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PRACTICAL MEANS OF GIVING EFFECT TO
THE INTERNATIONAL DIMENSION OF THE COMMITTEE'S WORK

prepared by the Secretariat

CONTENTS

I. INTRODUCTION

1. A key aspect of the current mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') is the international dimension of its work.[1] The Committee has decided to deal with the international dimension integrally with other substantive items on its agenda, notably the items on traditional knowledge (TK), expressions of folklore (EoF) and traditional cultural expressions (TCEs), and genetic resources (GR).

2. Draft provisions for the protection of TK and TCEs/EoF against misuse and misappropriation have been prepared and are under active consideration:[2] these draft provisions propose shared international objectives of protection, and express common international principles. These provisions could guide or determine the specific national laws that in turn provide for specific legal remedies against acts of misuse and misappropriation of TK and TCEs/EoF. Such provisions could provide the normative substance and content of an international outcome on protection of TK and TCEs/EoF.[3] But in addition to the need for substantive outcomes, and the development of international norms against misappropriation and misuse, emphasis has also been laid on the need for an appropriate legal or policy vehicle for giving international effect to such provisions.

3. The Committee's current mandate includes reference to an international instrument or instruments as a possible outcome,[1] and a significant number of Committee participants have called for new international binding law in this domain. Progress towards any specific international outcome may require the Committee to address questions such as the desired interplay between the international dimension and national legal systems, the preferred manner of recognition of foreign right holders, and the appropriate relationship with other international instruments and processes. Such questions have practical or technical aspects, but also raise fundamental policy issues.

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1 Document WO/GA/30/8, paragraph 93.

2 On TCEs/EoF, see WIPO/GRTKF/IC/8/4 (and the previous text in WIPO/GRTKF/IC/7/3); on TK, see WIPO/GRTKF/IC/8/5 (and the previous text in WIPO/GRTKF/IC/7/5).

3 Work in the Committee on intellectual property and genetic resources has not produced a specific set of stand alone provisions akin to the draft provisions on TK and TCEs/EoF. The legal and policy issues raised by genetic resources are closely and integrally related with the protection of TK in particular, and are naturally dealt with in the draft TK provisions. Work has focussed on measures to prevent the obtaining or grant of illegitimate patents on genetic resources, and to promote information exchange and build capacity on the IP aspects of mutually agreed terms forming part of access and equitable benefit sharing systems. One reason for this form of treatment is that there is already a well established set of international rules governing genetic resources (principally the Convention on Biological Diversity (CBD) and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture), so that it is vital for WIPO work especially on genetic resource and related issues to respect and work within the framework already formed by these bodies of law. It has been strongly argued that WIPO work on TK and TCEs should respect and complement other international legal standards and policy processes, as the draft provisions and the discussions in this paper seek to do. The WIPO Ad hoc Intergovernmental Meeting on Genetic Resources and Disclosure Requirements (June 3, 2005) is addressing the specific question of disclosure requirements in patent law to deal with patents based on or drawing from TK and genetic resources, an issue the Committee has also addressed in the past, as one aspect of defensive protection of genetic resources.

4. This document supplements the draft substantive international provisions by setting out background information on the practical and technical aspects of these international questions. This may facilitate discussion of possible international mechanisms that could give effect to international normative standards such as those set out in the draft provisions. This document draws on the resources already put before the Committee concerning the international dimension (in particular the more detailed background document WIPO/GRTKF/IC/6/6). It distils and updates this material to respond to more recent developments in the Committee's work. It also identifies several questions that the Committee may wish to consider in advancing its work, in view of the lack of specific guidance to date on key international elements.

5. Even so, in providing this technical input and background material, this document does not seek to predetermine any approach on fundamental policy questions, which are properly the province of Committee members themselves to consider and determine. Since the Committee has already decided to consider these international questions integrally with the substantive agenda items, it is suggested simply that the material in this document be drawn on to the extent it is considered useful or appropriate in the substantive discussions on TK, TCEs/folklore, and genetic resources. Alternatively, this document may be considered redundant background information only.

II. PRIORITIZING THE INTERNATIONAL DIMENSION

6. Many Committee participants have stressed that the international dimension of the protection of TK, TCEs/EoF and genetic resources is a matter of the greatest priority for the Committee and for WIPO generally; it is also an express priority in the Committee's current mandate. A significant number of WIPO Member States have stated in the Committee and in other fora that the conclusion of a binding international instrument or instruments in this area is an important or fundamental priority. At the same time, there is as yet no consensus within the Committee on the appropriate vehicle or procedural steps to give effect to any substantive outcome. In view of both the expectations and the concerns expressed within the Committee, further discussion and guidance from the Committee may be necessary on the following specific questions:

- how its work should interact with other international processes and instruments, including dealing with concern that WIPO activities should be compatible with outcomes from other fora that are dealing with related questions such as human rights, the conservation of biodiversity and regulation of access and benefit-sharing concerning genetic resources, cultural heritage, and the promotion of cultural diversity;

- the options for recognizing the rights of the holders or custodians of TK, TCEs/EoF and GR in foreign jurisdictions ('recognition of foreign right holders'); and

- the linkage between international law, principles and standards, and national laws and measures that protect TK, TCEs/EoF and GR against misappropriation and misuse ('the interaction between international and national dimensions').

7. WIPO/GRTKF/IC/6/6 provided a general overview of the legal and policy background on the international dimension, and potentially remains an information resource for the

Committee.[4] The present document draws on this earlier document and provides more specific information that may be more directly applicable to the current Committee debate

8. Coupled with the strong emphasis laid by many Committee participants on the international dimension, there is continuing uncertainty about some pivotal questions on international protection, and an identified need for consultation and clarification of the options. For example, one delegation cautioned that "regional and international protection was … a complex issue and it was necessary to be very careful. Countries would have to consult with each other before adopting any legal measures in this regard." These areas of uncertainty have policy or political aspects, and are the domain of Committee members themselves to resolve; this technical paper does not seek to resolve them. Even so, clarification of some technical aspects of the international dimension may facilitate the conclusion of international instruments or comparable outcomes in conjunction with resolution of the broader policy and normative issues concerning protection.

