other traditional knowledge holders", needs to be added at the end of the provision. Further, in para. (f), after the reference to "legal systems", we want to see the inclusion of the term "including customary legal systems".

With regard to the Commentary to the General Guiding Principles, we agree with most parts of these as well, and particularly appreciate the highlighting of the importance of respecting the rights of TK holders, including the right to consent or not consent to access to TK as well as of indigenous customary laws pertaining to such issues.

As we have done repeatedly, the Saami Council reiterates our strong objection to para. (f) of the Commentary. Section (f) simply misrepresents international law, and would, if implemented, violate e.g. the UN Charter, which both WIPO and its member states obviously are bound to respect. We underline that we do not challenge the fact that states - as sovereigns – do have rights to genetic and other natural resources within their national borders. Equally firmly established under international law is, however, the existence of competing rights to such natural resources, such as indigenous peoples'

right to self-determination and our land and resource rights. Moreover, as human rights, these rights do not only compete with, but actually often precedent over the principle of state sovereignty. It is consequently simply a misrepresentation of international law to single out one right (state sovereignty) that pertain to genetic resources, without any reference whatsoever to the competing rights that also apply to such resources. There are two options. Either section (f) is altogether deleted from the Objectives and Core Principles. Alternatively, the provision is redrafted to accurate reflect international law on the area, i.e. references are included to all rights that compete with – and sometimes take precedent over - state sovereignty. We repeat that this is a deal-breaker for us. The Saami Council would denounce any Guidelines that include the language currently contained in section (f), in isolation. And so would, we believe, almost all other indigenous peoples´ representatives.

Further, the Saami Council strongly objects to para. (h), suggesting that indigenous peoples' customary laws should be recognized only subject to national legislation. This must be a drafting mistake, since obviously the recognition of the laws of one people cannot be dependent on the will of another. Any language suggesting otherwise would violate the fundamental principle of non-discrimination, a norm that constitutes jus cogens – a pre-emptory norm. It is outside the mandate of WIPO to adopt any language with legal implications that contradicts pre-emptory norms.

Turning to the Substantive Principles, we would like to register our concern with the drafting of Article 1 – "Protection against Misappropriation". Generally speaking, we think the scope of protection is too limited, as it will leave a substantial part of traditional knowledge that conventional IPR-regimes consider to be in the so called public domain continuously without protection.

We are fine with Article 2 – "Legal form of Protection", Article 3 - "General Scope of Subject Matter", Article 4 - "Eligibility for Protection" and Article 5 – "Beneficiaries of Protection".

With regard to Article 6 on benefit sharing, we can accept this one too, provided that para. 1 is clarified to express that benefit sharing can only take place following a correct application of the principle of free, prior and informed consent. Further, in para. 2, we would like to see the insertion of "if appropriate" after the word "need".

As to Article 7 on prior and informed consent, the Saami Council can accept this Article only if the phrase "subject to these principle and relevant national laws" is deleted from para. 1 and the phrase "as provided by applicable national legislation" from para. 2. The concept of free, prior and informed can be described as a bundle of rights, many of them human rights, such as, again, indigenous peoples' right to self-determination and our land and resource rights. Per definition, human rights can never be subject to national legislation. Consequently, Article 7, as currently drafted, contradicts a fundamental international legal principle, and must be corrected accordingly. In this context, it can be added that it is our understanding that the aspiration is that the international regime shall be legally binding. Obviously, to render provisions in a legally binding international legal instrument subject to national legislation, constitutes a contradiction in terms.

Turning to Article 8, we have concerns with para. 1. (ii) and in particular with para. 2. Certainly, indigenous peoples generally are positive towards sharing our medical

practices to the benefit of humanity. Still, we find it unbalanced that para. 1. (ii) grants an open-ended licence for all government hospitals to freely use and dispose over our traditional knowledge. Even more problematic is, however, para. 2, which allows states to exclude from the principle of prior and informed consent all traditional knowledge which conventional IPR-regimes perceive to be in the so called public domain. This provision is completely unacceptable, as it excludes from protection a substantial bulk of indigenous knowledge, and thus to a large extent renders the Guidelines meaningless. Para. 2 needs to be deleted –or at least seriously modified – for the Guidelines to be at all acceptable.

