

# WIPO



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**WORLD INTELLECTUAL PROPERTY ORGANIZATION**

GENEVA

**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. Documents WIPO/GRTKF/IC/INF/2 and WIPO/GRTKF/IC/INF/2 Add. circulated comments provided in English. This addendum contains additional comments which were provided subsequent to the preparation of these documents.

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

[Annex follows]

ANNEX  
COMMENTS

Canada

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CANADA

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS  
OF FOLKLORE: REVISED OBJECTIVES AND PRINCIPLES (WIPO/GRTKF/IC/9/4)

PURPOSE

At the ninth session of the WIPO IGC, member States have been invited to submit written comments on the above-referenced document in advance of the next scheduled IGC meeting, to be held from 30 November – 8 December 2006.<sup>1</sup>

In response to the above invitation from WIPO, Canada is making the following submission on document WIPO/GRTKF/IC/9/4 (document 9/4), without prejudice to comments that may be provided at a later date. The intent is that it be shared among Member States, the WIPO IGC Secretariat, and governmental and non-governmental organizations (NGOs).

GENERAL COMMENTS

Canada extends its thanks to the Secretariat for the opportunity to comment on Document 9/4 and commends the efforts of the WIPO Secretariat to synthesize the diverse views on document 9/4 put forward by Member States, non-governmental organizations and official observers taking part in the IGC. We are pleased to continue working with other Member States, and governmental and non-governmental organizations towards a consensus on these policy objectives and guiding principles as a way of guiding the future work of the IGC.

We note a number of general observations on Document 9/4 as a whole, as follows:

First, it is worth reiterating that Canada is of the view that any possible policy approaches that may be developed in the IGC for the protection of intellectual property (IP) rights of TCEs holders must be consistent with both the mandate of the IGC and with Member States' existing obligations with respect to international treaties relating to IP.

Second, with respect to the structure of the document itself, Canada notes that a number of objectives are quite similar in spirit and meaning, and we recommend that consideration be given, in these instances, to combining similar objectives.

Canada has indicated in this submission where draft policy objectives could be combined.

Third, Canada stresses the need for the policy objectives to strike the appropriate balance between the interests of the creators of TCEs and their respective communities and users on the one hand, and the interests of broader society on the other.<sup>2</sup>

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<sup>1</sup> IGC, *Decisions of the Ninth Session of the Committee*, April 24 to April 28, 2006, Geneva, April 28, 2006, p. 9.

<sup>2</sup> There are any number of commercial and non-commercial users of TCEs, ranging from private citizens, governments, educational institutions, libraries, museums and archives. It should also not be forgotten that users of TCEs may include individuals belonging to indigenous and local communities and the communities themselves.

Finally, Canada recommends, for clarity and consistency, that further consideration be given to the meaning of some terms inserted in Document 9/4 and on their implication for TCEs.<sup>3</sup> For example, we note that some Member States have expressed concerns regarding the term prior informed consent (PIC) being imported into the discussions on TCEs.<sup>4</sup> We further note the growing number of terms being used in document 9/4 to describe communities without a clear explanation as to whether there are any legal or policy differences associated with the different terms.<sup>5</sup>

## OUTLINE OF THE SUBMISSION

The following comments elaborate on Canada's intervention on document 9/4 at the ninth session of the IGC. The comments are divided into two sections, which correspond to the following headings in Document 9/4:

- I. Policy Objectives
- II. General Guiding Principles

Text from document 9/4 is reproduced below in bold, and is followed by Canada's comments. In certain instances, suggested amended language is also included.

### I. POLICY OBJECTIVES

Opening line: "The protection of traditional cultural expressions or expressions of folklore should aim to:"

#### Commentary

Canada has commented that the "protection" of TCEs can have a variety of meanings.<sup>6</sup> While recognizing that non-IP tools have an important role to play in preserving, protecting and promoting TCEs and may be usefully considered by giving some context to the deliberations of the IGC, the focus of the IGC is and should be IP. Accordingly, Canada noted in its earlier response to document 7/3 that WIPO is the most appropriate forum to discuss IP-related issues connected to TCEs and suggested that document 7/3 could benefit from being more focused on the specific IP aspects of protecting TCEs. With these considerations in mind, Canada repeats its earlier recommendation that the WIPO Secretariat amend the text as follows:

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<sup>3</sup> WIPO/GRTKF/IC/9/4, p. 15.

<sup>4</sup> For example, see WIPO/GRTKF/IC/8/15, p. 43.