9. At its seventh session, the Committee reviewed two complementary sets of draft international provisions on protection of EoF/TCEs and TK.[5] Following a commentary process, updated texts of these provisions are submitted to the Committee for consideration at its eighth session.[6] These draft provisions provide possible material for the content or normative substance of international outcomes from the Committee's work. However, Committee discussions to date have provided relatively little detailed guidance on the specific international questions highlighted in this paper. Any international instrument would need to take account of these issues, so this background information may assist in accelerating progress towards the Committee's outcomes. Accordingly, this document covers three aspects in turn:

- interaction with other international legal mechanisms and the possible scope of norm-setting (Section III);
- the linkage between domestic legal systems and norms and principles expressed at the international level (Section IV); and
- the specific approaches to triggering or recognizing the rights of foreign holders of TK or TCEs/EoF (Section V).

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4 The document covered the following issues: (a) Interaction with other elements of international law; (b) Current international IP law and standards that apply to TK and TCE subject matter; (c) Interpretation and extension of existing international standards, and the development of new international standards, including harmonization of the protection of TK and TCEs under national law; (d) International mechanisms for enabling nationals of one country to enjoy IP rights in a foreign jurisdiction; (e) International policy coordination; (f) International notification and registration; (g) International technical and administrative cooperation (including classification and documentation standards); (h) International coordination of mechanisms for the collective administration and management of IP rights; (i) Settlement of international disputes; and (j) Settlement of private disputes. Of these, elements (a), (c) and (d) are the focus of the present paper.

5 Annex I of documents WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5 respectively

6 Documents WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5.

III. INTERACTION WITH OTHER INTERNATIONAL LEGAL MECHANISMS AND PROCESSES.

10. This Section outlines the practical implications of two interrelated concerns: recognition of and respect for other international legal instruments and processes, and avoidance of inappropriate forms of protection that override or substitute for communities' own values, customary law systems and collective wishes for the maintenance and use of their TK and TCEs/EoF.

11. Participants in the Committee have consistently voiced the concern that WIPO's work in this area should be respectful of developments in other international fora, and should not encroach upon other international processes, nor pre-empt their outcomes; the current mandate of the Committee includes the reference that its work on the international dimension should be "without prejudice to the work pursued in other fora." At the same time, many participants have called for international outcomes from the Committee as a high priority, observing that exchanging national experience, explicating the full range of options, and capacity building initiatives are an inadequate response to the demands on and expectations of the Committee.

12. Equally, even before the Committee was established, during WIPO's consultations with TK holders in 1998 and 1999, many TK holders have expressed the view that inappropriate forms of intellectual property should not be imposed on the communities who hold TK and TCEs/EoF. As was identified during these dialogues, some "believe that the [IP] system is unsuitable as a modality to protect TK because of what they regard as the system's private property, exclusive rights and individual author/inventor-centric nature. One of the bases expressed for this criticism was that TK and the kind of innovation and creativity that the IP system was established to protect are too different. Certain of these persons are critical of the IP system *per se*, while others expressed opposition merely to its deployment in the TK arena. The latter stressed the holistic and communally-shared nature of TK, which, they said, should not become the subject of private IPRs in the hands of outside parties."[7] In addition, emphasis has been laid on the need to take international action to suppress certain forms of misappropriation and misuse of TK and TCEs/EoF by third parties. This would focus on the external environment, beyond the traditional community that develops and maintains TK and TCEs/EoF in the manner it chooses, and considers the kinds of acts that should be suppressed as illegitimate use or misappropriation beyond the current reach of the community's own traditional practices and any applicable customary law. At the same time, there have been concerns that WIPO's work should also take account of broader notions of protection, preservation and promotion of TK and TCEs/EoF.

13. These diverse requirements on the Committee may be perceived as being potentially in conflict. On the other hand, they may help positively clarify the appropriate space for international norms to be developed and articulated by the Committee, and also clarify its role vis-à-vis other international processes. In particular, these considerations suggest that the normative focus of the Committee should be on defining and preventing the acts by third parties beyond the community that are considered to be forms of misappropriation and misuse

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[7] *Needs and Expectations of TK Holders*, WIPO, 2001, p 90 (report on Fact-Finding Mission to Eastern and Southern Africa). A similar view has been reiterated in several recent commentaries on the work of the Committee. See, for example, Grain, "Community or commodity: What future for traditional knowledge?," *Seedling*, July 2004, p.1

of the materials developed and held by a traditional community, and should not focus on prescribing or defining the approach that traditional communities themselves take in developing, managing, and disseminating their knowledge according to traditional laws, practices and customs.[8] For example, many communities holding TK or TCEs/EoF stress that they already have customary laws in place, as the Four Directions Council underscored: "Indigenous peoples possess their own locally-specific systems of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its languages."[9] The diverse forms of such laws and practices is often a direct expression of the cultural identity of the communities concerned.

14. Accordingly, it may be considered an inappropriate intrusion for the Committee to endeavour to delimit or stipulate what laws and practices should apply within the traditional context, in particular within the original community. To the contrary, the draft provisions, in capturing the main points of the Committee's deliberations, have not sought to intrude in the traditional domain but rather to articulate how norms and practices established under local, customary law may be supplemented and buttressed by international safeguards against the misappropriation and misuse of TK and TCEs/EoF by third parties who act beyond the traditional community (including in foreign countries). Equally, the provisions do not propound the creation of distinct and discrete property rights as such, given the broader range of legal mechanisms that the Committee has explored, and the preference expressed by some to avoid such mechanisms. The draft provisions do, naturally, respond to the choice for specific rights that a number of national and regional *sui generis* laws create, and intangible property rights are one mechanism among several for addressing misappropriation and misuse, for empowering communities to authorize legitimate uses of their knowledge and cultural expressions, and for safeguarding the traditional domain against illegitimate acts by third parties. Yet in distilling a possible common international outcome that allows sufficient space for diversity while promoting convergence around shared norms, the provisions may need to look beyond specific legal mechanisms such as property rights, and instead concentrate on clarifying the acts of third parties that are considered illegitimate. As has been noted in past documents, this would be consistent with the evolution of intellectual property in a range of other fields, when the formulation of distinct property rights remains an option, implemented only if nations choose to take that path.[10]

15. This approach leaves open the option for communities to determine how they wish to exercise their say over their TK/TCEs/EoF, consistently with customary law, where applicable. It would give scope for the expression of community aspirations and values, consistent with respect for the customary domain and the diverse legal and cultural norms and traditions that define it. A clearer legal framework for preventing or penalizing the misappropriation and misuse of TK or TCEs/EoF by third parties, beyond the traditional community, would have the effect of complementing and supporting traditional knowledge

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8 Complementary capacity building and awareness raising activities allow for mutual learning from the experience of other communities, increase understanding of the practical options available, and buttress the capacity of communities to determine their own choices, in line with community values and goals, but do not seek to prescribe any particular approach, and are not normative materials in themselves.

