



# The content/substance of protection for TK and TCEs: WIPO's Draft Provisions and other resources

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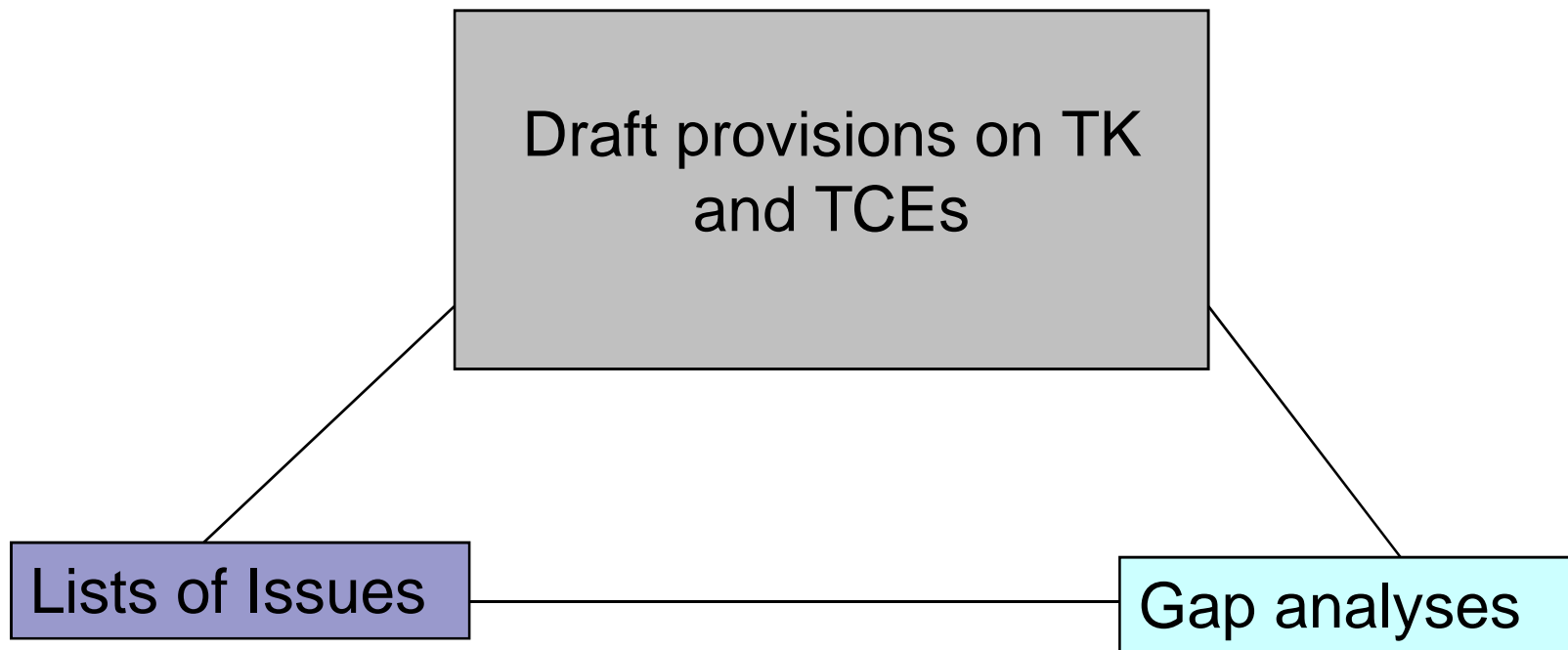
Director (a/g) and Head, Traditional Knowledge Division, WIPO



# Structure of presentation

- The “existing work” of the IGC on TK and TCEs
  - Draft provisions
  - Lists of Issues
  - Gap analyses
- A closer look at the draft TK and TCE provisions


# TK and TCEs





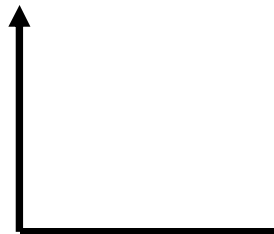
# Ancestral lines . . .