We are fine with Article 9 – "Duration of Protection".

We can support Article 10 – "Transitional Measures", provided that the last sentence is deleted.

With regard to Article 11 – "Formalities", we support para. 1. Para. 2, however, need to be modified to clarify that no registration may take place without the consent of the TK holders. We believe this to be in line with international law on the area, including a recent similar decision by the CBD COP 8.

We need to see Article 12 – "Consistency with the Legal Framework" deleted. As explained earlier, the Article as currently drafted contradicts well established international law and violates the UN Charter. Indigenous peoples have human rights to traditional knowledge and natural resources that can, per definition, not be subject to national legislation.

We could support Article 13 – "Administration and Enforcement of Protection", provided that at the end of para. 1. (a) (i) –(v) is added the phrase "in accordance with these Objectives and Core Principles and international law".

With regard to Article 14 - "International and regional protection", our comments are similar to those on the TCE document. We thus believe that this issue warrants some further consideration, but emphasize the importance of recognizing the role that indigenous customary legal systems must play also in cross-boundary protection of TCEs.

AUSTRALIA

WIPO/GRTKF/IC/9/4: 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objective and Principles'

Australia welcomes the opportunity to comment on WIPO/GRTKF/IC/9/4 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objective and Principles'. Australia notes that the Secretariat of the World Intellectual Property Organisation Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC) has taken account of Australia's comments on WIPO/GRTKF/7/3 in drafting the revised objectives and principles for the protection of traditional cultural expressions (TCEs)/expressions of folklore (EoF).

I. POLICY OBJECTIVES

Australia strongly agrees with the statement on page five of the Annex that the key initial step in the development of any regime or approach for the protection of TCEs/EoF is to first determine the relevant policy objectives. Only once objectives are developed which clearly outline the intended purpose behind the protection of TCEs/ EoF, will the Committee be able to focus on a possible outcome.

It is also important that the objectives and principles are clearly linked to the WIPO IGC mandate. The Secretariat has noted that the revised objectives have been rephrased to distinguish between objectives relating to the protection of TCEs/EoF at the IP interface and other objectives relating to other policy areas. It is important that the objectives do not lose their connection to the aim of protecting TCEs/EoF and do not extend into issues which would be more appropriately considered in other international fora.

Australia supports in principle objectives (i)-(iii) relating to recognising, respecting and being guided by Indigenous communities about treatment of TCEs/EoF. These three objectives cover broad elements which are central to developing effective and desirable mechanisms to protect TCEs/EoF. However, the breadth of these objectives means that they incorporate elements that are raised elsewhere in other objectives and principles. For example, objective (i) requires that TCEs/EoF be acknowledged as frameworks of innovation and creativity, while this is also specifically referred to in objectives (viii)-(x) which require the encouragement of innovation and cultural diversity. As the objectives and principles are expected to provide clarity and scope, it is necessary to ensure that they do not overlap in this way.

Australia supports the need to ensure that TCEs/EoF are not misappropriated under objective (iv) but this should not conflict with existing proprietary rights.

Australia notes that the term 'misappropriated' can potentially cover a broad scope of issues and therefore encourages greater discussion about the meaning of 'misappropriated' to ensure that the term is fully considered by Member States.

Australia has remedies to address instances where TCEs/EoF have been misrepresented or misappropriated. Australia is developing Indigenous communal moral rights legislation. This legislation will facilitate the attribution of copyright works based on Indigenous beliefs to the relevant Indigenous community and provides that a community may obtain a right of integrity in relation to the work.

Australia is also taking practical steps to promote equitable benefit-sharing from the use of TCEs associated with genetic resources and to discourage misappropriation through the fair dealing and transparency provisions contained in regulations 8A.08 and 8A.10 of Division 8A.2 of the Environment Protection and Biodiversity Conservation Regulations 2000. Australia also has a number of other pieces of legislation which help protect material of significance to Indigenous communities, including: the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 which allows a Federal Minister to make declarations for the protection of areas or objects under threat of injury or desecration that are significant in accordance with Aboriginal tradition and the Protection of Moveable Cultural Heritage Act 1986 which restricts the transfer of 'significant' cultural items outside of the country and restricts the importation of illegally exported moveable cultural heritage from the country of origin.

