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WORLD INTELLECTUAL PROPERTY ORGANIZATION
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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/9/5: ADDENDUM

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. Document WIPO/GRTKF/IC/INF/2 provided comments provided in English. This addendum contains additional comments which were unintentionally omitted from that document.

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

[Annex follows]

ANNEX

COMMENTS

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JAPAN

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

General opinion

Traditional cultural expressions (TCEs)/expressions of folklore (EoF) is an important issue for many members, and we appreciate the work by the WIPO Secretariat to produce the document WIPO/GRTKF/IC/9/4. However, as the current document does not fully reflect the view of the Japanese Government, we wish to submit comments for changes.

Legal status of the document WIPO/GRTKF/IC/9/4 and the principle of flexibility and comprehensiveness

Regarding the status of the document WIPO/GRTKF/IC/9/4, the Japanese Government cannot at this point agree to make it internationally legally binding. For the time being, international harmonization should be pursued mainly through giving the document a status of a guideline or a model provision. This means, in relation to the GENERAL GUIDING PRINCIPLES of the document, that the principle of flexibility and comprehensiveness needs to be fully carried through. Protection of TCEs/EoF is appropriately realized through a combination of framework for preservation of cultural property, unfair competition laws and other means, with each country choosing the appropriate combination that suits its local culture and characteristics. It is desirable that each country should "comprehensively" create its system of protection by "flexibly" choosing the system. This is because protection of TCEs/EoF should not be attained by any single "one-size-fits-all" or "universal" framework, and a variety of approaches tailored to its culture and customs should be accepted.

Regarding the present version of the document WIPO/GRTKF/IC/9/4, because the drafting of SUBSTANTIVE PROVISIONS has been started without consensus and sufficient understanding of POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES, there is currently an inconsistency between GENERAL GUIDING PRINCIPLES and SUBSTANTIVE PROVISIONS. That is, on the one hand, the principle of flexibility and comprehensiveness, which allows a country to choose its means of protecting TCEs/EoF according to the nation/region's characteristics, has been adopted as part of the GENERAL GUIDING PRINCIPLES (paragraph (d)), but on the other hand, the proposed SUBSTANTIVE PROVISIONS is drafted in a way that in effect provides for the right of authorization. Such provision of substantive right of authorization is inconsistent with the principle of flexibility and comprehensiveness. In order to avoid such inconsistency, the Japanese Government is of the position that we should first build consensus on issues of POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES before moving on to SUBSTANTIVE PROVISIONS which lays out the more detailed mechanism of their implementation.

The basic position of the Japanese Government on the desirable means of protection of TCEs/EoF

The basic position of the Japanese Government on protection of TCEs/EoF is that while we recognize the importance of respect for and preservation and maintenance of TCEs/EoF, discussions regarding creation of a new type of intellectual property or a similar proprietary right for the protection of TCEs/EoF should be dealt with precaution. Historically, culture has evolved through mutual exchange and borrowing of cultural expressions among different

cultural zones, often without the consent of the original creator of such cultural expression. We must be cautious in attempting to create a new type of intellectual property right regarding TCEs/EoF, as it could interfere with such development of rich culture through mutual exchange and enlightenment. Many of what is currently being proposed as POLICY OBJECTIVES can be attained through utilization of existing frameworks of intellectual property or frameworks outside intellectual property such as a framework for preservation of cultural property. On the other hand, our above-stated apprehension leads us to believe that those POLICY OBJECTIVES that can only be attained through creation of a new type of right call for cautious deliberation as to whether they should be included in the POLICY OBJECTIVES in the first place.

We will elaborate on the reasons for taking our position in correspondence to the reasons proposed for the need to protect TCEs/EoF. To begin with, the need to protect TCEs/EoF can be basically categorized into the following three: (i) the need to provide equitable benefit sharing to the holder of TCEs/EoF in cases of commercial exploitation, (ii) the need to secure and maintain the dignity of the TCEs/EoF and its holder, (iii) the need to assure that TCEs/EoF that has been passed down within a community with spiritual importance attached to it does not disappear and is passed down to the next generation. Regarding (i), giving something that is already in the public domain protection through creation of a new type of quasi-intellectual property system or giving it permanent monopoly right conflicts with the purpose of the intellectual property system, which is to provide incentives for new creation. (ii) should be understood as a matter of moral for the whole society to respect each other's culture. Giving TCEs/EoF moral right-type of protection even when it is difficult to identify its creator is essentially out of line with the concept of intellectual property system. (iii) should be dealt with as a part of a country's policy of preservation of cultural property, and not in the realm of intellectual property.