<sup>5</sup> For example, in addition to the expression "indigenous and local communities" used in earlier WIPO IGC documents, document 9/4 refers to:

- communities (objective 11);
- relevant communities (guiding principle a);
- peoples and communities (objective 2);
- indigenous peoples and by traditional and other cultural communities (objective 3);
- indigenous peoples and traditional and other cultural communities (objective 5); and
- indigenous peoples and other traditional communities (guiding principle g).

<sup>6</sup> WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva, April 2001, p. 21.

“The protection of traditional cultural expressions or expressions of folklore in relation to intellectual property should aim to:”

### 1. Recognize Value

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

#### Commentary

While some communities may view their TCEs as having “scientific” value, it is our understanding that many TCEs have no direct connection to science. The draft objective could be improved by replacing “including” with “which may include”.

### 2. Promote Respect

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

#### Commentary

Respect for TCEs is a theme that has been repeatedly raised by Member States and by the representatives of many communities taking part in this and other *fora*. WIPO has also previously noted that IP law can play a role in promoting respect for TCEs.<sup>7</sup> The objective can benefit from some additional clarity. It would be useful if it better reflected the fact that the successful promotion of respect for traditional knowledge systems, including TCEs, will only be possible if the views of all creators and users of TCEs are taken into account, including the broader interests of society.

### 3. Meet the Actual Needs of Communities

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

#### Commentary

Canada notes that the objective statement is overly broad; IP is only one way in which the “actual” needs of communities can be met. Canada, therefore, recommends re-stating the objective as follows: “Contribute to Meeting the Intellectual Property Needs of Communities”.

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<sup>7</sup> WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva, April 2001, p. 7.

In keeping with the need for greater consistency, clarity and focus in the text overall, Canada also suggests that this objective be combined with objective (xi) dealing with the promotion of community development and legitimate trading activities. The two are notionally related and should be read together.

#### 4. Prevent the Misappropriation of Traditional Cultural Expressions/ Expressions of Folklore

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

##### Commentary

We are of the view that more work and discussion with regards to the meaning of “misappropriation” is needed before being in a position to support this objective. Canada further notes that during the ninth session of the IGC other Member States pointed out that the inclusion of the term “derivatives” in objective 4 raises complex legal and policy issues. Questions about the relationship between a derivative work and the original TCE have also been raised by some NGOs.<sup>8</sup> And document 9/4 also highlights that some “key policy and legal questions pivot on the adaptation right, the right to make derivative works”<sup>9</sup>. This suggests that further consideration should be given to the implications of the inclusion of derivative works in this objective.

#### 5. Empower Communities

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

##### Commentary

The meaning of the expression “rights and authority” in this objective should be clarified. In keeping with the need for greater consistency, clarity and focus in the text overall, Canada repeats its previous suggestion that this objective be combined with objective (viii) dealing with encouraging community innovation and creativity and objective (xiii) dealing with enhanced certainty, transparency and mutual confidence. The three objectives are notionally related and should be read together.

#### 6. Support Customary Practices and Community Cooperation

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

##### Commentary

To a large extent customary practices take place on a daily basis within Canada’s existing legal framework. As with other societal activities, such customary practices should not be

<sup>8</sup> For example, see comments by the representative of FILAIE, WIPO/GRTKF/IC/7/15, p. 47.

<sup>9</sup> WIPO/GRTKF/IC/9/4, Annex, p. 23.

contrary to the domestic laws of a Member state or its international legal obligations. In keeping with the comments made about the need for greater consistency and clarity in the text overall, Canada repeats its earlier suggestion that this objective be combined with objective (vii) dealing with the safeguarding of traditional cultures.

#### 7. Contribute to Safeguarding Traditional Cultures

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

#### Commentary

Canada notes that there is a difference in the heading of this draft objective “...Safeguarding Traditional Cultures” and the supporting narrative “...safeguarding of the environment...”. The objective could be interpreted as focusing on the physical environment in which TCEs are practiced. In light of our above noted comments that the proposed objectives should focus on the possible IP role to protect TCEs, this objective should be clarified to ensure that we are not talking about the general IP protection of the physical environment per se, but the general safeguarding of the cultural environment in which TCEs are practiced by individuals and communities.

Subject to the above noted clarification, Canada believes that this objective and objective (vi) dealing with support for customary practices and community cooperation are notionally related and should be read together.

#### 8. Encourage Community Innovation and Creativity

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

#### Commentary

The present draft objective could be further improved by ensuring greater consistency between its title and its corresponding description. While the title of the objective refers to encouraging community innovation and creativity, the description of the objective, however, is to reward and protect tradition-based creativity and innovation. If the underlying idea of the objective is to “encourage” community creativity and innovation, and such encouragement may take a variety of forms beyond rewards and protection, the same language should also be used in the text describing the objective in more detail.