- Roundtables 1998 and 1999
- Fact-finding missions 1998, 1999, 2002 and 2003
- Folklore/TCE consultations 1999
- Sub-regional workshops 2001 and 2002
- Case-studies of national and community experiences
- Comparisons of national and regional laws (laws database available on WIPO's TK web pages)



Draft provisions on TK and on TCEs

WIPO/GRTKF/IC/9/4 and  
WIPO/GRTKF/IC/9/5



Elements of *sui generis* protection of TK (3/8) and study on terminology (3/9)

Questionnaire (2/7) and final report on national experiences with TCE protection (3/10)

Consolidated analysis (5/3) and summaries of *sui generis* national laws (4/INF 3 and 5/INF 3)

Policy and legal options (6/3 and 6/4)

International dimension (6/6)

Elements of an international instrument (African Group, 6/12)

**First Draft Policy Objectives and Core Principles (7/3 and 7/5), August 2004**


First commentary process on First Draft – comments incorporated

**Second Draft Policy Objectives and Core Principles (8/4 and 8/5, June 2005) (9/4 and 9/5; 10/4 and 10/5 etc)**

.....  
Second commentary process 2006 – comments not incorporated but circulated as 10/INF 2 etc and **compiled in 11/4(b) and 11/5(b)**

Examples of implementation of the Draft Policy Objectives and Core Principles (9/INF 4 and 9/INF 5)





Lists of Issues

*Agreed, IGC 10,  
December 2006*




See next slide



# Lists of Issues

1. Definition of EoF/TK that should be protected
2. Who should benefit/hold the rights to protectable EoF/TK?
3. What objective for protection (economic, moral rights)?
4. What forms of behavior considered unacceptable/illegal?
5. Any exceptions/limitations to rights attached to protected EoF/TK?
6. For how long should protection be accorded?
7. What gaps in existing IP system exist and need to be filled?
8. What sanctions or penalties should apply?
9. Division between international and national regulation
10. Treatment of foreign rights holders/beneficiaries



Lists of Issues

*Agreed, IGC 10,  
December 2006*



See previous slide



Commentary  
process –

“collation” of  
comments in  
11/4(a) and 11/5(a)

“factual extraction”  
of comments in  
collation in 12/4(b)  
and 12/5(b)

African Group’s  
comments on  
“factual extraction”  
(13/9)





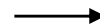
Gap analyses

*Commissioned  
IGC 12, Feb 2008*



The analyses:

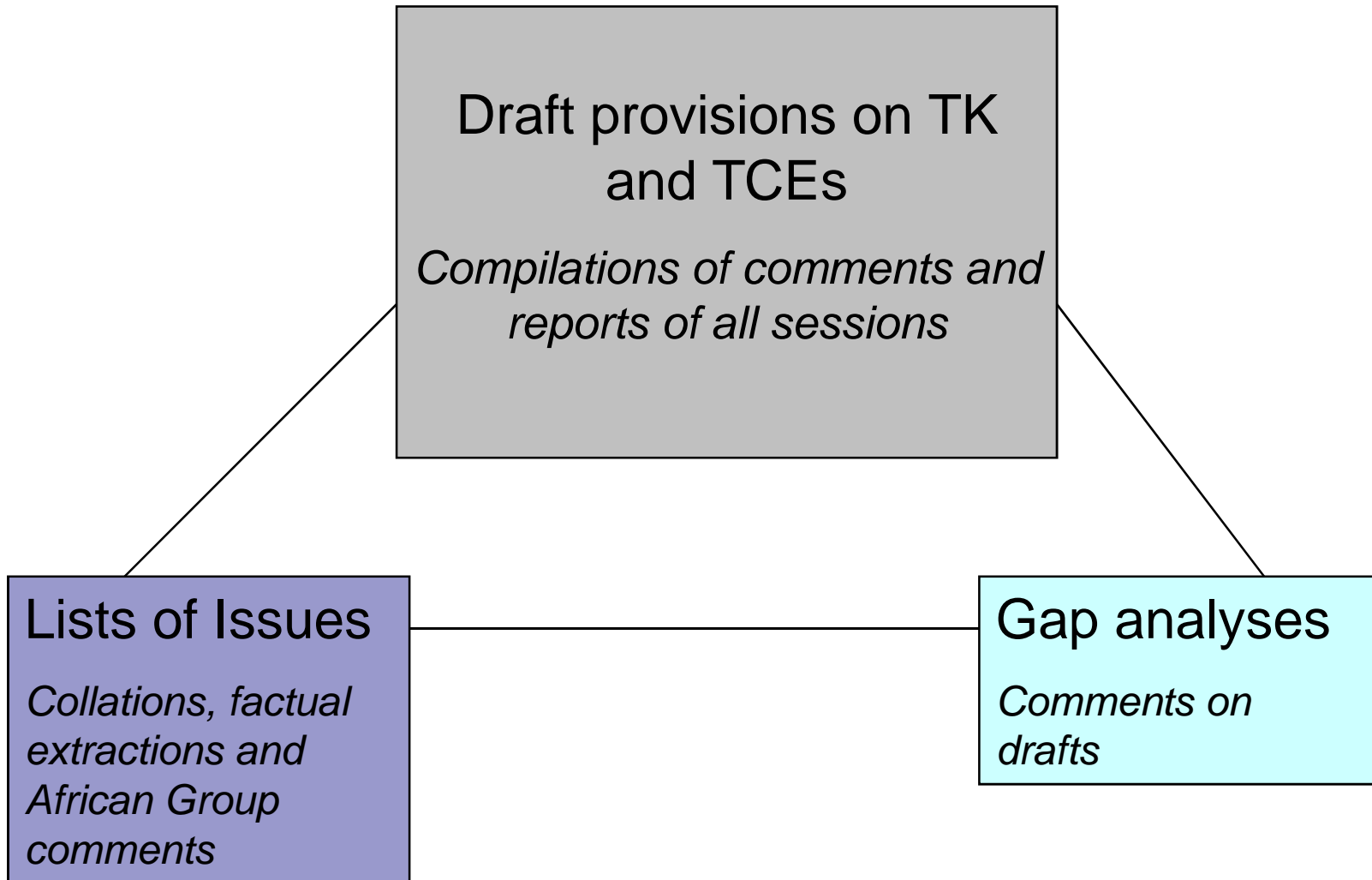
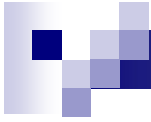
- Existing protection
- Gaps
- Considerations relevant to filling gaps
- Options for filling gaps