Procedural issues in discussing the document WIPO/GRTKF/IC/9/4

Regarding the discussion on traditional cultural expressions/expressions of folklore, even the definition of the term "traditional cultural expressions/expressions of folklore" has not been clarified in international fora, and although the initial discussion on TCEs/EoF should be concerned with the current status of respecting, preserving, and maintaining TCEs/EoF and identifying where problems exist, this has not yet been done. Therefore, taking into account the current status of the discussion, it is premature to discuss SUBSTANTIVE PROVISIONS related to TCEs/EoF. In order to conduct TCEs/EoF-related discussions in a more structured manner, we should first lay common ground by discussing POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES, and, after reaching consensus on them, move on to SUBSTANTIVE PROVISIONS, taking into consideration the current situation regarding how to respect, preserve and maintain TCEs/EoF and the relevant international and national systems, rather than starting a discussion on SUBSTANTIVE PROVISIONS prematurely.

Therefore, we would like to focus our comments solely on POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES at this time and, in this regard, provide additional comments and clarification in the future course of discussion, if necessary, while reserving our position on the SUBSTANTIVE PROVISIONS.

POLICY OBJECTIVES

First of all, we would like to raise attention to the fact that the term "traditional cultural expressions/expression of folklore" itself is not yet clear and may have diverse interpretations.

This issueis specifically identified as one of "the recurring issues" in paragraph 11 of the document WIPO/GRTKF/IC/9/4 (p.4). The definition of "traditional cultural expressions/expressions of folklore" concerns not only paragraph (i) (Annex, p.3), but also every other paragraph which includes or refers to the term "traditional cultural expressions/expressions of folklore."

The term "right(s)" appears several times in the POLICY OBJECTIVES section. Although the term "right(s)," as it is used in this section, possibly implies that a new type of right is to be given, there has been no consensus established on creating such a right. In order to make clear this point, we would like to propose the insertion of the following NOTE (or footnote) in the POLICY OBJECTIVES section.

Note: The use of the term "right(s)" in this POLICY OBJECTIVES section does not prejudge the creation of a new type of right currently nonexistent under national and international laws.

Paragraph (i) *"Recognize value"*

The scope of communities who are holders of TCEs/EoF that this document addresses, and who are the beneficiaries of protection of TCEs/EoF, is still unclear. Therefore we propose the insertion of the following NOTE that is attached to the term "indigenous peoples and traditional and other cultural communities" in Article 2 of the SUBSTANTIVE PROVISIONS (Annex, p.16) in this paragraph as well:

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

Paragraph (iii) *"Meet the actual needs of communities"*

This paragraph contains such wordings as "respect their rights". These might imply that a new type of right is to be given, but there is no consensus on creating such a new type of right and this issue has yet to be discussed. We understand that there are some existing rights, under customary laws or legal practices, which can deserve respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.

Paragraph (iv) *"Prevent the misappropriation of traditional cultural expressions/expressions of folklore"*

The phrase "provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including effective enforcement measures to prevent the misappropriation of their cultural expressions and derivatives therefrom" means in effect to create a system of a new type of intellectual property right or a similar system, and is apparently substantive and normative. Therefore this clause is inappropriate as a POLICY OBJECTIVE, and its first half before "to prevent" should be deleted. In addition, in line with the wording of paragraph (viii) of the POLICY OBJECTIVE of document WIPO/GRTKF/IC/9/5 (Annex, p.4), the word "prevent" should be changed to "repress". The

phrase "control ways in which they are used beyond the customary and traditional context" should also be deleted, as this is also normative, and making possible such control could hinder the development of culture. We believe that a balanced protection of TCEs/EoF can sufficiently be achieved by "repressing the misappropriation". However, the meaning of the term "misappropriation" itself is still unclear and needs further clarification.
This is how paragraph (iv) would appear after the proposed changes:

Repress the misappropriation of traditional cultural expressions/expressions of folklore

(iv) *repress the misappropriation of their cultural expressions and derivatives therefrom and promote the equitable sharing of benefits arising from their use;*

Paragraph (v) *"Empower communities"*

The phrase "empowers indigenous peoples and traditional and other cultural communities to exercise rights and authority" is normative and can mean in effect to create a system of a new type of intellectual property right or a similar system. Therefore we propose this paragraph to be changed to the following:

Facilitate communities

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

Paragraph (xii) *"Preclude unauthorized IP rights"*

This paragraph means in effect to create a system of a new type of intellectual property right or a similar system, and is apparently substantive and normative. Therefore this clause is inappropriate as a POLICY OBJECTIVE, and should be deleted.

