

TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE (TCEs/EoFs)

GENERAL REMARKS BY BRAZIL

The following concerns should guide the discussions on the protection of TCEs/EoFs within the competences of WIPO, most of which, by and large, are touched upon by the draft international instrument under consideration on the Annex to document WIPO/GRTKF/IC/10/4:

- Defensive protection: Measures to curb misappropriation of TCEs/EoFs, in particular to prevent and, when applicable, revert, the granting of IPRs without the authorization of the custodians of TCEs/EoFs, irrespective of whether the TCEs/EoFs have been registered;
- Positive protection: Without prejudice to the decision Members may take to protect TCEs/EoFs via "sui generis" systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TCEs/EoFs by examining, for example, (i) the extent to which rules relating to public domain should be adapted to accommodate appropriate protection of TCEs/EoFs; (ii) changes that might be necessary to accord TCEs/EoFs a term of protection commensurate to their duration in time; (iii) possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TCEs/EoFs;
- Prior informed consent: ensure that communities enjoy rights over their TCEs/EoFs by setting out the requirement of prior informed consent as a condition for their use by third parties;
- International dimension: The Committee should address ways and means to facilitate the enforcement of national legislation on the protection of TCEs/EoFs in third countries.

The answers to the questions below should be read in conjunction with the comments provided by Brazil on document WIPO/GRTKF/IC/10/4:

QUESTIONS

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| 1. Definition of traditional cultural expressions (TCEs)/expressions of folklore (EoF) that should be protected. |
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The subject matter should be all that consists in the elements belonging to the traditional cultural heritage, developed and maintained by a community or a people within a country or by individuals, and that reflect the traditional cultural expressions of said community or people.

The provisions defining the subject matter of the international instrument should reflect the idea that TCEs/EoFs have a dynamic and iterative (in the sense that it represents a process) nature. Accordingly, expressions that may characterize more recently established communities or identities should not be left unprotected, as they equally qualify as TCEs/EoFs.

With respect to musical expressions, musical styles in particular, the protection sought after is aimed at the particular rather than the general, i.e., there is little sense in ascribing entitlement to a musical style as a tradition that, by the very cultural dynamics of mankind, is transmitted and shared among many groups and societies.

In this context, the definition proposed in Article 1 of the Annex to document WIPO/GRTKF/IC/10/4, transcribed below, represents adequate basis to discuss the issue:

“(a) “Traditional cultural expressions” or “expressions of folklore” 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:

(i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;

(ii) musical expressions, such as songs and instrumental music;

(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances; whether or not reduced to a material form; and

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; 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.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.”

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| 2. Who should benefit from any such protection or who hold the rights to protectable TCEs/EoF? |
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Although it is not always possible to identify one individual author, TCEs/EoFs of ethnic groups and traditional populations have an identifiable collective authorship, given that they belong to a specified group or population – a reason why it is not possible to defend the expressions belong in the public domain. Therefore, entitlement to rights should be collective and in accordance with the interests and traditions of the groups in question.

The notion of “author” is an element that attests the complexity of the issue, i.e., oftentimes there is not an identifiable author or authors within the traditional communities. Apart from that, the transmission of such heritage is normally done orally across generations; a certain work is recreated and given renewed meaning over time, which evidences the inherent dynamics of this process of intellectual creation. Other examples highlight the complexity of the issue, such as the fact that many indigenous ethnic groups are not grouped within the same territory and therefore one specific TCE might be shared by different ethnic groups.

Despite the complexity of the issue, determination of the beneficiaries of TCE/EoF protection is a critical point of an international instrument. Although specific definition of eligibility should be left for national legislations, on the international level minimum standards should be set out and, in this respect, the draft provision of Article 2 represents adequate basis to discuss the issue:

“Measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities:

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

3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?

The growing demand for protection of TCEs/EoFs stems from the emergence of a market for products that are environmentally sustainable and that convey ethnic expressions. Such market appeals to a share of the international public opinion that favors projects targeted at forestalling the cultural extinction of traditional populations. A negative byproduct of the emergence of such market, nevertheless, is the increased number of cases of misappropriation of TCEs/EoFs.