First drafts commented on and comments available on website

Second drafts published as 13/4(b) Rev. and 13/5(b) Rev.

Comments available in report of 13<sup>th</sup> session






# WIPO's Draft Provisions

- Traditional cultural expressions
  - WIPO/GRTKF/IC/9/4
- Traditional knowledge *stricto sensu*
  - WIPO/GRTKF/IC/9/5



# WIPO Draft Provisions

- Do not address legal form but only content/substance of protection
- *Sui generis* provisions – collective rights, no formalities, indefinite protection
- “No one size fits all”: flexibility for national implementation
- Deference to customary legal systems and institutions
- Comprise three parts: objectives, guiding principles and substantive articles
- Based on extensive comments and experiences of States and communities: current as at 2006
- Formally adopted by the African Group; not yet adopted or agreed on by all Member States, but contributing to national, regional and international processes

- 
- What does one want to protect (subject matter)?
    - When is a skill or cultural expression “traditional”?
  - Why does one wish to do so (policy objectives)?
    - Prevent third-party use? Secure benefit-sharing? Facilitate economic exploitation?
  - Which acts should be prevented/subject to prior authorization (scope of protection)?
    - What is “misappropriation”, what is legitimate inspiration? Which exceptions ought to apply?
  - Who should benefit from this protection (rightsholders and beneficiaries)?
    - Indigenous communities? The State? Individuals?
  - How would rights be obtained and lost, managed and enforced (formalities, term, administration)?
    - Registration? Perpetual protection?



# WIPO Draft Provisions on TK

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



# WIPO Draft Provisions on TCEs

- Art 1: Subject matter
- Art 2: Beneficiaries
- Art 3: Scope of rights
- Art 4: Management of rights
- Art 5: Exceptions and limitations
- Art 6: Term of protection
- Art 7: Formalities
- Art 8: Sanctions and remedies
- Art 9: Transitional measures
- Art 10: Relationship with IP protection
- Art 11: International protection



- Protected subject matter
- Beneficiaries and rights holders
- Scope of protection
- Duration of protection



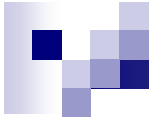


# Protected subject matter

- TK (Articles 3 and 4)
  - “. . . the content or substance of knowledge resulting from *intellectual activity in a traditional context* . . . It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources

*Which is:*

- *generated, preserved and transmitted in a traditional and intergenerational context;*
- *distinctively associated with a traditional or indigenous community or people; and*
- *integral to the cultural identity of an indigenous or traditional community or people*



