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THE PROTECTION OF TRADITIONAL KNOWLEDGE:
DRAFT OBJECTIVES AND PRINCIPLES

Document prepared by the Secretariat

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OVERVIEW

1. This document summarizes the state of play of the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') on the protection of traditional knowledge (TK), with a focus on the draft objectives and principles for TK protection developed within the Committee (this draft material is annexed to this document).

2. Concerning outcomes of the Committee's work on positive TK protection, and noting that the Committee's renewed mandate refers to the international dimension of its work and excludes no outcome, the document recalls previous Committee discussions on three aspects of possible outcomes, namely: (i) content or substance; (ii) form or legal status; and (iii) consultative and other working procedures necessary to achieve any agreed outcome.

I. INTRODUCTION

3. The Committee has extensively reviewed legal and policy options for the protection of TK. This work has built on extensive international, regional and national experience with the protection of TK. This review has covered comprehensive analyses of existing national and regional legal mechanisms, panel presentations on diverse national experiences, common elements of TK protection, case studies, ongoing surveys of the international policy and legal environment as well as key principles and objectives of TK protection that received support in the Committee's earlier sessions.

4. This extensive body of work and wide background of existing law has been distilled into draft objectives and principles for protection of TK, commissioned by the Committee at its sixth session, and revised and reviewed over the course of the following three sessions. The draft objectives and principles have also been widely consulted upon beyond the Committee, and have been used, even as a draft, as a point of reference in several national, regional and other international legislative and policymaking processes. Several of these processes are drawing directly from the draft.

5. The Annex to the current document reproduces the objectives and principles in the form provided to the Committee at its eighth and ninth sessions. This version was the result of the first round of stakeholder review established by the Committee after it reviewed a first draft at its seventh session. Thus the draft remains in the form in which it has been widely consulted upon and extensively reviewed in the Committee, and in many Member States and other policy processes. The input from the second intersessional round of commentary and review, initiated by the Committee at its ninth session, is separately circulated as information documents WIPO/GRTKF/IC/10/INF/2 (English) and WIPO/GRTKF/IC/10/INF/3 (Spanish).

6. The two core materials currently before the Committee relating to the protection of TK are:

- the draft objectives and principles for protection of TK (Annex to this document), and
- an overview of policy options and legal mechanisms (WIPO/GRTKF/IC/9/INF/5).

The objectives and principles: drafting and review processes

7. At its sixth session, the Committee reviewed key principles and objectives of TK protection, which had reflected its previous work¹ and decided to develop an overview of policy objectives and core principles for the protection of TK.² On the basis of guidance provided by the Committee and the wide range of national and regional approaches reported to the Committee, a draft set of objectives and principles was provided for the Committee to consider at its seventh session.³ An intersessional commentary process, drawing extensive comments from a wide range of Member States and Committee observers,⁴ provided further guidance for the revision of the draft objectives and principles that was considered at the eighth and ninth sessions.

8. At its ninth session, the Committee extensively considered and discussed the revised draft objectives and principles annexed to WIPO/GRTKF/IC/9/5. It decided upon a further commentary process in the following terms:

On the basis of the indications of delegations that they would be submitting written comments on the contents of documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, the Chair proposed, and the Committee agreed, that Committee participants be invited to submit such written comments to the Secretariat before July 31, 2006, so that the comments could be circulated prior to the tenth session of the Committee.

The Committee requested that its tenth session be extended to seven working days to continue work in accordance with its renewed mandate on all comments received on the documents discussed at the ninth session and to enable review of the comments received on documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5.

9. The comments received are circulated in the form received as information documents (WIPO/GRTKF/IC/10/INF/2 and WIPO/GRTKF/IC/10/INF/3) and are posted on the WIPO website, in view of the requirement that they be circulated in advance of the Committee's tenth session.

Implementing the objectives and principles – the policy options and legal mechanisms

10. At its sixth session, the Committee also requested the Secretariat to prepare an outline of the policy options and legal mechanisms for the protection of TK, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option. The Committee reviewed the first draft at its seventh session (WIPO/GRTKF/IC/7/6) and requested an update “in the light of revisions to the draft objectives and core principles and in the light of comments received”. The Committee reviewed the revised draft at its ninth session (WIPO/GRTKF/IC/9/INF/5). Since the Committee has linked this document to the draft objectives and principles, further updates of this ancillary document may depend on the evolution of those objectives and principles.