In view of the preceding situation, an international instrument should, inter alia, clearly ensure communities the entitlement of collective rights, moral and economic, related to their TCEs/EoFs – by means of, for example, the requirement of prior informed consent – so as to contribute to the improvement of their life conditions.

Considering that work of the Committee is circumscribed by WIPO’s mandate, one specific objective that must be addressed is the setting out of measures aimed at preventing and curbing the misappropriation of TCEs/EoFs by the granting of IPRs, irrespective of whether such expressions have been registered.

Also, since the issue is being discussed within the framework of WIPO, the Committee should examine possible “positive” measures necessary to accommodate protection of TCEs/EoFs under existing categories of intellectual property rights that respect the specific features of the former, and without prejudice to the possibility that Members may decide to accord protection to TCEs/EoFs via “sui generis” systems.

In this respect, the draft objectives proposed in document WIPO/GRTKF/IC/10/4, transcribed below, represent adequate basis to discuss the issue, in particular objective number (xii) – Preclude unauthorized IP rights - that touches more directly upon WIPO’s competences:

I. OBJECTIVES

The protection of traditional cultural expressions, or expressions of folklore, should aim to:

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 frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;

Promote respect

(ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore; Meet the actual needs of communities

(iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and by traditional and other 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;

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;

Empower communities

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

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;

Encourage community innovation and creativity

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

Contribute to cultural diversity

(x) contribute to the promotion and protection of the diversity of cultural expressions; 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;

Preclude unauthorized 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;

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, governmental, educational and other users of TCEs/EoF, on the other.”

4. What forms of behavior in relation to the protectable TCEs/EoF should be considered unacceptable/illegal?

An international instrument for the protection of TCEs/EoFs negotiated in an IP forum such as WIPO should not overlook the need to provide for measures aimed at curbing acts of misappropriation, specifically those acts that take place via the use of IP mechanisms. Among these measures, the requirement for prior informed consent should apply to all TCEs/EoFs, registered or not. Registration should not be a condition for the enforcement of rights by the communities in question.

Furthermore, one important criterium to assess whether an act constitutes misappropriation is the existence of prior informed consent by the community in question. The requirement for prior informed consent should figure as an important tenet in a system of protection of TCEs/EoFs.

With the preceding provisos in mind, the draft provision put forward in document WIPO/GRTKF/IC/10/4, Article 3, represents adequate basis to discuss the issue:

“(a) In respect of traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, ~~and which have been registered or notified as referred to in Article 7,~~ there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent the following acts taking place without its free, prior and informed consent:

(i) in respect of such traditional cultural expressions/expressions of folklore other than words, signs, names and symbols:

the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;

any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;

any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and

the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;

(ii) in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, any use of the traditional cultural expressions/expressions of folklore or derivatives thereof, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or derivatives thereof, which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute;

Other traditional cultural expressions/expressions of folklore

~~*(b) In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that:*~~

(i) the relevant community is identified as the source of any work or other production adapted from the traditional cultural expression/expression of folklore;

(ii) any distortion, mutilation or other modification of, or other derogatory action in relation to, a traditional cultural expression/expression of folklore can be prevented and/or is subject to civil or criminal sanctions;

(iii) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of a community, suggest any endorsement by or linkage with that community, can be prevented and/or is subject to civil or criminal sanctions; and

(iv) where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the Agency referred to in Article 4 in consultation with the relevant community; and

Secret traditional cultural expressions/expressions of folklore

(c) There shall be adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.”

5. Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?

A provision on exceptions and limitations is welcome as long as it is based on the need to allow uses of public interest. The draft provision of Article 5 of document WIPO/GRTKF/IC/10/4, transcribed below, represents adequate basis to discuss the issue:

“(a) Measures for the protection of TCEs/EoF should:

(i) not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices;

(ii) extend only to utilizations of TCEs/EoF taking place outside the traditional or customary context, whether or not for commercial gain; and,

(iii) not apply to utilizations of TCEs/EoF in the following cases:

- by way of illustration for teaching and learning;

- non-commercial research or private study;

- criticism or review;

- reporting news or current events;

- use in the course of legal proceedings;

- the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and

- incidental uses, provided in each case that such uses are compatible with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community.