- TCEs (Article 1):

- *“ . . . .are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:*

*...*

*which are:*


- *(aa) the products of **creative intellectual activity**, including individual and communal creativity;*
- *(bb) characteristic of a community’s cultural and social **identity** and cultural heritage; and*
- *(cc) **maintained, used or developed** by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.*



# Beneficiaries and rightsholders

- TK (Article 5):

*Protection of traditional knowledge should benefit the communities who generate, preserve and transmit the knowledge in a traditional and intergenerational context, who are associated with it and who identify with it in accordance with Article 4 . . .as well as recognized **individuals** within these communities and peoples*



- TCEs (Article 3):

*“ . . . indigenous peoples and traditional and other cultural communities*

- *in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and*
- *who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.”*



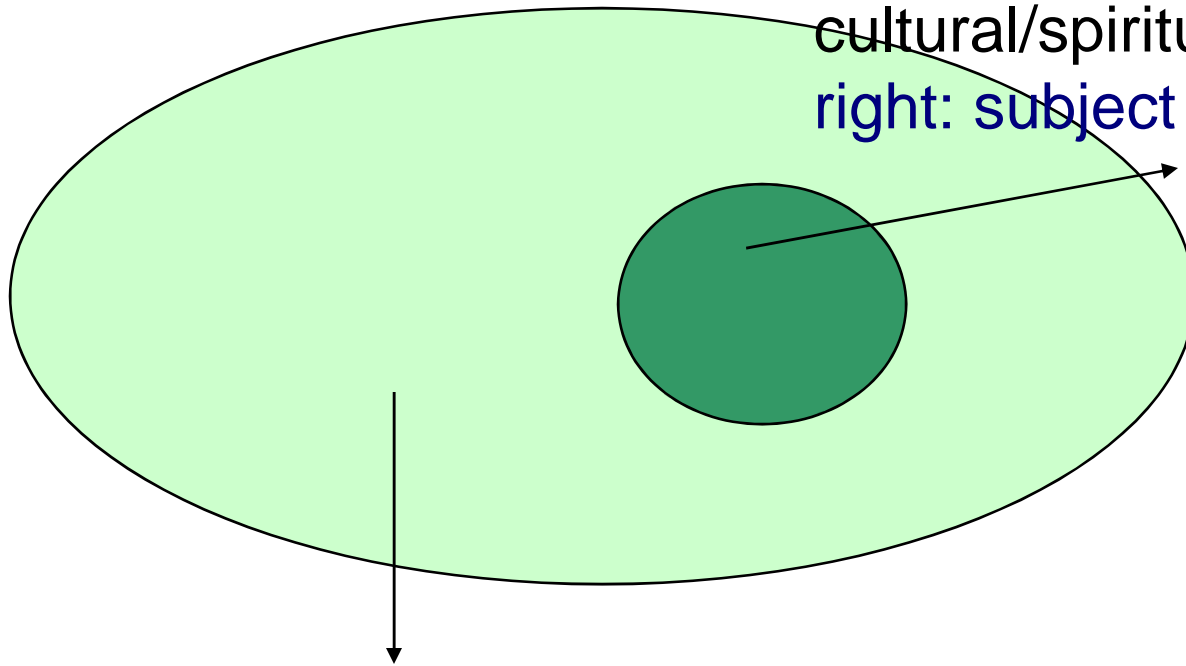
# Scope of protection

## ■ TK:

- Not a property right, but a right to prevent **misappropriation**, based on unfair competition law principles (Article 1)
- Rightsholders also entitled to **fair and equitable benefit-sharing** arising from use of TK (Article 6)
- **Access** to TK governed by principle of “prior and informed consent” (Article 7)
- No formalities (Article 11)

# TCEs (Article 3)

1. Cultural expressions of particular cultural/spiritual value – **exclusive right: subject to registration**



2. Other cultural expressions – **right of compensation: no registration**



# Duration of protection

- TK (Article 9):

*Protection . . . should last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 4.*

- TCEs (Article 6):

*Same principle*



# Next steps

- These are likely to be the (initial) focus of “text-based negotiations”
- Drawing on rich body of previous comments
- Comments made at IGC 15
  - rev documents to be published January 2010, for comment by end February 2010;
  - IGC 16 to examine Rev documents





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