9 Cited in *Needs and Expectations of TK Holders*, WIPO, 2001, p. 220.

10 See the example of performers' rights in document WIPO/GRTKF/IC/6/6

and cultural systems and practices, rather than commodifying or homogenizing them. It would aim to recognize, rather than interfere with, what has been called the "jurisprudential diversity" of traditional communities.[11] Such a framework also recalls that laws in the general field of intellectual property have not necessarily presumed the creation of distinct and severable property rights, nor the commodification or alienation of protected subject matter, but rather focus on the kind of unauthorized third-party acts that should be repressed. This has been an approach frequently taken in the development of international mechanisms. The general law of unfair competition, and a range of international standards in fields as diverse as performances, phonograms, integrated circuit protection and unregistered marks have been consistent with legal mechanisms focused on suppressing various forms of misapprpriation and misuse, rather than in constructing specific new property rights.[12] As was earlier noted:[13]

> some international requirements for protecting IP are variously expressed in terms of the "possibility of preventing" certain acts,[14] requiring Contracting States to "take adequate measures to prevent' unauthorized distribution,[15] or specifying that 'legal action required for ensuring the legal protection … may be taken … under the provisions of national legislation (1) at the instance of the Competent Office or at the request of the public prosecutor (2) by any interested party, whether a natural person or a legal entity, whether public or private."[16]
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> In some instances, international instruments explicitly set out the range of options for the form of protection, through a broad range of IP laws or other areas of law, including criminal law. Some existing *sui generis* forms of protection allow a very wide choice of legal mechanisms under national law to give effect to general protection standards articulated at the international level. For example, under the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC), Article 4, "[e]ach Contracting Party shall be free to implement its obligations … through a special law … or its law on copyright, patents, utility models, industrial designs, unfair competition or any other law or combination of laws." The Phonograms Convention[17] provides that its means of implementation 'shall be a matter of domestic law … and shall include' protection by means of one or more of "the grant of copyright or other specific right,' 'the law relating to unfair competition,' or 'penal sanctions."

16. Even so, the entitlement to obtain relief against misappropriation and misuse may still be grounded in the pre-existing and fundamental rights that arise from a community's

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11 Cited in *Needs and Expectations of TK Holders*, WIPO, 2001, p. 220.

12 See background commentary on these forms of protection of intangible property and interests against misappropriation or misuse in past Committee documents, notably WIPO/GRTKF/IC/6/6, WIPO/GRTKF/IC/7/3, WIPO/GRTKF/IC/7/4, WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/7/6.

13 WIPO/GRTKF/IC/6/6, paragraphs 15 and 16.

14 Rome Convention, Article 7.

15 Satellite Convention, Article 2.

16 Lisbon Convention, Article 8; compare the Commentary to the Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition, BIRPI (1966), which indicates that 'indications of source and appellations of origin (as distinct from marks) do not have an owner capable of ensuring their protection against misuse. The capacity to prevent or repress such misuse is therefore given to the competent authority … and to any interested person…' (Section 51(2)).

17 Article 3.

development and custodianship of TK and TCEs/EoF, and rights associated with the distinctive relationship between a traditional community and its knowledge and cultural expressions. In other words, such mechanisms can respect and give broader effect to such rights and responsibilities beyond the original community, without seeking to constrain, redefine or supersede traditional forms of custodianship, nor the customary laws, protocols and practices that are often integral to the way TK and TCEs/EoF are held, transmitted and developed within the community.

17. This understanding, in turn, helps distinguish an appropriate role for the Committee's norm-building activities vis-à-vis other international processes, by focussing on the specific role and function of draft provisions on defining illegitimate forms of misappropriation and misuse. This focus is akin to the earlier development of 'protection … against illicit exploitation and other prejudicial actions' that was the objective of earlier norm-setting activities conducted by WIPO and UNESCO regarding folklore.[18]

18. This broad approach, guided by the Committee's own deliberations,[19] could lead to draft provisions on protection of TK and TCEs/EoF which:

(i) focus on the most appropriate and relevant aspect of the broader field of intellectual property law, namely characterizing those acts of third parties, beyond the traditional communities, which are to be considered illegitimate, unauthorized or otherwise inappropriate forms of use of TK or TCEs/EoF, without prejudicing or pre-empting the communities' own laws;

(ii) appropriately complement work under way in other contexts, such as on indigenous rights, conservation and benefit sharing associated with biodiversity, and intangible cultural heritage and cultural diversity, without pre-empting outcomes in those fora on the crucial issues they are addressing;

(iii) operate consistently with those national *sui generis*systems that elect to create specific intangible rights in TK or TCEs/EoF, without requiring this approach when it is contrary to the wishes of holders of TK and TCEs/EoF, and against the policy of appropriate national authorities;

(iv) do not presume that TK or TCEs/EoF will be turned into commodities or be alienated from their , but would rather give the holders of TK and TCEs/EoF the entitlement to say 'no' to any use of their TK or TCEs/EoF that is contrary to their wishes; this would include the right to prevent any illegitimate use by third parties, to determine and to delimit how appropriate commercial use could occur through the grant of consent to partners beyond the community, and to sustain a suitable space for community-based initiatives that would make use of TK or TCEs/EoF as the basis of community-led development and cultural

[18] WIPO-UNESCO Model Provisions for National Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions, 1982).