Australia is also exploring practical measures to address unethical conduct in the Indigenous art sector. For example, a parliamentary inquiry into the Indigenous visual arts and crafts sector will examine and make recommendations on strategies and mechanisms to strengthen and protect the sector. This will include recommendations to address unscrupulous conduct that occurs in relation to Indigenous art works.

These pieces of legislation and projects seek to prevent misappropriation in the context of both gaining the use of TCEs without acknowledgement or authorisation of an Indigenous community or inappropriately exploiting material obtained with consent.

Greater discussion about the term 'misappropriated' is desirable so that Member States have a greater appreciation of what the term covers (ie would it cover the examples outlined above). This would assist in determining whether the objective overlaps with other objectives or guiding principles.

In objective (iv), Australia considers that the phrase 'including effective enforcement measures' is too prescriptive a requirement for a policy objective and should be removed. Without this phrase, Member States will have greater flexibility to determine what means can be provided to ensure the TCEs/EoF are not misappropriated. Flexibility is required in the policy objectives and guiding principles so that Member States can appropriately adopt local solutions for the benefit of their Indigenous communities.

Australia could support objective (v) to the extent that any rights given over TCEs/EoF are consistent with current national and international law and principles and would not affect the integrity of the current IP system.

Objective (xii) is unclear as to who is an 'unauthorised party' and in what circumstances are they 'unauthorised'? For example, is it a party who does not have authorisation by an Indigenous community to gain legal ownership over the IP rights or is it a party who misrepresents themselves as being Indigenous or a party who claims IP rights over a work which they pass off as being Indigenous in origin?

Australia would be unable to support objective (xii) if any rights given in relation to TCEs/EoF were to prevail over the existing IP system. It could not support an objective which has the potential to undermine national and international IP laws. Further discussion is required about the meaning of this objective and its potential scope.

II. GENERAL GUIDING PRINCIPLES

Several objectives and guiding principles deal with the role of customary law and TCEs/EoF. Australia does not recognise a separate system of law based on Indigenous customary law but aspects of customary practices can co-exist to the extent that they do not conflict with established international and national laws and policies. Australia acknowledges Indigenous customs in a variety of ways including through the development of Indigenous protocols which demonstrate appropriate ways to work with Indigenous cultural heritage in accordance with principles of customary law and through programs such as the Indigenous Protected Areas Program .

Australia is therefore able to support general guiding principles (a) and (h) in principle but only to the extent that they are consistent with international law and national law and policy.

Australia considers that the background on principle (a) may be inconsistent with principle (c) and should be revised. The background to principle (a) as currently drafted would require that Indigenous communities could rely exclusively on customary law to protect TCEs/EoF and that this should not be constrained by external legal protection. Principle (c) on the other hand refers to TCEs/EoF being protected in a manner which is consistent with international and regional instruments. The scope of principle (a) requires further discussion.

As previously stated, Australia strongly supports guiding principles (b)-(d) and considers that they are key elements in guiding the Committee's future work on the protection of TCEs/EoF.

Australia supports the need to respect the rights of Indigenous people and other traditional communities but questions whether principle (g) is necessary given the scope of principle (c). Principle (c) requires that the Committee's future work be in accordance with rights under national and international law, which broadly covers the requirements under principle (g). If it is shown that principle (g) is broader in scope or has a different meaning to principle (c) it should be clarified but otherwise it should be removed.

CONCLUSION

Australia strongly encourages the development of the draft policy objectives and general guiding principles to enable consensus about these elements in order to guide the Committee's future work.

Australia has previously stated that agreement should be reached on the policy objectives and general guiding principles prior to further discussion of the substantive provisions. Australia is concerned that the identification and development of substantive provisions prior to agreement by committee members on the objectives and principles will result in inconsistency.

There has been no agreement about the context and legal status of the work of the Committee. Australia is concerned that commenting on the substantive provisions would pre-empt the Committee's decision on this key issue. Australia welcomes discussion of a process to take the Committee's work forward.

AUSTRALIA

WIPO/GRTKF/IC/9/5
'The Protection of Traditional Knowledge: Revised Objectives and Principles'.