¹ WIPO/GRTKF/IC/6/4, paragraphs 17 to 28; and WIPO/GRTKF/IC/6/14, paragraphs 109

² WIPO/GRTKF/IC/6/14, para 109

³ WIPO/GRTKF/IC/7/5

⁴ WIPO/GRTKF/IC/8/INF/4.

II. SUBSTANCE AND CONTENT OF THE OBJECTIVES AND PRINCIPLES

11. Document WIPO/GRTKF/IC/7/5 characterized these draft objectives and principles as “possible substantive elements of protection of TK in a manner which leaves open and facilitates future decisions by Member States on the context and legal status which they may assume at the international, regional and national levels”. The material in this document was “not, in substance, new to the Committee: it simply distils and structures the existing legal mechanisms and the extensive practical experience with protection of TK that have already been widely discussed by the Committee, and draws essentially on the Committee’s own deliberations and the various materials put to the Committee”. This document therefore drew on the reported and documented national and regional experience with the protection of TK of countries and communities in many geographical regions, at every level of economic development, that had been surveyed extensively in previous sessions of the Committee.

12. The draft objectives and principles comprise:

- (i) policy objectives, which could set common general directions for protection and provide a consistent policy framework;
- (ii) general guiding principles, which could ensure consistency, balance and effectiveness of substantive principles; and
- (iii) specific substantive principles, which could define the legal essence of protection.

13. As in the past, this text is presented without prejudging its status or legal implications. It does, however, present in coherent and focused form the kind of specific questions that may need to be weighed by policymakers at national, regional and international level, when considering the appropriate form and means of protection of TK. Accordingly, relevant national, regional and international activities have been addressing the same issues to those set out in the draft objectives and principles. The Committee itself has examined these issues over a number of sessions.⁵ The recurring issues include the following:

- (a) nature of the subject matter of TK, and possible descriptions or definitions;
- (b) criteria for protection of subject matter;
- (c) identity of owners, bearers or custodians of TK, or other beneficiaries of protection;
- (d) nature of protection, including the possible need for formalities and the possible role of registration and other forms of official notice;
- (e) scope of rights and exceptions;
- (f) duration of protection;
- (g) role of government agencies or other authorities;
- (h) relationship with conventional IP protection, and international and national legal measures concerning the recognition of farmer’s rights and the *in-situ* conservation of biodiversity, including the preservation, promotion and protection of biodiversity-related TK, and legal frameworks regulating access to genetic resources and benefit-sharing;
- (i) transitional measures, retroactivity of protection and the role and status of the public domain;

⁵ See, for example, documents WIPO/GRTKF/IC/2/5, WIPO/GRTKF/IC/3/7, WIPO/GRTKF/IC/3/9, WIPO/GRTKF/IC/4/7, WIPO/GRTKF/IC/4/8, WIPO/GRTKF/IC/5/7, WIPO/GRTKF/IC/5/8, WIPO/GRTKF/IC/6/4.

- (j) international and regional protection;
- (k) recognition of foreign right holders and other foreign beneficiaries of protection.

A policy context

14. Traditional knowledge systems are often integral to a community's belief systems and collective values, can help to define its cultural identity, and may form part of a distinct world view. TK is therefore valuable from a cultural, intellectual and spiritual perspective for the communities who maintain, practice and develop such knowledge and sustain knowledge systems. TK may also be seen as one basis for grass roots development and appropriate commercial partnerships in the event that communities choose to build upon their creations and innovations, and to trade in TK-based products or otherwise to draw on TK for their social and economic development. These multiple characteristics of traditional knowledge systems raises a number of policy issues related to the protection, promotion and preservation of TK and the knowledge systems and customary practices, belief systems and customary laws that sustain the development, safeguarding and appropriate dissemination of TK.

15. From an IP point of view, which has been the main focus of the work of the Committee, the protection or otherwise of TK forms an integral part of policies concerning the promotion and protection of creativity and innovation, community development and grass-roots knowledge-based commercial activity when this is chosen by communities to form part of their sustainable social and economic development. However, the protection of TK also touches also upon other important policy areas. These include the safeguarding and preservation of diverse knowledge systems and the intellectual and cultural heritage of communities; conservation of the components of biodiversity and associated TK, and mechanisms for prior informed consent and equitable benefit-sharing; respect for the rights, interests and claims of indigenous peoples and other traditional communities; access to knowledge and the scope of the "public domain"; addressing the challenges of multiculturalism; and, the promotion of cultural diversity and the distinctive character, values and beliefs of diverse knowledge systems. As many Committee participants have pointed out, the protection of TK also needs to be complementary to and mutually supportive of protection of TCEs, as part of an overall holistic approach.