The draft objective includes the phrase “especially by”. As all communities create TCEs and all such TCEs should be, for the purposes of the IGC the subject matter of discussion, it is unclear why the words “especially by” should be included in the objective.

In keeping with the comment about the need for greater consistency and clarity in the text overall, Canada also suggests that this objective, as amended, could be combined, as appropriate, with objectives (v) dealing with the empowerment of communities and (xiii) dealing with enhancing certainty and transparency. The three are notionally related and should be read together.

### 9. Promote Intellectual and Artistic Freedom, Research and Cultural Exchange on Equitable Terms

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

#### Commentary

As noted above, Canada is of the view that any outcome of the IGC to address the IP concerns associated with TCEs must always take account not only the concerns of creators of TCEs and their respective communities, but also users of TCEs and the broader public interest. Consistent with this view, Canada suggests that the objective reflect the fact that any exchange must also be equitable for the users of TCEs and reflect the broader interests of society.

### 10. Contribute to Cultural Diversity

*(x) “contribute to the promotion and protection of the diversity of cultural expressions.”*

#### Commentary

As a multicultural society, Canada is a strong proponent of promoting cultural diversity. Cultural diversity is promoted not only by preserving TCEs, but also by allowing cultural interchange between individuals and between communities. Canada is in principle supportive of this policy objective to the extent that the objective recognizes that IP protection of TCEs may contribute to promoting and protecting cultural diversity, where appropriate, while still allowing for creative and intellectual exchange.

### 11. Promote Community Development and Legitimate Trading Activities

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

#### Commentary

In its previous comments, Canada indicated that this objective was overly prescriptive. In particular, Canada expressed concerns that the draft objective suggested that all communities view all their TCEs as necessarily “collective asset[s]”. From domestic work undertaken to date, it is Canada’s understanding that not all Aboriginal people in Canada, for example, share this view with regards to all their TCEs. In some cases there may not be a consensus as to what the community and some of its members should or should not commercialize in respect of TCEs. Consequently, it may be more appropriate for the text to focus on facilitating traditional and cultural knowledge holders’ ability to identify and treat their expressions as collective assets if they so choose. Canada understands that such facilitation will require further discussion domestically and internationally to be effective. In this context, the draft objective could be amended to read as follows: “where so desired by communities and their members and/or by creators or holders of TCEs from the community, promote the use of traditional cultural expressions/expressions of folklore for community-based development, recognizing that they are an asset of communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations.”



## 12. Preclude Invalid IP Rights

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

### Commentary

In our earlier comments, Canada stated that it was very important that this text clearly state that future development of this draft objective would need to be informed by the work of other WIPO committees as well as various international bodies in order to ensure global clarity and consistency.

Canada further notes that this draft objective is unclear in terms of what is meant by the phrase “unauthorized parties”. If it means “unauthorized” by the communities that are the supposed holders of the TCEs, then the objective is not really about “precluding invalid IP rights. Canada would also note the draft objective raises other issues.

## 13. Enhance Certainty, Transparency and Mutual Confidence

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

### Commentary

It is not clear why document 9/4 refers to “mutual confidence” in the heading of this objective but “mutual respect” in the body of the objective.

Canada supports the inclusion of government users in the dialogue with traditional knowledge holders. We therefore recommend inserting “governmental” after “educational” in this paragraph.

The federal government holds IP workshops in indigenous communities, at the request of those communities, expressly for the purpose of exchanging information on IP law and policy, and on traditional knowledge and traditional cultural expressions.

In keeping with the comment about the need for greater consistency and clarity in the text overall, Canada also suggests that this objective should be combined, as appropriate, with objectives (v) dealing with the empowerment of communities and (viii) dealing with encouraging community innovation and creativity. The three are notionally related and should be read together.

## Document 7/3: Complement Protection of Traditional Knowledge

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

### Commentary

We note that this objective has been deleted from the list of draft objectives in document 9/4. Canada understands from its discussions with Canadian Aboriginal groups that some traditional knowledge holders consider TK, TCEs and folklore to emanate from the same

source and, that taken together, they form part of a larger holistic view. In light of this, Canada respectfully submits that the objective be re-inserted into document 9/4. In addition, it is important that the draft policy objectives relating to TCEs complement the draft policy objectives on TK found in document WIPO/GRTKF/IC/9/5 (see draft policy objective xvi).<sup>10</sup>