General comments

Australia welcomes the opportunity to comment on WIPO/GRTKF/IC/9/5 'The Protection of Traditional Knowledge: Revised Objectives and Principles'.

Australia is strongly of the view that the key initial step in the development of any regime or approach to the protection of traditional knowledge is to first determine the relevant policy objectives and general guiding principles. It is only once the objectives and principles are developed in a way that clearly outlines the intended purpose of the protection of traditional knowledge that the Committee will be able to focus on a possible outcome.

This is why Australia considers it critical to a successful outcome that further discussion on the draft policy objectives and general guiding principles for the protection of traditional knowledge be undertaken. We have stated previously, and continue in our belief, that it is premature to consider draft negotiating text given that there is no consensus yet among Committee members on these initial objectives and principles. Nor is there consensus on the appropriate vehicle to give effect to any substantive outcomes. We therefore welcome discussion on an appropriate process for further reviewing and commenting on parts I and II of document WIPO/GRTKF/IC/9/5 to enable consensus to be reached on the appropriate policy objectives and guiding principles. Such consensus would be a major step towards an achievable and practical outcome on this important issue. Our comments below are therefore limited to the provisions in Parts I and II of document WIPO/GRTKF/IC/9/5.

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;

Australia can give in principle support to this objective.

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;

Australia acknowledges the importance of traditional knowledge systems to traditional knowledge holders and respects the role that they play in society. We can therefore support this objective in principle.

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;

Australia could support objective (iii) to the extent that it is consistent with current international law and national law and policies and would not affect the integrity of the current IP system. In this respect the provision would be improved by the following amendment: 'respect ~~their rights~~ *Indigenous people* as holders and custodians of traditional knowledge…'

We note that to meet the needs of traditional knowledge holders the objective provides for Member States to 'contribute to their [TK holder's] welfare and economic, cultural and social benefit….'. This provision would appear to extend well beyond the terms of reference of the Committee and thus its limits should be clearly delineated or the reference should be deleted.

Objective (iii) seeks to 'reward the contribution' made by traditional knowledge holders to their communities and to scientific progress. Although Australia acknowledges that reward may play a role in the protection of traditional knowledge it notes that the very broad coverage of this item needs further discussion. Would such reward be provided for all traditional knowledge in use generally in the wider community today? If so, how would such used be identified and how would the recipients of such reward be identified? It is also clear that such rewards may take different forms depending on the particular situation. We therefore suggest the following amendment 'reward *as appropriate* the contribution.'

Australia acknowledges that the development of mechanisms to protect traditional knowledge should be the result of collaboration and consultation with the Indigenous communities.

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;

Australia acknowledges the importance of conserving and preserving traditional knowledge. However we query the reference to 'protecting' traditional knowledge systems, particularly where this would imply intellectual property protection that would adversely conflict with

current intellectual property law rather than contribute to the preservation of traditional knowledge systems.

The final element of objective (iv) also suggests 'providing incentives' and Australia acknowledges that since such incentives may take different forms depending on the situation and suggests that this objective should contain the following changes in italics 'providing incentives, *as appropriate*'

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;

Australia could not support this objective if its aim was to allow any right given over traditional knowledge to prevail over existing IP laws and principles or run counter to prevailing national or international laws and principles. Australia therefore suggests the following amendment in italics:

'(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 subject to international law and national laws and policies* and equitable,…'

Australia notes that the term 'misappropriated' can potentially cover a broad scope of issues and therefore encourages greater discussion about the meaning of 'misappropriated' to ensure that the term is fully considered by Member States.

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;

Australia could not support this objective if it supported practices conflicting with international law and national laws and policies. We would therefore suggest that the objective be made subject to international law and national laws and policies, eg, through prefacing the objective with the words '*Consistent with international law and national laws and policies*….'

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;

Australia agrees in principle provided such customary laws and practices do not conflict with established international law and national laws and policies.

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;

Australia acknowledges the importance of measures to help prevent the misappropriation of traditional knowledge and the need for such approaches to be adaptable to 'national and local needs.'

We could therefore support this objective where it would not conflict with existing proprietary rights.