The meaning of 'protection' within an holistic policy context

16. TK can be 'protected' in several, complementary ways. A range of international policy processes and several international legal instruments address various aspects of protection, amidst calls for an holistic approach to protection of TK. Protection may include safeguarding against loss, including, among other ways, documenting and recording, building capacity to support traditional knowledge systems, the custodians of TK and TK systems, and the social structures that sustain and express them, acknowledging the broader range of collective and individual rights that are linked to TK and its physical, cultural and legal environment, and protecting the TK against illegitimate use or misappropriation by third parties, including commercial misappropriation and misuse that is derogatory or offensive.

17. The draft provisions in the Annex concern most directly the protection of TK in a legal sense, that is, protection against the kinds of illicit uses and misappropriations that IP protection usually addresses, while taking into account the particular nature and characteristics of traditional knowledge their systems, including their communal quality, and the preference many have expressed to avoid distinct new property rights. This has been the

approach of the Committee, in keeping with the mandate of WIPO, since the inception of its work. “Protection” in this sense is, as previously discussed, distinguishable from the “safeguarding” or “preservation” of TK and knowledge systems, but complements them within the broader policy and legal environment. Indeed, an holistic approach protection of TK within this broader international context may entail recognizing and complementing legal instruments and policy approaches in cognate policy areas, such as the recognition, preservation and protection of biodiversity-related TK under the Convention on Biological Diversity, the recognition of farmer’s rights and the regime for plant genetic resources under the FAO International Treaty on Plant Genetic Resources for Food and Agriculture, the protection of traditional and local knowledge under the United Nations Convention to Combat Desertification, and work in other forums such the United Nations Permanent Forum on Indigenous Issues as the Working Group on Indigenous Populations of the Commission on Human Rights.

18. As noted several times in earlier documents, only through such complementarity with instruments in other policy areas can truly comprehensive and holistic protection, preservation and promotion of TK be achieved. For example, the substantive provisions in the Annex are expressly intended to complement and work together with laws and measures for the preservation and safeguarding of TK and associated genetic resources, and practical suggestions in this regard are made throughout the provisions and the commentary. A suggested General Guiding Principle in the Annex is the “principle of respect for and cooperation with other international and regional instruments and processes”.

19. In line with this holistic approach, and in the light of the specific characteristics of intellectual property (IP) forms of protection, the objectives and principles annexed to this document address that specific facet of an overall, holistic approach that is most relevant to the law and policy of IP. The IP aspect concerns how to determine which forms of use of the protected material by third parties are permissible, what uses of protected material require the consent or authorization of the holders of TK, and what conditions or constraints may apply to use by third parties. This is consistent with the preservation of TK and the safeguarding of customary use and transmission of TK, while clarifying the specific issues relating to the IP facet of protection identified above.

The specific characteristics of protection

20. As a distillation of the forms of IP-related protection of TK discussed within the Committee, the form of protection outlined in the provisions has the following general characteristics:

(a) The concept of ‘misappropriation’ is clarified as including a range of acts typically prohibited under diverse laws and norms: this includes acquisition or appropriation of TK by unfair or illicit means, as well as misuse of TK and the concept of unjust enrichment or reaping unfair commercial benefit from TK

(b) Five specific aspects of misappropriation are set out, again corresponding to the acts that are most frequently identified in debate about TK protection and are addressed in many laws: (i) direct acts of deliberate misappropriation, (ii) misappropriation through the breach of legal arrangements for prior informed consent and benefit-sharing, (iii) misappropriation through attempts to obtain illegitimate IP rights over TK, (iv) misappropriation in the form of unfair competition or unjust enrichment, deriving

commercial benefit when this is manifestly inequitable, and (v) certain forms of willful misuse and offensive behaviour regarding TK.

(c) Consistent with existing international standards, the principles identify other relevant forms of unfair competition, such as misuse of the reputation of TK holders and acts creating confusion with traditional products.

(d) The principles suggest that customary practices, norms, laws and understandings should guide the protection against misappropriation of TK, including determination of equitable sharing and distribution of benefits.

(e) TK is defined in general, indicative terms as the content or substance of knowledge resulting from intellectual activity in a traditional context, and is not limited to any specific field, extending to agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

(f) However, the draft suggests that to be eligible for specific protection against misuse or misappropriation, more precision is needed, and that TK should (i) exist in a traditional and intergenerational context; (ii) be distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and (iii) be 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.