[19] See in particular the summary of views put to the Committee in Annex 2 of documents WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5, views which shaped the current provisions, and the more detailed background in documents WIPO/GRTKF/IC/7/4 and WIPO/GRTKF/IC/7/6.

exchange;

(v) allow sufficient space for continuing consultation, evolution, cross-fertilization and applying the lessons of practical experience, as continuing community, national, regional and international initiatives are taken to address various aspects of protection, safeguarding and preservation of TK and TCEs/EoF; and

(vi) allow scope and opportunity for continuing capacity building and cooperation based at promoting broader goals of preservation, promotion and safeguarding of TK/TCEs/EoF, and its use in grass roots development in ways chosen by the; this would continue to emphasize those forms of capacity building and the practical tools requested by the communities themselves.[20]

19. Such considerations could help ensure that the work of the Committee meets the expectations outlined above, firstly by appropriately complementing other international laws and processes, without pre-empting or conflicting with them; and secondly by supporting and respecting communities' own traditional and customary norms and practices without encroaching upon or circumscribing them.

IV. INTERACTION BETWEEN INTERNATIONAL AND NATIONAL DIMENSIONS

20. The draft provisions for protection TK and TCE/EoF were drafted as suggested norms that would be expressed and applied at the international level, but would have operational impact through national laws. Accordingly, they were shaped as potential international outcomes, along the lines of the template set out by the African Group (WIPO/GRTKF/IC/7/14). Such international principles would normally be predicated upon actual protection being undertaken through national legal systems. For instance, a general norm against misappropriation of TK may be expressed at the international level but would typically be applied in practice through national law. The draft provisions were neutral as to the legal or procedural vehicle for expressing or applying these principles internationally, so as not to pre-empt Committee decisions on this key question. Even so, some Committee participants criticized the draft provisions as being focussed on protection under domestic laws and lacking a true international component. According to one report, for example, "the policy objectives and core principles drawn up in the document were merely an international layer of national systems."[21]

21. On the other hand, most international principles governing the recognition, promotion and protection of TK and TCEs/EoF (whether in the IP context or in other legal and policy contexts) operate through national law and legal systems, and at the international level still define and prescribe how such domestic arrangements operate. For example, the recognition and protection of biodiversity-related TK under the CBD is one element of national obligations on *in-situ* conservation under Article 8 of that Convention, in line with the broader

[20] For example, those materials under development in response to requests made by holders of TK and TCEs/EoF in the consultations held by WIPO in 1998-99 (see 'Needs and Expectations of Traditional Knowledge Holders,' WIPO, 2001.)

[21] South Centre and CIEL IP Quarterly Update, at http://www.ciel.org/Publications/IP_Update_4Q04.pdf

objectives of the CBD (set out in Article 1) and the status of the CBD as international public law.

22. It therefore may be helpful for the Committee to clarify how legal obligations, standards, principles or objectives articulated at the international level can and should interact with national laws and other measures applied at the domestic level. The alternative, in international law terms, would be the creation of measures that are directly enforced and policed at the international level, rather than through national measures. A step further would be to establish acts of misappropriation of TK/TCEs/EoF as a direct breach of international law obligations: behind these choices is the important question of whether misappropriation is to be defined as a breach of international law in itself, to be resolved between states and other parties with international legal personality; or as a breach of national laws (which are in turn defined, shaped, or coordinated with reference to international laws and standards).

23. If the practice regarding IP in other domains is considered potentially relevant (which may not be the view of all Committee participants), what is often termed international protection of IP[22] is – on the whole - ultimately provided through rights and interests[23] recognized and exercised under national laws.[24] It is essentially at the national level that right holders are recognized as having legal identity (or legal personality), that they are given standing to take legal action, and that they are considered entitled to be granted or to hold an IP right; and it is ultimately under national law that rights and other interests are legally recognized. International arrangements can facilitate applying for rights, can define the basis for other interests, and can facilitate the registration and recordal of rights and interests. In some jurisdictions, the international arrangements can form the basis for rights directly exercised by individual right holders. Yet it is still at the national level that rights are exercised and actual benefits are attained. It is typically national legal mechanisms that allow right holders to take action to restrain infringement of their rights and to secure other remedies such as damages. Contracts and agreements that affect the ownership, licensing and other dealing in IP rights are also concluded and enforced under national laws.

24. An international arrangement for the protection of TK, TCEs/EoF and GR would need to consider how rights and obligations of States at the international level are translated into operational mechanisms at the national level. Any general approach to the IP protection of this subject matter, including its international dimension, necessarily entails consideration of

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22 *See, e.g.*, Jon Baumgarten, *Primer on the Principles of International Copyright*, in Fourth Annual U.S. Copyright Office Speaks: Contemporary Copyright And Intellectual Property Issues 470, 471 (1992): "The term 'international copyright' is something of a misnomer, for neither a single code governing copyright protection across national borders, nor a unitary multi-national property right, exists. What does exist is a complex of copyright *relations* among sovereign states, each having its own copyright law applicable to acts within its territory." (emphasis in original).

23 The term 'rights and interests' is used here and elsewhere in this document so as not to prejudge the choice of legal mechanism, in particular when distinct 'rights' are not the preferred mechanism. For example, protection of performances under the Rome Convention is phrased in terms of 'the possibility of preventing' certain illegitimate acts. IP laws and treaties can also provide for mechanisms that are available to 'interested parties,' such as an obligation to 'provide the legal means for interested parties to prevent' certain illegitimate acts under national law.

24 Regional laws may also apply. For the sake of simplicity in this document any reference to national laws also refers to applicable regional laws.

what legal mechanisms are required at the national level, how they should operate, and what legal and operational contributions the international dimension can make to protection at the national level. It also requires a shared understanding of the role, and the limits on the role, of international mechanisms, whether they are legal, policy, administrative or capacity-building mechanisms. This is not to diminish the international dimension of IP protection, but to set it in a practical and operational context.

25. Even if its protection ultimately hinges on the operation of national laws, the nature of IP has long demanded international cooperation, including through international legal instruments, but also through a wide range of other international systems and processes. In fact, it has been considered necessary to craft an international dimension to intellectual property protection since the mid-nineteenth century, firstly through a series of bilateral trade and IP agreements, and then through the first multilateral treaties on intellectual property (the Paris Convention on the Protection of Industrial Property ('Paris') concluded in 1883, and the Berne Convention for the Protection of Literary and Artistic Works ('Berne') in 1886).

26. As outlined in WIPO/GRTKF/IC/6/6, past experience suggests that the international layer of protection can include the following elements:

(i) mechanisms for ensuring that certain foreign right holders and interested parties have access to national legal systems;
(ii) mechanisms for recognizing the legal identity or standing of foreign right holders or interested parties;
(iii) substantive standards of protection that national law should provide to right holders or interested parties;
(iv) international notification or registration of some specific subject matter as being potentially eligible for protection under national laws;
(v) means for ensuring or encouraging that international standards are given effect in national laws, including by means of binding international law.