GENERAL GUIDING PRINCIPLES, COMMENTARY ON GENERAL GUIDING PRINCIPLES

The terms "measure(s)", "right(s)", "authority" and "legal protection" appear several times in the COMMENTARY ON GENERAL GUIDING PRINCIPLES section. Although these terms, as they are used in this section, possibly imply that a new type of right is to be given, there has been no consensus established on creating such a new type of right. In order to make clear this point, we would like to propose the insertion of the following NOTE in the COMMENTARY ON GENERAL GUIDING PRINCIPLES section.

Note: The use of the terms "measure(s)", "right(s)", "authority" and "legal protection" in the COMMENTARY ON GENERAL GUIDING PRINCIPLES section does not prejudge the creation of a new type of right currently nonexistent under national and international laws.

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

The terms "positive and defensive protection measures" and "measures for the legal protection of TCEs/EoF" might imply that a new type of right be created and given to holders and custodians, but there is no consensus on creating such a new type of right and this issue has yet to be discussed. We understand that there are some existing rights, under customary laws or legal practices, which can deserve respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.

Paragraph (b) *"Principle of balance"*

The term "right" in Paragraph (b) of the COMMENTARY might imply that a new type of right be created and given to holders and custodians, but there is no consensus on creating such a new type of right and this issue has yet to be discussed. We understand that there are some existing rights, under customary laws or legal practices, which can deserve respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.

Paragraph (d) *"Principle of flexibility and comprehensiveness"*

There is an inconsistency in the document WIPO/GRTKF/IC/9/4 in that while it is stated in the principle of flexibility and comprehensiveness that "effective and appropriate protection may be achieved by a wide variety of legal mechanisms", the SUBSTANTIVE PROVISIONS lays out a framework of specific legal mechanism. Moreover, reference to "the draft provisions" in the second subparagraph of this paragraph seems to prejudge certain specific contents for SUBSTANTIVE PROVISIONS, and this is out of line with our position that we should discuss SUBSTANTIVE PROVISIONS only after we have reached consensus on the POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES. Therefore, in line with the commentary on the principle of flexibility and comprehensiveness in the document regarding protection of traditional knowledge, WPO/GRTKF/IC/9/5 (p.10), we propose that the second subparagraph be changed to the following:

The draft provisions should therefore be broad and inclusive to allow sufficient flexibility to national and regional authorities to determine the appropriate means of attaining the POLICY OBJECTIVES in accordance with the GENERAL GUIDING PRINCIPLES at the national or regional levels. ThePOLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES themselves should not be understood to prejudge the establishment of any specific means of legal protection.

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

The term "special measures for legal protection" appears in this paragraph, but there is no consensus on creating a new type of right.

Paragraph (f) *"Principle of complementarity with protection of traditional knowledge"*

The term "legal protection" appears twice in this paragraph, but there is no consensus on creating a new type of right or a new mechanism of legal protection. The second sentence of this paragraph ("These draft provisions concern…") seems to refer to the content of the

SUBSTANTIVE PROVISIONS. However, SUBSTANTIVE PROVISIONS should only be discussed after we have reached consensus on the POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES. Therefore the second sentence should be deleted.

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

It is unclear whether the term "indigenous rights" is included in the category of "rights under customary laws". We understand that there are some existing rights, under customary laws or legal practices, which can deserve respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.

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

With regard to the term "customary laws and practices", we would like to confirm that rights under customary laws are not necessarily considered legal rights in foreign jurisdictions. With regard to the term "legal protection", there is no consensus on creating a new type of right or a new mechanism of legal protection.