(g) Beneficiaries of protection would also be defined in more rigorous terms to be the communities who generate, preserve and transmit the knowledge in a traditional and intergenerational context, who are distinctively associated with it, and who culturally identify with it. Benefits may flow to communities as such, or recognized individuals within communities. Again, customary protocols, understandings, laws and practices should guide or determine entitlement to the benefits of protection.

(h) Exceptions and limitations also draw on existing experience and respond to policy concerns, and safeguard the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders; uses such as traditional household use and public health ; and fair use of TK that is already readily available to the general public, subject to equitable compensation for industrial and commercial usage.

(i) Protection of TK against misappropriation should last as long as the TK fulfills the criteria of eligibility for protection, as mentioned in paragraph (f), above.

(j) Given the importance of TK for biological diversity, in case of biodiversity-related TK, access to, and use of, that TK shall be consistent with national laws regulating access to those components of biological diversity.

(k) The principles foresee a flexible form of national treatment, which would ensure that eligible foreign TK holders should be entitled to protection against misappropriation and misuse of their TK, provided that they are located in a country which is prescribed as eligible.

Addressing the international dimension

21. The Committee has decided to deal with the international dimension integrally with its work on the protection of TK. Calls for outcomes in the field of TK protection are set against concerns that this work should complement and not prejudice or encroach upon other international instruments or processes, and the requirement in the Committee's mandate that it should not prejudice work in other fora.

22. Thus the draft objectives and principles define a form of protection that can be situated within an holistic international context. In common with other areas of law and policy, the international dimension of protection is expressed in broad principles that would be implemented, interpreted and applied directly through national legal, administrative and policy mechanisms. Supplementary documents WIPO/GRTKF/IC/10/6, WIPO/GRTKF/IC/9/6, WIPO/GRTKF/IC/8/6 and WIPO/GRTKF/IC/6/6 set out various considerations concerning the international dimension of the work of the Committee. These more specific issues, already fully discussed in those supplementary documents, include:

- (i) the manner in which international principles can be articulated and applied in an international context;
- (ii) the relationship with other areas of international law and policy; and
- (iii) the means by which rights of holders of TCEs/EoF of one country are to be recognized under the law of another country.

Addressing the national dimension

23. As other policy and legislative processes continue to address these issues, further experience has accumulated with protection of TK. The lessons of this experience and the specific policy choices taken at the national and regional levels may shed further light on these issues as the Committee continues to discuss the draft objectives and principles or any other draft materials. The scope of policy options and legal mechanisms for protection of TK at the national and regional levels was set out in document WIPO/GRTKF/IC/7/6 and the revised and updated document, WIPO/GRTKF/IC/9/INF/5.

24. This supplementary document therefore provides additional information on how national and regional processes are implementing objectives and principles, and taking specific policy choices, for TK protection. In particular it illustrates the policy options and legal mechanisms that have been used in practice to give effect to the kind of draft objectives and principles that are set out in the Annex to this document and that are under review by the Committee.

III. FORM OR STATUS

25. The Committee's mandate, as renewed, does not predetermine the form, status or nature of any outcome of the Committee's work, but equally does not exclude any outcome. Concerning the possible form or status of any outcome, document WIPO/GRTKF/IC/6/6, considered by the Committee at its sixth session, sets out some of the possible approaches as follows:⁶

⁶ WIPO/GRTKF/IC/6/6, paragraph 34.

- 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 declaration espousing core objectives and principles and establishing the needs and expectations of holders of TK as a political priority (e.g. as the political basis for a further phase of work possibly aimed at more precise legal outcomes);
- Other forms of soft law or non-binding instruments, such as a statement or recommendation (for instance, 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);
- 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 against misappropriation and misuse, or other illicit uses).

26. These options are further considered in document WIPO/GRTKF/IC/10/6, and more fully in WIPO/GRTKF/IC/6/6.

IV. WORKING PROCEDURES

27. The Committee has also considered various possibilities for consulting upon and developing further draft materials, and what procedural steps may be desirable. This would be additional to the steps already taken to enhance the participation of indigenous and local communities, through accreditation, procedural changes, and the creation of a voluntary fund. At its seventh session, the Committee reviewed a range of possibilities, and established an intersessional commentary process for the further development of the draft objectives and principles. Document WIPO/GRTKF/IC/8/5 included a proposal for a further intersessional commentary process and to ‘consider options for further enhancing the role of the Committee, and possible subsidiary bodies, in directly preparing future drafts’.