However, as above, Australia notes that the meaning of the term 'misappropriation' has not been fully explored and considers that further analysis of the term by WIPO and Member States would be beneficial to discussions.

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;

Regarding objective (ix), the wording here refers to the need to 'take account of and operate consistently with, other international and regional instruments and processes.' However we believe that this wording has the potential to render the existing IP system subject to any possible mechanism for the protection for traditional knowledge.

Australia notes that in paper WIPO/GRTKF/IC/7/5 there was reference to the need to 'concord' with said international and regional instruments and thus our preference would be for the use of this term in this objective.

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;

Australia acknowledges the importance of rewarding and protecting tradition-based creativity and innovation because it helps promote the dissemination of knowledge.

We can therefore give in principle support to this objective but would suggest the following amendment in italics 'encourage, reward as appropriate…. *'.*

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;

Australia notes that the role of prior informed consent in any possible mechanism for the protection of traditional knowledge has yet to be determined and we would support further discussions on the contexts in which prior informed consent will be practicable, possible and desirable, consistent with national laws noting that there is no internationally recognized right or principle of prior informed consent. We therefore suggest that the term 'ensure' be replaced with '*promote*'.

We can give in principle support to consultation and participation of Indigenous people in decisions that affect them.

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;

The role of prior informed consent in any possible mechanism for the protection of traditional knowledge has not been determined. Therefore we would support further discussions about prior informed consent in particular, concerning its meaning, status, source and when it may be relevant and practicable.

While Australia can give in principle support to the concept of encouraging the fair and equitable sharing of benefits as reflected in objective (xii), Australia believes that this objective is currently too prescriptive in its reference to when fair and equitable compensation can occur and believes that this is an area that requires more in-depth discussion.

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;

Australia acknowledges the spirit of this objective and can give in principle support if the rights of traditional knowledge and local communities over their knowledge do not take precedence over any proprietary rights and if the concept of authenticity allows for more than one community to have the same traditional knowledge without providing the likelihood for conflict between relevant communities.

We would therefore suggest the following amendments in italics:

(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 *the pursuit of* ~~*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;

We oppose this policy objective including the reference here to the requirement that the disclosure in patent applications of the source and country of origin of traditional knowledge and associated genetic resources as well as evidence of prior informed consent and compliance with benefit sharing conditions be made a condition for the grant of a patent right. The issue of including such a disclosure requirement within the patent system is the subject of ongoing discussions which have not been finalised. The inclusion of such a specific and prescriptive requirement as an 'objective' is not consistent with the nature of the material in this section which is the enunciation of policy objectives rather than specific actions. This issue is in any case relevantly covered in general guiding principle (e).

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;

Enhancing certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders and other users of traditional knowledge is important.

However Australia queries the reference here to 'the principles of free and prior informed consent' as such a concept is not a universally agreed principle and many questions remain about the content and appropriate context for such a concept. Australia would therefore

recommend its deletion from this objective while encouraging further discussion about its meaning, status and source. Australia suggests substituting the phrase with "*the approval and involvement of the holders of such knowledge*".

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.

Australia can give in principle support to this objective.

Given the close relationship, any protection of traditional knowledge or traditional cultural expressions and expressions of folklore needs to be closely aligned and complementary.

II. GENERAL GUIDING PRINCIPLES

(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.

Australia can give in principle support to this provision to the extent that such aspirations, expectations and needs of traditional knowledge holders are consistent with international and national laws and policies. For example, Australia would not be able to support customary practices that are inconsistent with national laws.

(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.

Australia gives in principle support to this provision. As discussed above, Australia considers there should be further consideration of the term 'misappropriation'.

(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.

Australia acknowledges the importance of guiding principle (c) in any system of protection of traditional knowledge. However since the role of prior informed consent has yet to be determined Australia considers it should be deleted from this provision. This would not detract from the flexibility of implementation of this guiding principle and would be consistent with Australia's comments on objectives (xii) and (xv). It would also promote consistency between guiding principles (c) and (d) as (d) provides for flexibility in implementation of any protection. Australia suggests the following amendments:

'Where measures for the protection of traditional knowledge are adopted, appropriate enforcement mechanisms should be developed, *consistent with international law and national laws and policies,* permitting effective action against misappropriation of traditional knowledge ~~*and supporting the broader principle of prior informed consent*~~'

Again, Australia would support further discussion of the term 'misappropriation' to ensure that the term is given fully explored by Member States.