## II GENERAL GUIDING PRINCIPLES

### (a) Principle of Responsiveness to Aspirations and Expectations of Relevant Communities

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

#### Commentary

This guiding principle covers a number of issues ranging from the recognition of indigenous and customary laws and protocols to the prevention of certain acts, such as those that are insulting, derogatory or offensive. Our comment is focused on the issue of indigenous and customary laws and practices, a topic on which Canada commented at the eighth session.<sup>11</sup> Countries taking part in the IGC have a range of experiences with respect to the relationship between indigenous and customary laws and protocols and their respective national legal systems. It is our impression that the words have different meanings and are used in different ways among the participants in the IGC. It would be useful to determine whether this is indeed the case, and whether a common understanding can be found. Interventions on this issue by Canada and by Aboriginal people from Canada who participate in this forum have tended to focus on the application of the laws and legal traditions of indigenous peoples. Canada believes that much more work is required in relation to the issue of indigenous and customary laws and protocols at the international level. We look forward to learning more about the experiences of and challenges faced by other countries, indigenous people from Canada and other places, and to further work by the Secretariat on this matter. Simply calling on Member States, as if it could be done easily as a matter of course, to recognize and apply indigenous and customary laws and protocols in order to protect TCEs cannot succeed without a better collective understanding of what this entails.

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<sup>10</sup> WIPO/GRTKF/IC/9/5, Annex, p. 1.

<sup>11</sup> WIPO/GRTKF/IC/8/15, p. 48.

(b) Principle of Balance

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

Commentary

Canada is in principle supportive of this guiding principle, although we note a diversity of views on what we mean by balance. Some Member States and some observers have, for example, expressed concerns that this principle may tilt any future action away from the interests of communities regarding the protection of their TCEs. For the most part IP law and policy involves more than just creating new IP rights. It is also about taking into account the users of works, for example, and the broader public interest. Future drafts of document 9/4 should clarify the difference, if any, between a “principle of balance” and a reference to an “equitable balance” in the commentary section of the document.

(c) Principle of Respect for and Consistency with International and Regional Agreements and Instruments

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

Commentary

Canada is in principle supportive of this guiding principle. National IP regimes are often based on international IP agreements that have evolved over many years and in some cases many decades and often form the basis of domestic IP laws and policies. In this context, Canada noted in its earlier response to document 7/3 that it has consistently stated at the WIPO that any possible policy approaches that may be developed in the IGC for the protection of TCEs would need to be consistent with the mandate of this Committee as well as with Member States’ existing obligations in international treaties relating to IP and potentially other international agreements that may impact IP right and obligations.

Canada could not support any outcome from the IGC that would impact our ability to respect our international obligations, IP or otherwise, including those dealing with human rights. In a similar manner, this general guiding principle should not suggest that any outcome of the IGC would bind a non-Member State to any specific instrument. To this end, Canada believes that this objective should be qualified with “relevant” or “applicable”, given that there is not a unique combination of international obligations, but a mosaic that may vary from state to state.

In keeping with the need for greater consistency, clarity and focus in the text overall, Canada also suggests that this general guiding principle be combined with guiding principle (g) that

refers to the principle of respect for the rights and obligations towards indigenous peoples and other traditional communities. The two are notionally related and should be read together.

#### (d) Principle of Flexibility and Comprehensiveness

*This principle concerns a need to recognize that effective and appropriate protection may be achieved by a wide variety of legal mechanisms, and that too narrow or rigid an approach at the level of principle may constrain effective protection, conflict with existing laws to protect TCEs/EoF, and pre-empt necessary consultation with stakeholders and holders of TCEs in particular. It concerns the need to draw on a wide range of legal mechanisms to achieve the intended objectives of protection. In particular, experience with TCEs/EoF protection has shown that it is unlikely that any single “one-size fits-all” or “universal” international template will be*

*found to protect TCEs comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of traditional communities in all countries. An indigenous organization has put it best: “Any attempt to devise uniform guidelines for the recognition and protection of indigenous peoples’ knowledge runs the risk of collapsing this rich jurisprudential diversity into a single ‘model’ that will not fit the values, conceptions or laws of any indigenous society.*

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

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

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

#### Commentary

Canada is generally supportive of the need for flexibility in how we address the concerns associated with TCEs. However, Canada expresses caution about seeking to be overly driven to provide “comprehensive” protection for TCEs. For example, as pointed out by an academic, copyright protection does not seek to give authors perfect control over their copyrighted works, but a balanced right.<sup>12</sup> Similarly, “comprehensiveness” in terms of

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<sup>12</sup> Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, Random House, New York, 2001, pp. 109-110.

protecting TCEs needs to address the concerns of creators of TCEs and their communities while also taking into account the concerns of users of TCEs and the broader public interest.