28. The range of possibilities discussed have included one or more of the following:

- (a) expert-level or subsidiary consultations or technical drafting groups, for example dealing with specific questions or working through the text from a focused expert perspective;
- (b) intersessional commentary processes, such as those implemented in the past;
- (c) continuing consultations by national governments with stakeholders, especially holders and custodians of TK, as well as consultations through regional bodies and other forums;
- (d) procedural measures such as the institution of panel sessions chaired by traditional and local communities at the beginning of the IGC.

29. Document WIPO/GRTKF/IC/9/6 sets out further background to these possibilities.

V. DEVELOPMENT AND CIRCULATION OF THE PROVISIONS

30. As noted, the present document reproduces in its Annex the most recent version of the draft objectives and principles, exactly as contained in the Annexes to both WIPO/GRTKF/IC/8/5 and WIPO/GRTKF/IC/9/5. No amendment or update has been made, in view of the Committee's ongoing discussions and review of this material, and the consultation and review processes that are reportedly under way in a number of Member States. Documents WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/8/5 provide the full details and origin of this material; the latter document describes in particular the differences between the two versions and the changes made following the commentary process. A brief timeline of the development process is provided here.

31. The draft objectives and principles built on the Committee's work on the elements of protection of TK that commenced in 2001. Briefly, this work entailed:

(a) *Second session (December 2001)*: Delegations of the African Group, Venezuela, supported by the Delegations of Brazil, Ecuador and Egypt, request the preparation of a document with "elements for a possible *sui generis* system"⁷;

(b) *Third session (June 2002)*: the Committee considered "Elements of a *Sui Generis* System for the Protection of Traditional Knowledge", which set out eight core elements.⁸ Based on these elements, the Delegation of Norway proposed "to provide protection for TK ... using Article 10*bis* [of the Paris Convention] as a model when considering the framework of a *sui generis* system for TK" and "to have a general international norm that obliged the States to offer protection against unfair exploitation of TK ... supplied with internationally agreed guidelines on how to apply the norm".⁹ The Committee decided to "prepare an amended ... version of the document ... taking into account the suggestion made by the Delegation of Norway"¹⁰ and to "discuss whether it would be possible to provide protection for TK along similar lines as in article 10*bis* of the Paris Convention concerning unfair competition".¹¹ The Committee invited written comments on the contents of *sui generis* TK systems and, based on the comments, requested a revised draft text on the core elements of TK protection;¹²

(c) *Fourth session (December 2002)*: the Committee considered a revised version of the core elements¹³, which incorporated the Norwegian proposal and the comments and observations of Committee members. It decided to incorporate the core elements of *sui generis* systems for TK into a composite study, aiming for "a more concrete analysis of specific options"¹⁴;

⁷ WIPO/GRTKF/IC/2/16, paragraphs 188, 189, 190, 191; recorded in Chairman's Conclusions, paragraph 194

⁸ WIPO/GRTKF/IC/3/8, paragraphs 29 to 57 ("V. Elements of a *Sui Generis* System for the Protection of Traditional Knowledge")

⁹ WIPO/GRTKF/IC/3/17, paragraph 227

¹⁰ WIPO/GRTKF/IC/3/17, paragraph 249, item 3

¹¹ Ibid.

¹² WIPO/GRTKF/IC/3/17, paragraph 249, items 2 and 4

¹³ WIPO/GRTKF/IC/4/8

¹⁴ WIPO/GRTKF/IC/4/15, paragraph 163(i)

(d) *Fifth session (July 2003)*: the Committee conducted a comparative analysis of ten existing *sui generis* TK laws,¹⁵. It also heard a Panel on national experiences with these laws, which became the basis for the development of the draft objectives and principles;

(e) *Sixth session (December 2003)*: the Committee welcomed an African Group proposal on “Objectives, Principles and Elements of an International Instrument, or Instruments”.¹⁶ Support was expressed for ten “key principles and objectives of TK protection”.¹⁷ The Committee agreed to develop “first drafts of an overview of policy objectives and core principles” of TK protection;¹⁸

(f) *Seventh session (November 2004)*: the Committee considered draft objectives and principles on the protection of TK, based on proposals, discussion and documented approaches from the previous five sessions.¹⁹ The Committee agreed that the draft should provide a basis for preparing further drafts of the objectives and principles²⁰ and called for “comments on the draft ... including specific suggestions for wording” within an agreed timeframe, which would provide the basis for the preparation of the next draft.²¹ Extensive comments were provided,²² including specific suggestions for wording, on the draft Objectives and Principles on the protection of TK and TCEs. As noted, these comments were integrated into the revised draft provisions for consideration at the eighth session.