27. To this could be added consideration of the different avenues by which international standards determine possible ways of ensuring that national systems do give effect to international standards, including. There have been many calls for the development of internationally binding law as an outcome of the Committee's work. The formulation of international law with directly binding effect on states is beyond the legal competence of the Committee itself, and indeed of WIPO itself. It would be a constitutional and political departure for a WIPO body to seek to articulate *jus cogens* or international law with directly binding effect.[25] A standard reference on the law of international institutions observed that:

> The approach is much more restrictive … when it comes to institutional acts aiming at producing effects outside the organization's legal order. It is largely agreed in that respect that the power to adopt normative acts binding on members in the "external sphere" must be expressly stated in the organisation's constituent instrument and may not be implied. … [S]uch explicit empowerment is the exception rather than the rule… This does not mean, however that institutional acts which should technically be

[25] Referred to in the Vienna Convention on the Law of Treaties, Art. 53 as 'a peremptory norm of general international law' and defined as 'a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

considered as merely recommendatory will be devoid of all legal effects vis-à-vis member states in the external sphere; some of them may indeed become legally binding in other ways.[26]

28. The current framework is for Member States to determine those international standards which they wish to adhere to, and to take specific legal steps accordingly as defined in the relevant international treaty. Of the WIPO treaties that are in force and that concern IP protection, the number of countries that have elected to adhere currently[27] ranges from 169 (Paris Convention) to 10 (Patent Law Treaty). Several treaties, concluded with the intention of formulating standards binding on contracting parties, have not entered into force due to an insufficient number of ratifications.[28] In some cases, treaty text has been given binding effect through other legal mechanisms (e.g. the TRIPS Agreement, which gives effect to substantive provisions of the Washington Treaty in an amended form). In other cases, standards adopted as non-binding recommendations have evolved into proposals for new treaty text with potential binding effect (e.g. the current process to revise the Trademark Law Treaty draws in part on the Joint Recommendation on Trademark Licenses adopted by WIPO in 2000).[29] As document WIPO/GRTKF/IC/6/6 outlines, measures adopted internationally have been recognized and given effect by national legal and judicial authorities even in the absence of specific international law obligations to do so.

29. This background discussion suggests that the following questions may be relevant if the Committee elected to consider these broad questions.

Should the Committee seek to determine at the international level how the misappropriation and misuse of TK and TCEs/EoF should be suppressed?

As discussed above, the focus on misappropriation and illicit use of TK and TCEs/EoF would be consistent with past norm-setting activities, such as the concentration in past work on folklore on its protection against 'illicit exploitation and other prejudicial actions'. Elaboration and development of the draft provisions on protection of TK and TCEs/EoF is a possible pathway to achieving this objective, if the Committee agrees to continue this work. The provisions would specify key questions such as what acts are considered to be misappropriation or illicit use, and provide guidance on the nature of the subject matter of protection and the identify of beneficiaries of this form of protection.

If so, should it seek to define this form of protection in terms of international measures to be given effect directly at the international level, or by determining principles and standards that would be given effect by domestic (municipal) laws and other legal measures?

The conventional option would be to seek to express at the international level the standards that would be given effect through national legislation and domestic legal systems. In this approach, the international dimension sets out substantive standards and other legal matters

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[26] P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th Edition, p. 280.

[27] As at April 1, 2005

[28] Among those discussed in WIPO/GRTKF/IC/6/6 are sui generis protection systems such as the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (1989), the Vienna Agreement for the Protection of Type Faces and their International Deposit (1973) and the Geneva Treaty on the International Recording of Scientific Discoveries (1978).

[29] See document WO/PBC/4/2, page 53

such as the entitlement of foreign right holders and interests to benefit from protection in a given jurisdiction. National laws would give effect to such general standards, rather than having TK and TCEs/EoF directly protected under international law – in the sense that an act of misappropriation would be considered a direct breach of international law, rather than a matter that is governed by national laws that comply or give effect in some way to principles and standards articulated or defined at the international level. Alternative approaches may be explored and researched if Committee members chose to take that path.

If protection is to be afforded through national legal measures, what form of linkage is required between the international expression of standards and the national legal systems?

If national laws are to give effect to agreed international principles or standards, the linkages between national and international layers can taken various forms. Document WIPO/GRTKF/IC/6/6 sets out some of the following possible approaches:

- a binding international instrument or instruments (e.g. obliging Contracting Parties to apply the prescribed standards in national law), including stand-alone instruments, protocols to existing instruments or special agreements under existing agreements;
- a non-binding statement or recommendation (e.g. recommending, encouraging or urging States to give effect to the prescribed standards in national law and other administrative and non-legal processes and policies);
- guidelines or model provisions (e.g. providing the basis for cooperation, convergence and mutual compatibility of national legislative initiatives for the protection of TK and TCEs/EoF);
- authoritative or persuasive interpretations of existing legal instruments (e.g. guiding or encouraging the interpretation of existing obligations in such a way as to enhance the desired protection of TK and TCEs/EoF against misappropriation and misuse); and
- an international political declaration espousing core principles and establishing the needs and expectations of TK holders as a political priority (e.g. as the political basis for a further phase of work possibly aimed at more precise legal outcomes).[30]

Since the draft provisions have been prepared in a neutral form, so as not to pre-empt the policy choices of the Committee in this regard, they would be potentially applicable for any one or combination of the above options. Equally, the provisions provides possible legal content for instruments at the regional and national level, such as regional or national laws, regulations, decrees or policies.

30. While there is likely to be differing views within the Committee as to the appropriate course of action, it could perhaps be noted that these have not been mutually exclusive options, in the realm of international IP law and in international law in other areas. For example, the UNESCO-WIPO Model Provisions for the Protection of Folklore were developed with a view to the subsequent conclusion of a treaty, and have also been highly influential in their own right in the past development of many national laws. The FAO International Treaty, drafted as a binding international instrument, was a development of a

[30] WIPO/GRTKF/IC/6/6, paragraph 34.

past non-binding International Undertaking. As noted, past WIPO recommendations have been employed in drafting national laws, have been weighed by judicial authorities, and have given rise to proposed binding treaty language. A number of influential international instruments on the protection of TK and TCEs/EoF have been prepared as non-binding instruments with potential capacity to determine the legal obligations established under national laws (African Union Model Law, Pacific Framework). While this is very plainly a matter for Committee members to consider and determine, experience in other domains suggests the possibility of a phased approach, in which one mechanism for framing international standards and for promoting the desired approach to protection in national standards leads in turn to further elaborated or revised mechanisms, with increasing expectation of compliance and increasing legal effect.