(b) Measures for the protection of TCEs/EoF could allow, in accordance with custom and traditional practice, unrestricted use of the TCEs/EoF, or certain of them so specified, by all members of a community, including all nationals of a country.”

6. For how long should protection be accorded?

Due to their specific characteristics, such as the difficulty to identify a specific author, TCEs/EoFs should deserve protection for as long as the symbolic features that originated the expression in question remain in the tradition of the community that holds it.

In this respect, the term of protection should only be related to the criteria for protection. Once a TCE/EoF meets these criteria, protection should be accorded without need for any further requirement – such as previous registration.

With these provisos in mind, the draft provision laid down in Article 6 of the Annex to document WIPO/GRTKF/IC/10/4, transcribed below, represents adequate basis to discuss the issue:

*“Protection of traditional cultural expressions/expressions of folklore should endure for as long as the traditional cultural expressions/expressions of folklore continue to meet the criteria for protection under Article 1 of these provisions, and
(i) in so far as TCEs/EoF referred to in Article 3 (a) are concerned, their protection under that sub-article shall endure for so long as they remain registered or notified as referred to in Article 7; and
(ii) in so far as secret TCEs/EoF are concerned, their protection as such shall endure for so long as they remain secret.”*

7. To what extent do existing IPRs already afford protection? What gaps need to be filled?

Without prejudice to the decision Members may take to protect TCEs/EoFs via “sui generis” systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TCEs/EoFs by examining, for example, (i) the extent to which rules relating to public domain should be adapted to accommodate appropriate protection of TCEs/EoFs; (ii) changes that might be necessary to accord TCEs/EoFs a term of protection commensurate to their duration in time; (iii) possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TCEs/EoFs.

8. What sanctions or penalties should apply to behavior or acts considered to be unacceptable/illegal?

As a general rule, sanctions foreseen in IP rules should apply in the cases of misappropriation. The draft provision of Article 8 (a) in the Annex of document WIPO/GRTKF/IC/10/4, transcribed below, represents adequate basis to discuss the issue:

“(a) Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.”

9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?

One critical function of an international instrument for the protection of TCEs/EoFs should be to facilitate the enforcement of national legislation in third countries. Accordingly, minimum rules should be set out on an international level, such as: (i) the requirement that use of TCEs/EoFs be

conditioned upon compliance with prior informed consent; (ii) reference of cases that may represent acts of misappropriation; (iii) recognition of rights over TCEs/EoFs to the communities they relate to; (iv) ways and means to protect such rights.

Apart from the decision to decide the underlying features of the system of protection – IP-related or “sui generis” -, national legislations should be entitled to provide for, inter alia: (i) specific definition of the beneficiaries of protection; (ii) rules on benefit-sharing; (iii) management of rights relating to TCEs/EoFs; (iv) specific sanctions applying in cases of misappropriation.

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| 10. How should foreign rights holders/beneficiaries be treated? |
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Foreigners should be afforded the same treatment as nationals or treatment not less favorable. The draft provision of Article 11 in the Annex to document WIPO/GRTKF/IC/10/4, transcribed below, represents adequate basis to discuss the issue:

“The rights and benefits arising from the protection of traditional cultural expressions/expressions of folklore under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.”