(g) *Eighth session (June 2005)*: after reviewing this revised draft (WIPO/GRTKF/IC/8/5), the Committee concluded that there was broad support for the process and work it was undertaking on TK²³ but “noted the diverse views expressed” on this issue.²⁴ The WIPO General Assembly subsequently agreed in October 2005 to renew the mandate of the Committee to continue its current mandate for the 2006-2007 biennium.

(h) *Ninth session (April 2006)*: on taking up its renewed mandate, the Committee continued its review of the draft objectives and principles (reissued unaltered as the annex to WIPO/GRTKF/IC/9/5), and commissioned a further intersessional commentary process.

Circulation and reference beyond the Committee

32. The draft objectives and principles under consideration by the Committee were distilled, inter alia, from many national, regional and international legal instruments. In turn, these same draft objectives and principles have since been consulted upon, and used as direct textual inputs, in the course of a range of international, regional and national policy or legislative processes. Several regional processes, and many national consultation processes

¹⁵ Including those of the African Union, Brazil, China, Costa Rica, India, Peru, Philippines, Portugal, Thailand and the United States of America: see WIPO/GRTKF/IC/5/INF/4, WIPO/GRTKF/IC/5/INF/6 and WIPO/GRTKF/IC/5/INF/7

¹⁶ WIPO/GRTKF/IC/6/12

¹⁷ For the ten key principles of TK protection see WIPO/GRTKF/IC/6/4, paragraphs 17 to 28; and WIPO/GRTKF/IC/6/14, paragraph 109

¹⁸ WIPO/GRTKF/IC/6/4, paragraph 104, and WIPO/GRTKF/IC/6/14, paragraph 109

¹⁹ WIPO/GRTKF/IC/7/5

²⁰ WIPO/GRTKF/IC/7/15, paragraph 149

²¹ WIPO/GRTKF/IC/7/15, paragraph 150

²² WIPO/ GRTKF/IC/8/INF/4

²³ WIPO/ GRTKF/IC/8/15 Prov, paragraph 162

²⁴ WIPO/ GRTKF/IC/8/15 Prov, paragraph 163

have made use of the draft objectives and principles as a resource. For instance, at the international level, a draft proposal for an international regime on access and benefit-sharing under consideration by the Convention on Biological Diversity includes text referring to taking “into account the work of the WIPO/IGC on the intellectual property aspects of sui generis systems for the protection of traditional knowledge and folklore against misappropriation and misuse.” Several regional processes, and many national consultation processes have made use of the draft objectives and principles as a resource.

33. At the national level, a number of countries are in the process of developing their national TK protection measures by adapting and applying the draft WIPO provisions to their national circumstances. In the process they are using the principle of flexibility and comprehensiveness to adapt the draft WIPO provisions to their national circumstances and legal systems. For example, draft law of Mongolia applies Policy Objectives (viii), (xi) and (xii) of the draft WIPO Policy Objectives; General Guiding Principle (e); and Articles 1 to 11, as attached in the Annex;

34. Several regional organizations are developing regional TK protection frameworks which draw extensively on the text of the draft objectives and principles. These include the African Regional Intellectual Property Organization (ARIPO) and the *Organisation Africaine de la Propriété Intellectuelle* (OAPI) in their work on a Draft Framework for an African Instrument on the Protection of Traditional Knowledge; and the South Asian Association for Regional Cooperation (SAARC) in its development of a Draft Legal Instrument for SAARC Countries on Protection of Traditional Knowledge, which was approved by the SAARC Summit in 2006 as a basis for further work.

International applications and adaptations of the WIPO objectives and principles

35. International organizations have also applied and adapted the objectives and principles when discussing and developing TK-related instruments. Some examples follow.