Paragraph (i) *"Principle of effectiveness and accessibility of measures for protection"*

With regard to the term "measures for the acquisition, management and exercise of rights", there is no consensus on creating a new type of right or a new mechanism of legal protection.

JAPAN

COMMENTS ON THE DOCUMENT WIPO/GRTKF/IC/9/5

General Opinion

Traditional knowledge (TK) is an important issue for many members, and we welcome the work based on the document WIPO/GRTKF/IC/9/5. Before continuing this work, we would like to mention that no consensus has been reached on the legal status of the outcome of this work; in other words, whether the outcome should be internationally legally binding.

Regarding the discussion on traditional knowledge, even the definition of the term "traditional knowledge" has not been clarified in international fora, and although the initial discussion on TK should be concerned with the current status of respecting, preserving, and maintaining TK and identifying where problems exist, this has not yet been done. Therefore, taking into account the current status of the discussion, it is premature to discuss SUBSTANTIVE PROVISIONS related to TK.

Regarding the present version of the working document or WIPO/GRTKF/IC/9/5, the drafting of SUBSTANTIVE PROVISIONS has been started without consensus and sufficient understanding of POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES, and it seems that there is some inconsistency between GENERAL GUIDING PRINCIPLES and SUBSTANTIVE PROVISIONS. On the one hand, the principle of flexibility has been adopted as part of the GENERAL GUIDING PRINCIPLES (paragraph (d)), and on the other hand, Prior Informed Consent (PIC), on which international consensus has not yet been reached, is required for any access to traditional knowledge as stated in the SUBSTANTIVE PROVISIONS (ARTICLE 7).

In order to conduct TK-related discussions in a more structured manner and thereby avoid such inconsistency, we should first lay common ground by discussing POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES, and, after reaching consensus on them, move on to SUBSTANTIVE PROVISIONS, taking into consideration the current situation regarding how to respect, preserve and maintain TK and the relevant international and national systems, rather than starting a discussion on SUBSTANTIVE PROVISIONS prematurely.

Therefore, we would like to focus our comments solely on POLICY OBJECTIVES and GENERAL GUIDING PRINCIPLES at this time and, in this regard, provide additional comments and clarification in the future course of discussion, if necessary, while reserving our position on the SUBSTANTIVE PROVISIONS.

POLICY OBJECTIVE

First of all, we would like to raise attention to the fact that the term "traditional knowledge" itself is not yet clear and may have diverse interpretations. This issueis specifically identified as one of "the recurring issues" in paragraph 12 of the document WIPO/GRTKF/IC/9/5 (p. 5). The definition of "traditional knowledge" concerns not only this paragraph (i) (Annex, p. 3) but also every other paragraph which includes or refers to theterm "traditional knowledge."

The term “right(s)” appears several times in the POLICY OBJECTIVE section. Although the term “right(s),” as it is used in this section, possibly implies that a new type of right is to be given, there has been no consensus established on creating such a right. In order to make clear this point, we would like to propose the insertion of the following NOTE (or footnote) in the POLICY OBJECTIVE section.

Note: The use of the term “right(s)” in this POLICY OBJECTIVE section does not prejudge the creation of a new type of right currently nonexistent under national and international laws.

Paragraph (iii) “*Meet the actual needs of holders of traditional knowledge*”

This paragraph describes TK holders as having “rights as holders and custodians of traditional knowledge.” Although this description might imply that a new type of right is to be given to holders and custodians, there is no consensus on creating such a right and that this issue has yet to be discussed. We understand that there are some existing rights, under customary laws or legal practices, which merit respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.

Paragraph (v) “*Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems*”

We are concerned that the language, “empower traditional knowledge holders to exercise due rights and authority,” seems to mean that a new type of right will be created and given to TK holders. There is no consensus on creating and giving to TK holders such a new type of right and this issue has yet to be discussed. We would like to propose that the word “empower” in this paragraph and in the title of this paragraph be replaced with the word, “facilitate.”

The term “misappropriation” still needs to be clarified. We understand that the definition of “misappropriation” should be discussed at a later stage when we discuss SUBSTANTIVE PROVISIONS.

Paragraph (viii) “*Repress unfair and inequitable uses*”

This paragraph may be too substantive to be a policy objective.
The difference between “misappropriation” of traditional knowledge and “other unfair commercial and non-commercial activities” is also not clear.