(e) Principle of Recognition of the Specific Nature and Characteristics of Cultural Expression

*Protection should respond to the traditional character of TCEs/EoF, namely their collective, communal and inter-generational character; their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and their constantly evolving character within a community. Special measures for legal protection should also recognize that in practice TCEs/EoF are not always created within firmly bounded identifiable "communities". TCEs/EoF are not necessarily always the expression of distinct local identities; nor are they often truly unique, but rather the products of cross cultural exchange and influence and intra-cultural exchange, within one and the same people whose name or designation may vary on one side or another of a frontier. Culture is carried by and embodied in individuals who move and reside beyond their places of origin while continuing to practice and recreate their community's traditions and cultural expressions.*

Commentary

It is not clear whether the reference to "special" measures refers to the proposed new instrument *per se* or the community. Interestingly, the last sentence emphasizes the individual while in most of the text the reference to TCEs is to the community. Canada also notes that this guiding principle raises an issue that Canada has raised before but has not been fully discussed at the IGC, namely the impact of any outcome from the IGC to protect TCEs on immigrants who carry with them and practice their TCEs in a new homeland.<sup>13</sup> As one of the largest *per capita* recipients of immigrants in the world, Canada believes that it is important for the IGC to consider the rights of individual practitioners and users of TCEs who immigrate to another community.

(f) Principle of Complementarity with Protection of Traditional Knowledge

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

Commentary

See our comments note above that this general guiding principle should be restored as a policy objective.

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<sup>13</sup> WIPO/GRTK/IC/6/14, p. 16.

(g) Principle for Respect for Rights of and Obligations Towards Indigenous Peoples and Other Traditional Communities

*This principles suggests that any protection of TCEs/EoF should respect and take into account certain over-arching rights and obligations, particularly international human rights and systems of indigenous rights, and not prejudice the further elaboration of such rights and obligations.*

Commentary

Member States are expected to comply with their international legal obligations, whether directed at indigenous or non-indigenous peoples. It is also unclear why there is no reference to cultural communities in this guiding principle.

In keeping with the need for greater consistency, clarity and focus in the text overall, Canada also suggests that this guiding principle be combined with guiding principle (c) dealing with respect for and consistency with relevant or applicable international and regional agreements and instruments. The two are notionally related and should be read together.

(h) Principle of Respect for Customary Use and Transmission of TCEs/EoF

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

Commentary

In large measure communities are free to exercise their customary practices in Canada to the extent that they do not contravene domestic laws or Canada's international legal obligations. For example, some comprehensive claims agreements include provisions addressing law-making by an indigenous government respecting the language and culture of its indigenous constituents, subject to certain limitations (e.g. Canada's Charter of Rights and Freedoms, a constitutional document) and certain exceptions (IP and other laws of national importance).

(i) Principle of Effectiveness and Accessibility of Measures for Protection

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

Commentary

This principle should not be interpreted as imposing on government any additional financial obligations.

CANADA

THE PROTECTION OF TRADITIONAL KNOWLEDGE:  
REVISED OBJECTIVES AND PRINCIPLES (WIPO/GRTKF/IC/9/5)

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Canada extends its thanks to the Secretariat for the opportunity to comment on Document 9/5. We are pleased to continue working with other Member States, and governmental and non-governmental organizations towards a consensus on these policy objectives and guiding principles as a way of guiding the future work of the IGC.

We note a number of general observations on Document 9/5 as a whole, as follows.

First, it is worth reiterating that Canada is of the view that any possible policy approaches that may be developed in the IGC for the protection of intellectual property (IP) rights of traditional knowledge holders must be consistent with both the mandate of the IGC and with Member States' existing obligations with respect to international treaties relating to IP.

Second, it is equally important, in Canada's view, to keep in mind the need for maximum flexibility for Member States at the national level during the further development and refinement of policy objectives.

Third, Canada stresses the need for the policy objectives to strike the appropriate balance between the interests of the traditional knowledge holders and users on the one hand, and the interests of broader society on the other.

Fourth, Canada recommends, for clarity and consistency, that references to "rights" in the document be changed to specify "IP rights". In addition, we also recommend that further consideration be given to the meaning of some terms inserted in Document 9/5 and on their implication for TK. For example, we are of the view that more work and discussion with regards to the meaning of "prior informed consent" and "misappropriation" is needed.

Fifth, recognizing the relationship between the work of the IGC and the on-going TK-related discussions under the CBD and other international *fora*, we wish to reiterate our view that the WIPO-IGC is the appropriate body to discuss the IP-related aspects of the protection of traditional knowledge. Other TK-related issues that go beyond the scope of IP should be discussed in the appropriate international *fora* such as the CBD, UNESCO, etc.