TRADITIONAL KNOWLEDGE

GENERAL REMARKS:

The following concerns should guide the discussions on the protection of TK within the competences of WIPO, most of which, by and large, are touched upon by the draft international instrument under consideration on the Annex to document WIPO/GRTKF/IC/10/5:

- **Defensive protection:** Measures should be established to curb the misappropriation of TK, in particular to prevent and, when applicable, revert, the granting of IPRs without the authorization of the holders of TK, irrespective of whether the TK have been registered. In this connection, a provision should be incorporated to the effect that intellectual property applications should disclose the origin of the TKs, any associated genetic resources, as well as evidence of compliance of prior informed consent and benefit-sharing.
- **Positive protection:** Without prejudice to the decision Members may take to protect TK via “sui generis” systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TK by examining, for example, possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TK;
- **Prior informed consent and benefit-sharing:** ensure that communities enjoy rights over their TK by setting out the requirement of prior informed consent as a condition for their use by third parties, as well as compliance with benefit-sharing, when applicable;
- **International dimension:** The Committee should address ways and means to facilitate the enforcement of national legislation on the protection of TK in third countries.

The answers to the questions below should be read in conjunction with the comments provided by Brazil on document WIPO/GRTKF/IC/10/5:

QUESTIONS

1. Definition of traditional knowledge that should be protected.

The definition to be adopted should be anthropological, meaning that, *inter alia*, all knowledge dynamically produced, reproduced, maintained and transmitted by traditional methods, in a collective and inter-generational environment, and related to the identity and the socio-cultural integrity of a given community should be protected (including beliefs, spirituality, values and knowledge employed for the conservation of biodiversity).

In this context, the definition proposed in Article 3 (2) of the Annex to document WIPO/GRTKF/IC/10/5, transcribed below, represents adequate basis to discuss the issue:

"2. For the purpose of these principles only, the term "traditional knowledge" refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources."

2. Who should benefit from any such protection or who should hold the rights to protectable traditional knowledge?

Discussion on this issue should follow developments in relevant international fora. The provisions in Articles 4 and 5 of the Annex to document WIPO/GRTKF/IC/10/5, transcribed below, represent adequate basis to discuss the issue:

"ARTICLE 5

BENEFICIARIES OF PROTECTION

Protection of traditional knowledge should benefit the communities who generate, preserve and transmit the knowledge in a traditional and intergenerational context, who are associated with it and who identify with it in accordance with Article 4. Protection should accordingly benefit the indigenous and traditional communities themselves that hold traditional knowledge in this manner, as well as recognized individuals within these communities and peoples. Entitlement to the benefits of protection should, as far as possible and appropriate, take account of the customary protocols, understandings, laws and practices of these communities and peoples."

"ARTICLE 4

ELIGIBILITY FOR PROTECTION

Protection should be extended at least to that traditional knowledge which is:
(i) generated, preserved and transmitted in a traditional and intergenerational context;
(ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and
(iii) integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship,

collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.”

3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?

Considering that work of the Committee is circumscribed by WIPO’s mandate, one specific objective that must be addressed is the setting out of measures aimed at preventing and curbing the misappropriation of TK by the granting of IPRs. Particular attention should be given to the need to render the IP system compatible with the relevant provisions of other international instruments that govern access to TK, such as the Convention on Biological Diversity. Accordingly, discussions on the issue should ensure that the granting of IPRs related to traditional knowledge is contingent upon compliance with the requirements of prior informed consent and benefit-sharing, by demanding that IP applications disclose evidence to that effect.

Also, since the issue is being discussed within the framework of WIPO, the Committee should examine possible “positive” measures necessary to ensure protection of TK under existing categories of intellectual property rights that respect the specific features of the former, and without prejudice to the possibility that Members may decide to accord protection to TK via “sui generis” systems.

In this respect, along with draft Articles 6 and 7, the draft objectives proposed in document WIPO/GRTKF/IC/10/5, transcribed below, represent adequate basis to discuss the issue, in particular objective number (xiv) – Preclude the grant of improper IP rights to unauthorized parties - that touches more directly upon WIPO’s competences:

“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;

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;

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;

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;

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;

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;

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;

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;

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;

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;

Ensure prior informed consent and exchanges based on mutually agreed terms

(xi) ensure prior informed consent and exchanges based on mutually agreed terms, in coordination with existing international and national regimes governing access to genetic resources;

Promote equitable benefit-sharing

(xii) promote the fair and equitable 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;

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;

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;

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;