Paragraph (xi) “*Ensure prior informed consent and exchanges based on mutually agreed terms*”

The nuance of the language, “ensure prior informed consent,” is substantive and normative and not appropriate for POLICY OBJECTIVES. And we should also pay attention to the fact that Article 8(j) of the CBD does not directly require PIC concerning TK and that PIC is yet to be discussed. We would like to propose the following amendment using the phrases of Article 8 (j) of the CBD.

draft amendment

Promote wider application of traditional knowledge with the approval and involvement of the holders of such knowledge
(xi) Promote, as far as possible and as appropriate, wider application of traditional knowledge with the approval and involvement of the holders of such knowledge , in coordination with existing international and national regimes governing access to genetic resources;

Paragraph (xii) "*Promote equitable benefit-sharing*"

PIC concerning TK has yet to be discussed.

Paragraph (xiii) "*Promote community development and legitima te trading activities*"

There are such wordings as "the rights of traditional and local communities over their knowledge" and "their right to freely pursue economic development." These might imply that a new type of right is to be given, but there is no consensus on creating such a new type of right and that this issue has yet to be discussed. We understand that there are some existing rights, under customary laws or legal practices, which can deserve respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.

Paragraph (xiv) "*Preclude the grant of improper IP rights to unauthorized parties*"

This paragraph requires disclosure of origin, evidence of PIC, and evidence of benefit-sharing (BS), and it is apparently normative. Moreover, there is no consensus on introducing disclosure of origin internationally. This paragraph should be deleted.

GENERAL GUIDING PRINCIPLES:
COMMENTARY ON GENERAL GUIDING PRINCIPLES

The terms "measure(s)"and "right(s)"appear several times in the COMMENTARY ON GENERAL GUIDING PRINCIPLES section. Although these terms, as they are used in this section, possibly imply that a new type of right is to be given, there has been no consensus established on creating such a new type of right. In order to make clear this point, we would like to propose the insertion of the following NOTE in the COMMENTARY ON GENERAL GUIDING PRINCIPLES section.

Note: The use of the terms "measure(s)"and "right(s)"in the COMMENTARY ON GENERAL GUIDING PRINCIPLES section do not prejudge the creation of a new type of right currently nonexistent under national and international laws.

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

We are not sure of the meaning of the wording, "measures for the legal protection of traditional knowledge." Do such "measures" mean existing measures or measures which must

be created to provide for the legal protection? In this regard, we would like to mention that so far a consensus has not been made in support of a sui generis IP protection system for TK.

"Customary and traditional forms of protection" are mentioned in this paragraph, and we understand that there are some existing forms of protection under customary and traditional laws, which can deserve respect. However, even in the case that such an existing form of protection does merit respect, we would like to confirm that the customary laws and legal practices in some countries or regions do not necessarily have legal validity in foreign jurisdictions.

Paragraph (b) "*Principle of recognition of rights*" and Paragraph (e) "*Principle of equity and benefit-sharing*"

The term "right" in Paragraph (b) of the COMMENTARY ON GENERAL GUIDING PRINCIPLES might imply that a new type of right be created and given to holders and custodians, and we would like to confirm that there is no consensus on creating such a new type of right and that this issue has yet to be discussed. We understand that there are some existing rights, under customary laws or legal practices, which can deserve respect. However, even in this case, we would like to confirm that the rights, which are recognized under the customary laws and legal practices in some countries or regions, are not necessarily considered legal rights in foreign jurisdictions.

We would like to repeat the aforementioned comments as they pertain to Paragraph (e) of the COMMENTARY ON GENERAL GUIDING PRINCIPLES (Annex, p.10) which mentions "the rights of traditional knowledge holders."

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

The wording, "appropriate enforcement mechanisms should be developed permitting effective action against misappropriation of traditional knowledge and supporting the broader principle of prior informed consent," appears to be too substantive to be mentioned in COMMENTARY ON GENERAL GUIDING PRINCIPLES.

2nd subparagraph, Paragraph (d) "*Principle of flexibility and comprehensiveness*"

The sentence "Protection should include defensive measures to curtail illegitimate acquisition of industrial property rights over traditional knowledge … and positive measures establishing legal entitlement for traditional knowledge holders" appears to be too substantive, and the word "should" is prejudging outcomes.

[End of Annex and of document]