Finally, with respect to the structure of the document itself, Canada notes that a number of objectives are quite similar in spirit and meaning, and we recommend that consideration be given, in these instances, to combining similar objectives.

## OUTLINE OF THE SUBMISSION

The following comments elaborate on Canada's interventions on Document 9/5 at the ninth session of the IGC. These comments are divided into two sections, which correspond to the following headings in Document 9/5:

- I - Policy Objectives; and
- II - General Guiding Principles.

Text from document 9/5 is reproduced below in bold, and is followed by Canada's comments. In certain instances, suggested amended language is also included.

### I POLICY OBJECTIVES

Opening line: *The protection of traditional knowledge should aim to:*

#### Commentary

While Canada recognizes that the protection of TK may be broader than just the IP protection of such knowledge, we feel that it is nonetheless important to focus on the IP aspects of TK, particularly in the context of keeping the discussion in IGC, given its technical expertise in IP and its relationship to TK.

In this regard, Canada notes that focusing on the specific IP aspects of protecting TK would strengthen and reinforce the policy objectives and guiding principles. The opening line of the document could set this up, by being amended to read, "The protection of traditional knowledge in relation to intellectual property 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*

#### Commentary

Canada is pleased to note that our previous comments, relating to the intrinsic value of TK within indigenous and local communities, are reflected in this text. Therefore, we support this objective in principle. We would appreciate, however, receiving additional clarity with respect to the meaning of the phrase "equal scientific value as other knowledge systems".

#### Promote Respect

*(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and*



*maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge holders; and for the contribution which traditional knowledge holders have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology*

#### Commentary

Generally, Canada supports this objective because it recognizes the value of TK for existing TK holders, including indigenous and local communities (as well as other TK communities). However, we feel that the text could more clearly and firmly state the need for a balanced approach. Successfully promoting respect for TK will only be possible if the views of all TK creators and users, as well as those of the general public, are taken into account in a balanced fashion.

#### 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*

#### Commentary

Canada notes that the objective statement is overly broad; IP is only one way in which the “actual” needs of TK holders can be met. Canada, therefore, recommends re-stating the objective statement as follows, “Contributing to meeting the intellectual property needs of holders of traditional knowledge”.

In addition, the explanatory text itself is somewhat vague. For example, the reference to “rights” ought to be changed to “IP rights”. The text should also clearly indicate that any potential policy approaches need to take into account and balance the needs and interests of all TK holders and user communities, as well as those of the general public. The phrase “to the progress of science and socially beneficial technology” should be defined.

Finally, in keeping with our comments regarding the need for greater consistency, clarity, and focus in the text generally, Canada recommends combining this objective with objective (xiii) - or at least placing them sequentially, as they are notionally related and would benefit from being read together.

#### 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*

#### Commentary

Canada views this text as very similar to that of Objective (vi) – support traditional knowledge systems. In our view, both objectives are not necessary. We recommend that a new, combined objective be drafted, building on the objective above, and focusing

specifically on the IP aspects of promoting, respecting and supporting the conservation and preservation of TK.

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*

Commentary

Empowering holders of TK to protect their knowledge is important. Canada notes that Member States require maximum flexibility at the national level. We also note that more work and discussion is needed, at national and international levels, to determine what this policy objective will entail in practice. It would be useful to clarify the intent of “due rights and authority over their own knowledge”. In addition, we are of the view that more work and discussion with regards to the meaning of “misappropriation” is needed.

This objective could be combined with, or placed next to, objectives (x) and (xv), as they are all notionally related and should be read together.

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*

Commentary

Please see our previous comment under Objective (iv) – promote conservation and preservation of traditional knowledge.

In addition, Canada is unclear as to the meaning of the following language: “augment customary custodianship of knowledge and associated genetic resources.” and would have to have clarification before being in a position to agree with this objective.

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*

Commentary

For consistency with the qualifications in the opening sentence (the appropriate balance; customary and other means), Canada recommends adding “as appropriate” just prior to “in accordance with relevant customary laws”.

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*

Commentary

Canada is pleased to note that our previous concerns about the need of Member States for maximum flexibility at the national level are reflected in this text. However, we are of the view that more work and discussion with regards to the meaning of “misappropriation” is needed.

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*

Commentary

Canada is pleased to note the revised language of this objective, particularly with respect to the opening part of the explanatory text, “take account of and operate consistently with other international and regional instruments and processes”.

We feel, however, that the text should go even further, and should note specifically that the work done in the IGC on the IP protection of TK should not be prejudged nor should it be predetermined by possible outcomes in other international *fora*. It is also important that this work be mindful of the non-IP TK-related work undertaken in other international *fora*.