31. These questions may perhaps be summarized as:

(i) If the Committee is to produce a normative outcome, should its essential focus be on defining the norms of suppression of misappropriation and misuse (while ensuring complementarity with broader policy and legal processes)?

(ii) Should these norms be expressed in terms of acts of misappropriation and misuse as violations of international law, or in the terms of objectives and principles that would in some manner and form define, shape, guide or bind the national laws which would provide direct remedies against acts of misappropriation and misuse?

(iii) If the international and national layers of protection are clarified, what means or combination of means should be selected to express and give effect to the agreed norms? Should this be any one or combination of the options set out in WIPO/GRTKF/IC/6/6 and paragraph 29 above, or other options not covered there? Should there be a single goal, in terms of one defined outcome, or a phased approach, in which there could be a succession of cumulative outcomes?

These questions are not intended to prescribe or limit the choice of approaches available to the Committee, but aim merely to focus the considerations that have been put before the Committee and thus possibly to facilitate discussion.

V. MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS

32. International laws and principles define, to greater or lesser extent, the nature, standard and scope of protection for TK, TCEs/EoF and GR. They address such substantive issues as what subject matter should be protected, for how long, and against what forms of use or misappropriation by third parties. Whether as a legal obligation (as many delegations have called for) or as a voluntary step, national laws are required to give effect to such substantive principles that are espoused internationally. Such substantive questions have been discussed extensively in the Committee, and are covered in the draft provisions on TK/EoF/TCEs protection (see also the discussion on the use of international instruments to give effect to principles in national legal systems above in section IV). But additional to the level and nature of protection that such international standards and principles stipulate, there is the key issue, central to the international dimension, of how rights and interests of foreign holders of

TK/EoF/TCEs and custodians of GR are to be recognized in national laws. This question is a fundamental choice in many international instruments: which foreign nationals should be recognized under a national law, according to what criteria or doctrine; should any foreign national automatically gain access to the domestic legal system, or are there restrictions or conditions?

33. In the historical development of international IP law, the first major question to be dealt with at the international level was the recognition of foreign right holders in domestic law. The initial impulse towards the original multilateral treaties on IP law (notably the Paris and Berne Conventions in the 1880s) came in part from recognition of the need for consistent recognition of foreign right holders in national jurisdictions, and the consequent desire for a multilateral framework to allow reasonable non-discriminatory access to the IP system for foreign right holders. Accordingly, the creation of the Paris and Berne Unions helped ensure that countries in each Union provided non-discriminatory access to their industrial property or copyright systems for nationals of all other countries in the Unions.

34. The questions raised then are still relevant today for domestic legislators, and for international regimes that set norms and standards for domestic systems to comply with. The questions boil down specifying the conditions or circumstances that determine whether foreign right holders and interests have access to national IP systems, which foreign countries are eligible, and what level of protection is to be afforded.

35. One approach would be to recognize and give effect to any eligible right holder or interested party, regardless of where they are located – a principle of universality. According to one authority, this principle 'has been favoured by countries that treat copyright as the emanation of a natural right of a creative individual.'[31] In other cases, access is allowed for nationals of certain stipulated countries, typically those which have acceded to a certain treaty (this often is extended to others who are not nationals as such, but who have a sufficient relationship with a stipulated country, a relationship that can be treated as equivalent to nationality).

36. The standard set in the nineteenth century, which is still the cornerstone of international IP law, is the principle of 'national treatment' for nationals of those states which have adhered to a relevant treaty. National treatment is a particular form of a general rule of non-discrimination against foreign rights or interests. The principle can be defined in terms of granting to foreign nationals the same protection as domestic nationals, or *at least* the same form of protection. The Paris Convention (Article 2) provides that 'nationals of any country of the [Paris] Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals.' The Berne Convention (Article 5) provides that '(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention,' and that 'protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.' The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that each WTO Member "shall accord to the nationals of other Members

[31] Bently and Sherman, 'Intellectual Property," Oxford, 2001, p.100.

treatment *no less favourable* than that it accords to its own nationals with regard to the protection of intellectual property" (Article 3, emphasis added). Another related mechanism for affording access to a national system is 'assimilation' to an eligible nationality by virtue of residence. For example, the Berne Convention (Article 3(2)) provides that authors who are not nationals of one of the countries of the [Berne] Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.' According to commentary on the Convention, this paragraph 'covers the special case of stateless persons and refugees.'[32] (See also Article 3 of the Paris Convention for a similar 'assimilation' mechanism.)

37. Instead of national treatment, or supplementing it, other international legal mechanisms have been used to recognize the IP rights of foreign nationals. Under reciprocity or reciprocal recognition, whether a country grants protection to nationals of a foreign country depends on whether that country in turn extends protection to nationals of the first country; the duration or nature of protection may also be determined by the same principle. Under a mutual recognition approach, a right recognized in one country would be recognized in a foreign country by virtue of an agreement between the two countries. Behind these different approaches is a fundamental principle: should protection enjoyed in one country be independent of protection afforded elsewhere (e.g. in the country of origin); or should it somehow be linked (e.g. protection in a foreign country may only be available for subject matter that is protected in its country of origin.)

38. Also of potential application to the recognition of rights of foreign IP holders, is the 'most-favoured-nation' principle, a key element of international trade law since the nineteenth century, but not applied directly or explicitly to IP protection until the comparatively recent entry into force of TRIPS. TRIPS provides (subject to exceptions) that: '[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a [WTO] Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.' This principle could potentially be relevant in the event of bilateral or regional agreements extending protection of TK or TCEs/EoF.