Complement protection of traditional cultural expressions

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

“ARTICLE 6

FAIR AND EQUITABLE BENEFIT-SHARING AND RECOGNITION OF KNOWLEDGE HOLDERS

- 1. The benefits of protection of traditional knowledge to which its holders are entitled include the fair and equitable sharing of benefits arising out of the commercial or industrial use of that traditional knowledge.*
- 2. Use of traditional knowledge for non-commercial purposes need only give rise to non-monetary benefits, such as access to research outcomes and involvement of the source community in research and educational activities.*
- 3. Those using traditional knowledge beyond its traditional context should mention its source, acknowledge its holders, and use it in a manner that respects the cultural values of its holders.*
- 4. Legal means should be available to provide remedies for traditional knowledge holders in cases where the fair and equitable sharing of benefits as provided for in paragraphs 1 and 2 has not occurred, or where knowledge holders were not recognized as provided for by paragraph 3.*
- 5. Customary laws within local communities may play an important role in sharing benefits that may arise from the use of traditional knowledge.”*

“ARTICLE 7

PRINCIPLE OF PRIOR INFORMED CONSENT

- 1. The principle of prior informed consent should govern any access of traditional knowledge from its traditional holders, subject to these principles and relevant national laws.*
- 2. The holder of traditional knowledge shall be entitled to grant prior informed consent for access to traditional knowledge, or to approve the grant of such consent by an appropriate national authority, as provided by applicable national legislation.*
- 3. Measures and mechanisms for implementing the principle of prior informed consent should be understandable, appropriate, and not burdensome for all relevant stakeholders, in*

particular for traditional knowledge holders; should ensure clarity and legal certainty; and should provide for mutually agreed terms for the equitable sharing of benefits arising from any agreed use of that knowledge.”

4. What forms of behavior in relation to the protectable traditional knowledge should be considered unacceptable/illegal?

Any act that impairs the recognition or exercise of the rights held by communities over their knowledge should be deemed illegal.

An international instrument for the protection of TK negotiated in an IP forum such as WIPO should not overlook the need to provide for measures aimed at curbing acts of misappropriation, specifically those acts that take place via the use of IP mechanisms. Among these measures, the requirement for prior informed consent should apply to all TK, registered or not. Registration should not be a condition for the enforcement of rights by the communities in question.

The draft provision put forward in document WIPO/GRTKF/IC/10/5, Article 1, transcribed below, represents adequate basis to discuss the issue:

“PROTECTION AGAINST MISAPPROPRIATION

- 1. Traditional knowledge shall be protected against misappropriation.*
- 2. Any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.*
- 3. In particular, legal means should be provided to prevent:*
 - (i) acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception, misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means;*
 - (ii) acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent as a condition of access to the knowledge, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent concerning access to that knowledge;*
 - (iii) false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matter when those intellectual property rights are not validly held in the light of that traditional knowledge and any conditions relating to its access;*
 - (iv) if traditional knowledge has been accessed, commercial or industrial use of traditional knowledge without just and appropriate compensation to the recognized holders of the knowledge, when such use has gainful intent and confers a technological or commercial advantage on its user, and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge; and*
 - (v) willful offensive use of traditional knowledge of particular moral or spiritual value to its holders by third parties outside the customary context, when such use clearly constitutes a mutilation, distortion or derogatory modification of that knowledge and is contrary to ordre public or morality.*
- 4. Traditional knowledge holders should also be effectively protected against other acts of unfair competition, including acts specified in Article 10bis of the Paris Convention. This*

includes false or misleading representations that a product or service is produced or provided with the involvement or endorsement of traditional knowledge holders, or that the commercial exploitation of products or services benefits holders of traditional knowledge. It also includes acts of such a nature as to create confusion with a product or service of traditional knowledge holders; and false allegations in the course of trade which discredit the products or services of traditional knowledge holders.

5. The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.”

5. Should there be any exceptions or limitations to rights attaching to protectable traditional knowledge?

A provision on exceptions and limitations could be considered with a view to allow uses of public interest. Also, measures should be adopted to ensure the availability of traditional knowledge to their holders.