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*

Commentary

Canada recommends deleting the phrase “, 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”, since it is beyond the scope of IP law and policy.

Also, in keeping with our comments regarding the need for greater consistency, clarity, and focus in the text generally, Canada recommends combining this objective with objectives (v) and (xv), or that the document be re-ordered to place all three objectives together, as they are notionally related and would benefit from being read sequentially.

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*

#### Commentary

Canada is pleased to note the reference to existing national and international regimes in the explanatory text.

However, we feel that the introductory word “ensure” is too strong, particularly given that we have no agreed-upon definition of “prior informed consent”. Canada is of the view that “ensure” reflects an obligation that Member States can not meet given that states would not necessarily be the agents in exchanges of this nature. We recommend reverting to the original introductory word “promote”.

The lack of clarity and definition around “prior informed consent” is also a concern for Canada. This is an area that warrants further discussion.

#### 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*

#### Commentary

Canada considers the IGC as the most appropriate international body to deal with technical issues relating to the IP protection of TK. Nevertheless, we note that the development of any possible approaches in the IGC relating to access and benefit-sharing would need to take into consideration ongoing discussions and initiatives on this same subject in other *fora*, such as the CBD, to ensure consistency.

Canada views the wording in the explanatory text as very limiting which, if adopted, could impact our future flexibility with respect to policy development.

Canada is concerned that the word, “disclosed”, might lead to confusion and be taken to mean solely in reference to the issues involving patent disclosure. “Released” or “available” may be more accurate terms.

Finally, we also note some concerns with respect to the terminology used. For example, we would like to see some precision with respect to the addition of the word “sharing” to the phrase “sharing and distribution of monetary and non-monetary benefits”(does it relate only to agreements reached between communities on how to share the benefits? Does

“distribution” means that an authority would be in charge of administering the benefits and then distributing them to the rights holders concerned?). Furthermore, the phrase “compensation in special cases where the individual holder is not identifiable” needs clarification. Finally, the lack of clarity and definition around “prior informed consent” is also a concern for Canada. This is an area that warrants further 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*

Commentary

Canada supports this objective in principle.

Again, as we have stated elsewhere in our commentary, Canada recommends specifying “IP rights” in the phrase concerning recognition of “rights”. As well, in keeping with our general comments regarding the need for greater consistency, clarity, and focus in the text overall, this objective should be combined with, or should follow, objective (iii), as they are notionally related and would benefit from being read together.

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*

Commentary

Since the patent disclosure discussion among WIPO Members is still on-going, Canada feels it is premature to make such an addition to a policy objective that is to be in essence reflective of a common general direction for protection of all Members. In addition, the lack of clarity and definition around “prior informed consent” is also a concern for Canada. This is an area that warrants further discussion.

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*

Commentary

It is not clear why document 9/5 refers to “mutual confidence” in the heading of this objective but “mutual respect” in the body of the objective.

Canada supports the inclusion of government users in the dialogue with traditional knowledge holders.

The federal government holds IP workshops in indigenous communities, at the request of those communities, expressly for the purpose of exchanging information on IP law and policy, and on traditional knowledge and traditional cultural expressions.

We observe, however, that the last part of the text implies that there already exists a clear and established set of principles and guidelines regarding ethical codes of conduct and prior informed consent. Canada is of the view that this overstates the reality of the situation, and recommends softening the language accordingly. The lack of clarity and definition around “prior informed consent” is also a concern for Canada. This is an area that warrants further discussion.

As noted previously, this objective could be combined with objectives (v) and (x).

Complement protection of traditional cultural expressions

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

#### Commentary

Canada is supportive of this text. However, we note that the corresponding objective has been deleted from document 9/4. Canada understands from its discussions with Canadian Aboriginal groups that some traditional knowledge holders consider TK, TCEs and folklore to emanate from the same source and, that taken together, they form part of a larger holistic view. In light of this, Canada respectfully submits that the corresponding objective be re-inserted into document 9/4.

## 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.*

Commentary

Canada is pleased to note that many of our previous comments are reflected in this text. However, some concerns remain with respect to the concept of recognizing and applying “indigenous customary practices, protocols and laws”, even with the qualifier “as far as possible and appropriate”. In Canada’s view, more analysis is needed on the issue of recognizing customary laws and protocols.