39. In principle, therefore, the existing choices for recognizing the rights and interests of foreign holders of TK and TCEs/EoF include universality, national treatment, assimilation, the most-favored nation principle, reciprocity and mutual recognition. Actual instruments can draw on a number of these principles in practice. Committee participants drew critical attention to the lack of specificity on the protection of foreign right holders when reviewing the draft provisions discussed the Committee's seventh session.[33] However, existing TK and TCE laws, and policy and legal discussion, have provided little guidance on the recognition of foreign right holders, and the draft provisions were therefore expressed in general terms so as not to pre-empt this important consideration. One delegation noted in reference to these mechanisms that there was a "need for wider consultation involving all interested parties before the establishment of legal protection mechanisms."[34]

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[32] Guide to the Berne Convention, WIPO, p. 27.

[33] See principles concerning "International and Regional Protection" at B12(a) (Annex II, WIPO/GRTKF/IC/7/3) for TCEs/folklore and at B14 (Annex II, WIPO/GRTKF/IC/7/5) for TK; see commentary *passim* in the report of the session (WIPO/GRTKF/IC/7/14 Prov.2)

[34] WIPO/GRTKF/IC/7/14 Prov.2, para 85.

40. No clear guidance can be drawn from the many existing *sui generis* laws protection TK. Some *sui generis*laws do not protect foreign TK holders at all, and are focussed on the rights and interests of domestic TK and domestic holders of TK. Other *sui generis* laws provide for limited reciprocity of protection. For example, Country A protects the rights and interests of TK holders from Country B, only to the extent that Country B protects TK from Country A. Existing laws on TCEs/folklore equally show a mixed picture. In some cases, folklore protection is accorded as an element of the protection of copyright, so that the national treatment principle could apply as under copyright more generally. But there is also a relatively widespread pattern of defining folklore protection as applying to domestic folklore exclusively (in some cases even defining the term 'folklore' as being limited to domestic folklore only).

41. Some elements of mutual recognition may also lend themselves to protection of TK/TCEs and GR. For instance, if one country has a system of recognition of customary law, of recognizing the legal identity of an indigenous community, or of recognizing custodianship rights and obligations, such recognition could be given direct effect in a foreign jurisdiction through a system of mutual recognition. Given the diverse, specific, and inherently local, characteristics of TK/TCEs/EoF and the integral, often holistic relationship between the custodian community and the subject matter, this may be a necessary step for more elaborated elements of protection, rather than requiring a TK holding community to establish its legal identity, standing or the nature of its customary law, this may be a more equitable and effective means of assuring protection in foreign jurisdictions. Where protection is accorded to a collective entity, such as a traditional community, it would be burdensome for them to be required to reestablish their legal identity and standing in each foreign jurisdiction. Mainstream international IP law also deals with this question.

42. For example, a measure of mutual recognition of the legal status of a collective body is provided for in the Paris Convention. Article 7*bis* (3), concerning collective marks, provides that "the protection of these marks shall not be refused to any association the existence of which is not contrary to the law of the country of origin, on the ground that such association is not established in the country where protection is sought or is not constituted according to the law of the latter country." The eligibility for access to the legal system in the country of protection is based upon the legal status of the collective group in the country of origin. This provides a potential analogy for the protection in foreign jurisdictions of the TK or TCEs/EoF held by collective entities recognized in their country of origin.

43. Since the documents drafted by the Secretariat have sought only to reflect the positions expressed and the experience reported upon in the Committee, and in view of the lack of guidance on this key aspect of the international dimension, the draft provisions articulated a general provision of had left the questions of the desired mechanism for recognition of foreign right holders open for the Committee's consideration. Nonetheless, the commentary on these neutral provisions called for greater consultation and consideration of these issues. Accordingly, the following discussion sets out, provisionally, the kind of questions that may be considered. These questions do not relate, directly, to the question of what substantive standards of protection that international laws or standards require for national law to give effect to. They refer, rather, to the question of what kind of access to one nation's legal system should international standards prescribe should be available for foreign holders of TK or TCEs/EoF. Again, these questions are not intended to prescribe or limit the choice of approaches available to the Committee or Committee members, but rather to illustrate some of the choices that are available in more concrete form.

Should foreign right holders or foreign interests be recognized at all?

44. A prior, basic question is whether or not a national law on TK or TCEs/EoF should recognize foreign right holders or foreign interests at all. This is not a foregone conclusion, bearing in mind that some existing laws have an exclusive domestic focus; for example, some only protect domestic folklore. On the other hand, the focus on the international dimension has arisen at least in part because of the expectation that TK and TCEs/EoF originating in one country should be protected against misappropriation or misuse in other countries. Accordingly, where international standards require the protection of TK or TCEs/EoF in a foreign country, they may need to clarify that this protection should, indeed, be available to eligible foreign holders of TK and TCEs. A further question is whether entitlement for protection is based on the *subject* of protection (the TK or TCEs/EoF as such), or the *beneficiaries* of protecton (the right holders, the eligible Indigenous and local communities, or other defined interests).

45. Some illustrative examples include:

(i) Country A only provides protection to TK or TCEs/EoF that originate in Country A by defining eligible TK or TCEs/EoF as being of domestic origin;
(ii) Country A only provides protection to TK or TCEs/EoF that originate in Country A by defining beneficiaries of protection as being nationals, residents or defined eligible communities or peoples of Country A;
(iii) Country A provides protection to eligible TK or TCEs/EoF regardless of its origin;
(iv) Country A provides protection to eligible beneficiaries (communities or individuals), regardless of their nationality or location;
(v) Country A provides protection to eligible TK or TCEs/EoF provided that it originates in Country B, where Country B meets certain criteria; or
(vi) Country A provides protection to eligible holders of TK or TCEs/EoF provided that they are located in or are nationals of Country B, where Country B meets certain criteria.

If foreign right holders or interests are recognized, then from which countries?

46. If protection is extended beyond domestic TK/TCE holders and so as to benefit foreign right holders and interests, the question arises as to what foreign countries are recognized. One approach, a universal approach, would be to recognize the rights or interests of any holders of TK and TCEs/EoF no matter what foreign country they are nationals of, reside in, or are otherwise linked with – any holder of TK or TCEs/EoF would automatically gain access to the legal system, as an international entitlement *erga omnes*, applying a principle of universality. A more conventional approach would be to extend protection only to TK/TCE holders from states which had adhered to a relevant international instrument, or were otherwise members of an international arrangement. For example, many countries limit the entitlement to national treatment to nationals of countries which are party to the Paris Convention, the Berne Convention or other relevant treaties, or which are members of the WTO, because international legal instruments specifically oblige them to. They are not obliged to give access to their legal systems to nationals of countries which have not adhered to the relevant international treaties. Another approach has been to make protection conditional on the conclusion of bilateral agreements, or on the basis of mutual recognition, so that protection is available only if domestic Alternatively, certain eligible countries may be identified, so that protection would only be available for the benefit of TK/TCE holders from

certain neighboring countries, countries part of a region agreement, or from developing countries only, to cite some possible examples.