It is relevant to note, however, that use of TK by third parties should not entail negative environmental, cultural or economic impacts to the community.

Considering the preceding remarks, the draft provision put forward in document WIPO/GRTKF/IC/10/5, Article 8 (1), transcribed below, represents adequate basis to discuss the issue:

“EXCEPTIONS AND LIMITATIONS

1. The application and implementation of protection of traditional knowledge should not adversely affect:

(i) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders;

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

6. For how long should protection be accorded?

Due to its inter-generational character and to the dynamics of creation of TKs, there should be no limitation in time for the protection of TK. The draft provision put forward in document WIPO/GRTKF/IC/10/5, Article 9 (1), transcribed below, represents adequate basis to discuss the issue:

“DURATION OF PROTECTION

1. Protection of traditional knowledge against misappropriation should last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 4.”

7. To what extent do existing IPRs already afford protection? What gaps need to be filled?

IPR rules have so far proved insufficient to safeguard TK holders against misappropriation. Respect for prior informed consent and for fair and equitable sharing of benefits arising from the use of their traditional knowledge should be incorporated into the IP system. Where traditional

knowledge is associated with genetic resources, the sharing of benefits should be consistent with measures established in accordance with the Convention on Biological Diversity, and, in this connection, the draft provision of Article 12, transcribed below, represents adequate basis to discuss the issue:

“1. In case of traditional knowledge which relates to components of biological diversity, access to, and use of, that traditional knowledge shall be consistent with national laws regulating access to those components of biological diversity. Permission to access and/or use traditional knowledge does not imply permission to access and/or use associated genetic resources and vice versa.”

A crucial gap that needs to be filled is the lack of a rule that requires IPR applications to disclose compliance with prior informed consent and benefit-sharing. Draft policy objective number (xiv) – Preclude the grant of improper IP rights to unauthorized parties –, transcribed below, should be turned into a substantive provision:

“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;”

Without prejudice to the decision Members may take to protect TK via “sui generis” systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TK by examining, for example, possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TK.

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| 8. What sanctions or penalties should apply to behavior or acts considered unacceptable/illegal? |
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Measures should be put in place to ensure that enforcement procedures are available under Members legislation so as to permit effective action against any act of misappropriation, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. In this respect, the Committee might consider possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TKs in the cases where the granting of IPRs has infringed rules on TK protection.

The draft instrument contained in the Annex of document WIPO/GRTKF/IC/10/5 should incorporate a specific provision to this effect, that could draw upon the provision proposed, for example, in the draft instrument regarding protection of TCEs/EoFs (Article 8 (a)), transcribed below:

“(a) Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.”

9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?

The international instrument on the protection of TK should set out minimum standards with a view to facilitate enforcement of provisions of national legislations in third countries, in particular those targetted against acts of misappropriation. The international dimension of the work of the Committee lies on determining general rules applicable to the protection of TK, such as (i) the requirement for prior informed consent and, when applicable, benefit-sharing; (ii) reference to cases that constitute acts of misappropriation; (iii) a rule requiring the need to put in place effective enforcement measures.

At the national level, legislation would lay down specific relevant definitions as well as the applicable procedures for the identification of parties eligible to protection, maintenance and exercise of rights over TK.

10. How should foreign rights holders/beneficiaries be treated?

Foreigners should be afforded the same treatment as nationals or treatment not less favorable. The draft provision of Article 14 in the Annex to document WIPO/GRTKF/IC/10/5, transcribed below, represents adequate basis to discuss the issue:

“INTERNATIONAL AND REGIONAL PROTECTION

The protection, benefits and advantages available to holders of TK under the national measures or laws that give effect to these international standards should be available to all eligible traditional knowledge holders, who nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign holders of TK should enjoy benefits of protection to at least the same level as traditional knowledge holders who are nationals of the country of protection. Exceptions to this principle should only be allowed for essentially administrative matters such as appointment of a legal representative or address for service, or to maintain reasonable compatibility with domestic programs which concern issues not directly related to the prevention of misappropriation of traditional knowledge.”