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.*

Commentary

As stated elsewhere in our submission, Canada is of the view that more clarity and precision around the term “rights” is warranted. In our view, the text should explicitly refer to intellectual property rights. It is clear to Canada that IP rights are available to TK holders and can be used, where appropriate, for the protection of their knowledge, but in certain instances there are limits to the usefulness of those rights. Part of the IGC’s work is to determine how to more adequately deal with these circumstances. Therefore, we believe that it is important to reinforce the specific reference to IP rights throughout the entire text.

In addition, as previously stated, we are of the view that more work and discussion with regards to the meaning of “misappropriation” is needed.

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*

Commentary

Canada recommends the following modification to the last sentence, in keeping with our principle of allowing maximum flexibility for Member States “Where measures for the protection of traditional knowledge are adopted, appropriate enforcement mechanisms should be developed at the national and local levels permitting effective action against misappropriation of traditional knowledge and supporting the broader principle of prior informed consent”.

Again, we are of the view that more work and discussion with regards to the meaning of “misappropriation” is needed. The lack of clarity and definition around “prior informed consent” is also a concern for Canada. This is an area that warrants further discussion.

#### 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.

#### Commentary

Canada is supportive of this principle and considers it to be of primary importance to the interpretation of all other guiding principles. As such, we suggest that it become the first, rather than the fourth, guiding principle in Document 9/5.

We recommend deleting the last sentence of explanatory paragraph 2 (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), as many of these issues are still under discussion in a variety of international *fora*, and it thus seems premature to reflect them here.

#### 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.*

#### Commentary

Canada has a number of concerns with respect to this principle. First, we observe that the term “protection” has several different meanings, such as preserving, promoting wider use, controlling use, preventing misuse, or channelling a proper share of benefits to holders. In addition, these various forms of protection may be realized through a variety of legal and policy measures quite apart from IP law.

Second, Canada notes that the primary purpose of most branches of the IP system is to promote human intellectual creativity and innovation. IP law and policy do so by striking a careful balance between the rights and interests of innovators and creators, on the one hand, and of the public at large, on the other. Thus, public dissemination of information is an important IP objective. All IP rights are also subject to various exceptions and limitations to help ensure a balance between the rights of creators and users. In addition, IP rights may be circumscribed by other legal and policy considerations such as freedom of expression, access to information and privacy legislation, and competition policy.

We believe that that the concept of prior informed consent requires clarification and definition. While the language used in the second explanatory paragraph draws from Article 8(j) of the CBD, it does not reflect any of the necessary contextual qualifiers, and, therefore, is misleading. The text also fails to address those TK or associated genetic resources that are already in the public domain, and the impact this may have on any possible policy approaches to equitable benefit-sharing.

Finally, Canada recommends that the third explanatory paragraph be deleted.

#### F: Principle of consistency with existing legal systems governing access to associate 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.*

#### Commentary

Canada strongly recommends that the second explanatory paragraph contained in Document 7/5 be re-inserted in to Document 9/5. In our view, the stand-alone explanatory paragraph now in Document 9/5 is too narrow in that it does not adequately maintain the integrity of

existing IP systems and international agreements. Accordingly, we recommend adding a second paragraph, as follow:

“Traditional knowledge protection should be consistent with, and supportive of, existing IP systems and should enhance the applicability of relevant IP systems to traditional knowledge subject matter in the interests of holders of traditional knowledge and consistently with the broader public interest. Nothing in these Principles shall be interpreted to derogate from existing obligations that national authorities have to each under the Paris Convention and other international intellectual property agreements.”

We also recommend inserting “if any” in the first paragraph (The protection of traditional knowledge associated with genetic resources shall be consistent with the applicable law, if any, governing access to those resources...).

#### 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.*

#### Commentary

Canada is supportive of this principle and explanatory text. Canada has consistently stated in its interventions and submissions to the IGC that any policy mechanisms that may be developed for the IP protection of TK must be consistent with Member States’ international obligations and commitments in IP treaties.

#### 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.*

Commentary

Canada is supportive of this principle, but recommends a re-inserting the qualifiers “as far as possible and as appropriate” into the opening sentence (Customary use, practices and norms shall be respected and given due account in the protection of traditional knowledge, as far as possible and as appropriate, subject to national law and policy).

*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.*

Commentary

Canada is supportive of this principle, as it seems to adequately reflect comments and concerns frequently expressed by Aboriginal peoples in Canada.

*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.

Commentary

Canada would like to express its appreciation to China for developing this new guiding principle, and we support the desirability of capacity building as expressed here.

Capacity issues are prominent in the Canadian context and given the number and diversity of communities, in some cases their relative isolation, and linguistic and cultural diversity, the resource implications are large. In our view, therefore, this principle needs to realistically reflect resource limitations on the part of governments to carry out capacity building activities.

[End of Annex and of document]