47. Some illustrative examples include:

(i) Country A accords protection to any otherwise eligible foreign TK/TCE/EoF regardless of its origin, or to foreign right holders and interests regardless of their nationality, location or residence (as appropriate);

(ii) Country A accords protection to subject matter or beneficiaries connected with Country B, where Country B has agreed bilaterally to protect Country A's TK or TCEs/EoF to a similar standard;

(iii) Country A accords protection to subject matter or beneficiaries connected with Country B, where Country B is party to a relevant treaty or convention, or is member of an international organization;

(iv) Country A accords protection to subject matter or beneficiaries connected with Country B, where Country B meets certain other criteria (e.g. it is member of a regional body, or is a developing or least-developed country);

(v) Country A accords protection to subject matter or beneficiaries from Country B; due to an applicable most-favored nation obligation it owes to Country C, Country A is therefore obliged to provide the same level of protection to subject matter or beneficiaries from Country C.

If foreign right holders or interests are recognized, what legal status is necessary and what connection with their country is required?

48. The question also arises as to the legal status the right holder would need to have and what connection they need to have with a relevant country. As to legal status or legal personality, one example is given by the Paris Convention which, as noted above, provides for recognition of "collective associations the existence of which is not contrary to the law of the country of origin" even where they are not recognized legally in the country of protection. Another question is whether a foreign right holder needs to be a national (including a recognized 'legal person' such as an association, corporation, community or tribe) of a certain country. Alternatively, simple residence, domicile or another connection may be enough. A more general linkage of this nature might be more appropriate for communities who hold TK and TCEs/EoF, to allow for greater diversity in their legal personality and the possibility of elements of the same community residing in neighboring countries.

49. Some illustrative examples include:

(i) Country A accords protection to TK or TCEs/EoF held by a traditional community in Country B, on the basis that the community has recognized legal personality in Country B; or on the basis that is not 'contrary to the laws' of Country B;

(ii) Country A accords protection to TK or TCEs/EoF held by a traditional community in Country B, on the basis that a substantial portion of the community is normally resident in Country B;

(iii) Country A accords protection to TK or TCEs/EoF held by a traditional community in Country B, on the basis that the laws of Country B explicitly recognize the community as being an eligible community for the purposes of protection of TK or TCEs/EoF;

(iv) Country A accords protection to TK or TCEs/EoF held by a traditional

community in Country B, on the basis that the community accords with Country A's own rules for legal personality and eligibility.

What standard of protection and benefit should apply to foreign right holders?

50. If foreign right holders or interests relating to TK or TCEs/EoF are recognized, the question then arises as to what standard of protection of benefit should they receive. A general national treatment approach would entail that foreign right holders or interests would enjoy the same, or at least the same, level of protection and benefit enjoyed by domestic right holders and interests (subject to certain exceptions – these often apply to matters such as the need to have an address for service, an agent or legal representative in the country where protection is required). National treatment is seen as providing an elementary safeguard to ensure that foreign right holders are not unreasonably discriminated against. On the other hand, some existing *sui generis* national laws concerning TK or TCEs/EoF contain highly specific provisions precisely tailored to the traditions, and the cultural and historical context, of TK/TCE holding communities within the countries concerned, including integration of protection with government programs in other areas such as land law, environmental management , health and indigenous rights, that may be difficult to extend effectively and equitably to foreign holders of TK/TCEs/EoF.

51. Some illustrative examples include:

(i) Country A protects the eligible TK or TCEs/EoF of Country B at exactly the same standard, or to at least the same standard, as the TK or TCEs/EoF of Country A (national treatment);

(ii) Country A protects the eligible TK or TCEs/EoF of Country B to the standard that the TK or TCEs/EoF of Country A are protected in Country B (reciprocity);

(iii) Country A protects the eligible TK or TCEs/EoF of Country B in accordance with the standards prescribed in an international instrument.

52. On the basis of this discussion, one possible approach to developing further the general principle of effective protection proposed in the original draft provisions would be a flexible form of national treatment *erga omnes*, which would ensure that eligible holders of TK and TCEs/EoF in any foreign country should be entitled to protection against misappropriation and misuse of their TK or TCEs/EoF. However, if the provisions were being considered as an international instrument, this could be modified by referring to nationals of prescribed countries (so as to give countries a positive incentive to adhere to the instrument). This could be achieved at the international level by incorporating the following elements in international standards:

(i) national laws that give effect to international standards on TK/TCE protection should ensure that all eligible holders of [TCEs or EoF/TK and associated GR] should benefit from this protection.

(ii) benefits should be available regardless of the nationality or country of habitual residence or establishment of the eligible holders of [TCEs or EoF/TK and associated GR]; or may be limited to beneficiaries who are nationals or habitual residents of a

prescribed country as defined by international obligations or undertakings.

(iii) the level of benefit for foreign right holders or interests should be at least at the same level as holders of [TCEs or EoF/TK and associated GR] who are nationals of the country of protection.

(iv) exceptions should be permitted for essentially administrative matters such as appointment of a legal representative or address for service.

(v) exceptions may also be required where it is necessary to maintain reasonable compatibility with domestic programs on matters such as public health or community development that are not directly related to the prevention of misappropriation and misuse of [TCEs or EoF/TK and associated GR].

53. This approach is suggested as an illustration of the choices available, not to prescribe any particular approach. Other choices are of course available and may well be more appropriate to TK/TCE subject matter. This may nonetheless help identify and highlight the important policy choices that must be made in the formulation of an international instrument in this area, and my facilitate further guidance from the Committee.

54. The Committee is invited: (i) to review and draw on the above material as needed or appropriate during its eighth session when addressing substantive issues concerning traditional knowledge, traditional cultural expressions/folklore and genetic resources; and (ii) to identify any further information on international mechanisms that it may require to progress its future work.

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