(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.

Australia can support this provision in principle but would suggest that the final paragraph be made less prescriptive through the terms '*as appropriate*' and/or '*may*' rather than 'should'.

A flexible approach to the protection of traditional knowledge helps ensure that appropriate mechanisms are available to suit the range of needs of Indigenous people, and that an appropriate balance is achieved between those needs and the maintenance of a stable

framework for investment. This flexibility should also extend to respect for the diversity of legal systems amongst member States.

(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.

Consistency with existing obligations under international law and national laws and policies is essential to Australia's support for this provision. This is acknowledged in, eg, general guiding principle (g) which provides for consistency with national laws regarding access to genetic resources.

Regarding the references in the first and third paragraphs to prior informed consent our earlier comments regarding objectives (xii) and (xv) would apply to this provision also. We would therefore recommend deleting "respect for prior informed consent" and substituting it with '*respect for appropriate consultative measures*' and where appropriate consent should be encouraged.

(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.

Australia agrees that consistency with the applicable law governing access to genetic resources and benefit sharing is essential to prevent any conflict between obligations and can therefore give in principle support to this provision.

(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.

Australia can give in principle support acknowledging that consultation and cooperation with other international fora is important and consistency with relevant provisions of existing international instruments is critical to ensure their continued and effective operation. Australia stresses that it can only recognise customary law where it does not conflict with international law and national laws and policies.

(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.

Australia can support this provision in principle, where customary law does not conflict with current international law and national laws and policies, including human rights.

(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.

Australia notes the broad nature of this principle and the difficulty that member States may have in ensuring that specific characteristics of a community's traditional knowledge which may be unknown are considered in developing mechanisms for protection.

In principle, Australia would support a provision which focuses on considering the general characteristics of Indigenous communities' treatment of traditional knowledge.

(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.

Australia can give in principle support to this provision where collective management is appropriate, with the understanding that the assistance in setting up collective management systems would be in the form of 'principles' or 'guidelines' and not the development of specific laws.

CONCLUSION

Australia strongly encourages the development of the draft policy objectives and general guiding principles to enable consensus about these elements in order to guide the Committee's future work.

Australia has previously stated that agreement should be reached on the policy objectives and general guiding principles prior to further discussion of any substantive provisions. Australia is concerned that the identification and development of substantive provisions prior to agreement by Committee members of the objectives and principles will result in inconsistency.

There has been no agreement about the context and legal status of the work of the Committee. Australia is concerned that commenting on substantive provisions would pre-empt the Committee's decision on this key issue. Australia welcomes discussion of a process to take the Committee's work forward.

[Appendix follows]

APPENDIX

REVISED TEXT OF WIPO/GRTKF/IC/9/5 PROVIDED BY SOUTH AFRICA

REVISED PROVISIONS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

POLICY OBJECTIVES AND CORE PRINCIPLES

CONTENTS

N.B. These draft provisions are reproduced unaltered from the Annex of document WIPO/GRTKF/IC/8/5, 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 of Committee participants in full.

I. POLICY OBJECTIVES

(i) Recognize and Affirm value
(ii) Promote respect
(iii) Meet the actual needs of traditional knowledge holders and practitioners
(iv) Promote conservation and preservation of traditional knowledge
(v) Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems
(vi) Support traditional knowledge systems
(vii) Contribute to development and safeguarding traditional knowledge
(viii) Eliminate (Repress) unfair and inequitable uses
(ix) Concord with relevant international agreements and processes
(x) Promote innovation and creativity
(xi) Ensure prior informed consent and exchanges based on mutually agreed terms
(xii) Promote fair and equitable benefit-sharing
(xiii) Promote community development and legitimate trading activities
(xiv) Preclude the grant of improper intellectual property rights to unauthorized parties
(xv) Enhance transparency and mutual confidence
(xvi) Complement protection of traditional cultural expressions
(xvii) An objective on governance of the IKS natioanally, regionally and internationally- See principles for coherence.
(xviii) Protection of IKS and genetic/biological resources