(i) the *Convention on Biological Diversity (CBD)* is developing an International Regime on Access and Benefit-sharing (IR). The draft text of the IR adapts and incorporates specific wording from Policy Objectives (viii), General Guiding Principle (f) and Article 1 of the draft WIPO provisions within brackets. It also states within brackets that ‘the IR will take into account the work of the WIPO IGC on the intellectual property aspects of sui generis systems for the protection of traditional knowledge and folklore against misappropriation and misuse’.²⁵

(ii) the *Working Group on Indigenous Populations (WGIP)* of the Commission on Human Rights (Sub-Commission on the Promotion and Protection of Human Rights) has been developing Draft Principles and Guidelines on the Heritage of Indigenous Peoples. For instance, one draft of principles and guidelines adapts text from the WIPO provisions.²⁶ The document raised the question ‘whether a comprehensive protection system should be developed which would integrate the work undertaken by, and involve, United Nations bodies and organizations such as the Permanent Forum on Indigenous Issues, WIPO, the Secretariat

²⁵ UNEP/CBD/COP/8/6, Annex I, Scope, paragraph 4.

²⁶ Annex to document E/CN.4/Sub.2/AC.4/2005/3, containing ‘Draft Principles and Guidelines on the Heritage of Indigenous Peoples’ the text of which in part reflects inter alia Policy Objectives (ii), (vii), (viii), (x) General Guiding Principle (d), (f), (h), (i) and Article 1, 3, 4, 6, 7, 9 of the draft WIPO provisions

for the Convention on Biological Diversity and the Office of the United Nations High Commissioner on Human Rights, ensuring, *inter alia*, a human rights-based approach to the issue of protection for indigenous peoples' heritage.'

36. These examples from other international fora show that the development of the objectives and principles in the Committee is without prejudice to the work of other fora working on related issues, as required by the WIPO General Assembly mandate given to the Committee. They also illustrate that the draft objectives and principles have, since the time when they were first considered by the Committee at the seventh session, received an extensive uptake and application at the national, regional and international levels.

37. Some Committee participants who have applied or adapted the draft Objectives and Principles, have subsequently submitted comments on the drafts Objectives and Principles to reflect their experiences with their adaptation and application. These comments may in turn feed into the further evolution of the draft Objectives and Principles, thus improving and adding value to the existing drafts by informing them of concrete and actual experience.

VI. CONCLUSIONS

38. This document has briefly reviewed the evolution of the draft provisions and has set out possibilities for the Committee to consider in relation to its work on positive protection of TK under three aspects:

- (i) the substance or content of its work;
- (ii) the form, nature or legal status of any outcome from its work;
- (iii) procedures or methodology required to enhance progress towards any desired outcome.

From a general perspective, these questions were reviewed extensively in documents WIPO/GRTKF/IC/6/6 and WIPO/GRTKF/IC/8/6, and briefly recapitulated in WIPO/GRTKF/IC/9/6 and WIPO/GRTKF/IC/10/6.

39. The document clarifies the context of the Committee's work on the protection of TK within the broader international policy and legal environment, and describes the application and implementation of the draft objectives and principles in a range of international, regional and national contexts.

The Committee is invited to:

(i) consider the possibilities for advancing its work on the protection of TK, including the substance or content of possible outcomes of this work; the form or legal status of any such outcome, and preferred procedures required to achieve any such outcome;

(ii) continue to review and comment on the draft provisions contained in the Annex, including in the light of the comments received since the ninth session of the Committee;

(iii) consider an appropriate process to develop a draft outcome of the Committee's work on protection of TK for consideration at the tenth session, in view of the possibility of a draft outcome or decision being presented to the WIPO General Assembly in September 2007;

(iv) invite Committee participants and other relevant stakeholders to report their experiences relevant to the international dimension of the objectives and principles in order to inform their further evolution and possible implementation; and

(v) develop options for further enhancing the role of the Committee, and possible subsidiary bodies, in directly preparing future drafts of this material.

[Annex follows]

ANNEX

REVISED PROVISIONS
FOR THE PROTECTION OF
TRADITIONAL KNOWLEDGE

POLICY OBJECTIVES AND CORE PRINCIPLES

CONTENTS

N.B. These draft provisions are reproduced unaltered from the Annex of documents WIPO/GRTKF/IC/8/5 and WIPO/GRTKF/IC/9/5, considered by the Intergovernmental Committee on Intellectual Property and Genetic Resources and Folklore ('the Committee') at its eighth and ninth sessions. Committee members have expressed diverse views on the acceptability of this material as a basis for future work, in particular regarding certain passages of Part III: Substantive Principles. WIPO/GRTKF/IC/8/15 and WIPO/GRTKF/IC/9/14 set out these diverse views of Committee participants in full.