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CORE PRINCIPLES

II. GENERAL GUIDING PRINCIPLES

(a) Responsiveness to the needs and expectations of traditional knowledge holders
(b) Recognition of rights
(c) Effectiveness and accessibility of protection
(d) Flexibility and comprehensiveness
(e) Fairness and Equity and benefit-sharing
(f) Consistency with existing legal systems governing access to associated genetic resources
(g) Respect for and cooperation with other international, regional and national instruments and processes
(h) Respect for customary use, exchange and transmission of traditional knowledge
(i) Recognition of the specific characteristics of traditional knowledge
(j) Providing assistance to address the needs of traditional knowledge holders and practitioners

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Commentaire : For consistency with the document.

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III. SUBSTANTIVE PRINCIPLES

1. Protection Against Misappropriation, misuse and exploitation
2. Legal Form of Protection
3. General Scope of Subject Matter
4. Eligibility for Protection
5. Beneficiaries of Protection
6. Fair and Equitable Benefit-sharing and Recognition of Knowledge Holders
7. Principle of Prior Informed Consent
8. Exceptions and Limitations
9. Duration of Protection
10. Transitional Measures
11. Formalities
12. Consistency with the General Legal Framework
13. Administration and Enforcement of Protection
14. International and Regional Protection
15. Compliance

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I. POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

Recognize and affirm value

(i) recognize and affirm the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, cosmological, 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 and practitioners 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 practitioners; and for the contribution which traditional knowledge holders and practitioners have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology;

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Meet the actual needs of holders of traditional knowledge

(iii) be guided by the aspirations and expectations expressed directly and indirectly by traditional knowledge holders and practitioners, 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 direct dependents and to the progress of science and socially beneficial technology;

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Promote conservation and preservation of traditional knowledge

(iv) promote and support the conservation and preservation of traditional knowledge by affirming, 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 and practitioners 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 and practitioners to exercise due rights and authority over their own knowledge; Should the conventional IPR regime not be supportive f the protection of IKs new regimes should be developed for the said purpose. i.e sui generis protection.

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Commentaire : Is this rendering okay or should we be making more broader demands of changing the conventional intellectual property regimes to include the exercise of due rights.

Support traditional knowledge systems

(vi) respect and facilitate the continuing customary use, practice, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders and practitioners; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;

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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 and practitioners, for the primary and direct benefit of traditional knowledge holders and practitioners in particular, and for the benefit of humanity in general;

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Repress unfair and inequitable uses

(viii) Eliminate 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, regional and national 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 and practitioners, by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge;

Commentaire : We favour the use of indigenous and local communities

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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 benefit 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;

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Commentaire : How do we introduce the concept of the community benefiting from the knowledge?

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 and practitioners seek such development and opportunities consistent with their right to freely pursue economic development;

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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 and agreement 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 and practitioners 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;

Supprimé : *traditional knowledge holders*

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[7] while also recalling that TK itself is of scientific value and may be considered by some as a distinct but equally valid scientific system.[8] 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

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

[8] 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.

America and the guiding principle of "providing assistance to address the needs of traditional knowledge holders and practitioners" at the request of China.

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Comments and inputs reflected: African Group,[9] GRULAC;[10] 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.

9 African Group (WIPO/GRTKF/IC/6/12, Annex, "Objectives")
10 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 and practitioners*

(b) *Principle of recognition and affirmation of rights*

(c) *Principle of effectiveness and accessibility of protection*

(d) *Principle of flexibility and comprehensiveness*

(e) *Principle of Fairness, equity and benefit-sharing*

(f) *Principle of consistency with existing legal systems governing access to associated IK and genetic/biological resources*

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

(h) *Principle of respect for customary use, exchange 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 and practitioners*

(k) *Principle of transparency and governance*

(l) *Principle of discosure*

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[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 practitioners; 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 practitioners; 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.

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(b) Principle of recognition of rights

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

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(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 and practitioners. 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.

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(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 and practitioners.

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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 and practitioners.

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(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 practitioners, 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 and practitioners to consent or not to consent to access to their traditional knowledge and should take into account the principle of prior informed consent.

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The rights of traditional knowledge holders and practitioners 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.

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

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(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.

Commentaire :

(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.

Commentaire : Does this mean that you cannot change anything in the international law in relation to the protection of TK?

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 and practitioners, 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.

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(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 and practitioners

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Traditional knowledge holders and practitioners 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.

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[Substantive provisions follow]

III. SUBSTANTIVE PROVISIONS

ARTICLE 1

PROTECTION AGAINST MISAPPROPRIATION

1. Traditional knowledge shall be protected against misappropriation.

Commentaire : Is protection only 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:

(vi) 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;

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(vii) 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;

(viii) 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;

(ix) 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

(x) willful offensive use of traditional knowledge of particular moral, spiritual or cosmologicl 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.*

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4. Traditional knowledge holders and practitioners 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 and practitioners, or that the commercial exploitation of products or services benefits holders

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

Supprimé : *traditional knowledge holders*

Supprimé : *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"[11] and other expressions of commitment to "preventing the misappropriation of TK."[12]

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.[13]

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11 See, Objective 1, African Group proposal, Annex, WIPO/GRTKF/IC/6/12

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

13 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).

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 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.[14]

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.

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

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

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; customary law 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,[15] the Paris Convention, and the Rome Convention.[16] 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.

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

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

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.

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 and creativity.

Commentaire : We prefer the use of customary and local context to traditional context. Recommend replacement.

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.

Commentaire : The use of traditional knowledge has already been mentioned, South Africa prefers Indigenous Knowledge.

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.[17]

[17] 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.

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

ARTICLE 4

ELIGIBILITY FOR PROTECTION

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

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

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

(vi) 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.

Mise en forme : Puces et numéros

Commentaire : Who does it refer to by "people" Clarification is sought.

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[18]." 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.

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

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,[19]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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18 (Section 309.2(f), 25 CFR Chapter II 309 (Protection of Indian Arts and Crafts Products)).

19 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.

Commentaire : What does the reference to peoples refer to: clarification on definition of peoples is sought.

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 and practitioners".[20]

Supprimé : traditional knowledge holders

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.[21]

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

[21] 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 but not limited to; 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 and spiritual values of its holders.

4. Legal means should be available to provide remedies for traditional knowledge holders and practitioners 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.

Supprimé : *traditional knowledge holders*

5. Customary laws and practices 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.[22] 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.[23]

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22 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)

23 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 and practitioners; 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.

Supprimé : *traditional knowledge holders*

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".[24] 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,[25] 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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[24] United States of America (WIPO/GRTKF/IC/6/14, para. 76)

[25] 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 and practitioners;

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

Supprimé : *traditional knowledge holders*

Mise en forme : Puces et numéros

Supprimé : *traditional knowledge holders*

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 fair and 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.

Commentaire : The duration of protection is not clearly stated. The South African position prefers the duration of protection to be held in perpetuity.

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."[26] 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"[27], 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 and practitioners, 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.

Supprimé : traditional knowledge holders

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.

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

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

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

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.

Commentaire : The South African position is that there should be formalities to ascertain the validity of the IK to be protected.

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 and practitioners. Such registers and databases 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 and practitioners in relation to undisclosed elements of their knowledge.

Supprimé : *traditional knowledge holders*

Supprimé : *traditional knowledge holders*

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, regional and international laws, conventions and protocols 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 international 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 practitioners 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/ regulatory national or regional authority or international 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, regional and or international 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.

Supprimé : *or*

Supprimé : *traditional knowledge holders*

Mise en forme : Puces et numéros

Supprimé : *t*

Supprimé : *and*

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.[28] 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. [29]

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.

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[28] 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.

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

Comments and inputs reflected: Brazil, OAPI, Saami Council

ARTICLE 14

INTERNATIONAL, REGIONAL AND NATIONAL PROTECTION

Supprimé : AND

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 and practitioners, 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 and practitioners 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.

Supprimé : *traditional knowledge holders*

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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.[30] 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

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

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 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."[31] Morocco noted the need for "wider consultation involving all interested parties before the establishment of legal protection mechanisms."[32] 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 Appendix and of document]

31 WIPO/GRTKF/IC/7/15 Prov. Par. 69.
32 WIPO/GRTKF/IC/7/15 Prov. Par. 85.