I. POLICY OBJECTIVES

- (i) Recognize value
- (ii) Promote respect
- (iii) Meet the actual needs of traditional knowledge holders
- (iv) Promote conservation and preservation of traditional knowledge
- (v) Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems
- (vi) Support traditional knowledge systems
- (vii) Contribute to safeguarding traditional knowledge
- (viii) Repress unfair and inequitable uses
- (ix) Concord with relevant international agreements and processes
- (x) Promote innovation and creativity
- (xi) Ensure prior informed consent and exchanges based on mutually agreed terms
- (xii) Promote equitable benefit-sharing
- (xiii) Promote community development and legitimate trading activities
- (xiv) Preclude the grant of improper intellectual property rights to unauthorized parties
- (xv) Enhance transparency and mutual confidence
- (xvi) Complement protection of traditional cultural expressions

CORE PRINCIPLES

II. GENERAL GUIDING PRINCIPLES

- (a) Responsiveness to the needs and expectations of traditional knowledge holders
- (b) Recognition of rights
- (c) Effectiveness and accessibility of protection
- (d) Flexibility and comprehensiveness
- (e) Equity and benefit-sharing
- (f) Consistency with existing legal systems governing access to associated genetic resources
- (g) Respect for and cooperation with other international and regional instruments and processes
- (h) Respect for customary use and transmission of traditional knowledge
- (i) Recognition of the specific characteristics of traditional knowledge
- (j) Providing assistance to address the needs of traditional knowledge holders

III. SUBSTANTIVE PRINCIPLES

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

I. POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

Recognize value

(i) recognize the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are fundamentally important for indigenous and local communities and have equal scientific value as other knowledge systems;

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.

[Commentary on Objectives follows]

COMMENTARY ON
POLICY OBJECTIVES

Background

Most existing measures, legal systems and policy debates concerning the protection of traditional knowledge have expressly stated the policy objectives which they seek to achieve by protecting TK, and often they share certain common objectives. These objectives are often articulated in preambular language in laws and legal instruments, clarifying the policy and legal context. The draft policy objectives draw on the common goals expressed within the Committee as the common objectives for international protection.

Part A sets out the policy objectives of traditional knowledge (TK) protection, as they have been articulated by the Committee. These objectives give a common direction to the protection established in the principles of Part B. Such objectives could typically form part of a preamble to a law or other instrument. The listed objectives are not mutually exclusive but rather complementary to each other. The list of objectives is non-exhaustive and, given the evolving nature of the provisions, the Committee members may supplement the current list with additional objectives or decide to combine existing objectives from the current list which are notionally related.

Changes reflecting stakeholder comments and inputs received from Committee members regarding the policy objectives in WIPO/GRTKF/IC/7/5

Committee participants provided valuable and in-depth comments on the policy objectives contained in Annex I of WIPO/GRTKF/IC/7/5 including specific proposals for redrafting the wording of the objectives. In addition, comments had already been made on policy objectives at earlier sessions of the Committee and in related early exercises regarding TK protection, such as the WIPO Fact-finding missions on intellectual property and traditional knowledge in 1998-1999. All the comments and inputs have been taken into account in the revised draft policy objectives. Committee participants' proposals for specific wording have been directly entered into the text wherever possible, so that the revised text is a direct reflection of the drafting proposals. In some cases, policy objectives have been significantly reworded or entirely replaced, such as the objective to "ensure prior informed consent and exchanges based on mutually agreed terms", which replaces the objective to "promote intellectual and technological exchange" at the request of Brazil. In some cases, changes have been introduced to respond to comments in the light of earlier inputs from TK holders, such the need to recognize that TK is as valuable as conventional scientific knowledge¹ while also recalling that TK itself is of scientific value and may be considered by some as a distinct but equally valid scientific system.² In other cases, new policy objectives or guiding principles have been added at the request of Committee members, such as the objective of conservation and preservation of TK at the request of the United States of

¹ See, Objective (i) in the present document and WIPO/GRTKF/IC/8/INF/4, Comment of Brazil.

² E.g., TK holders have pointed out that "... the implication [of certain assumptions about TK] is that TK is not "science" in the formal sense of a systematic body of knowledge that is continually subject to empirical challenges and revision. Rather the term implies something "cultural" and antique. [...] What the international community needs to protect is 'indigenous science'". See Statement by Dr. Russell Barsh, 21 July 2000, *IP Needs and Expectations of TK Holders. Report on Fact-finding Missions on IP and TK*. Geneva, 2001: page 116, footnote 3.

America and the guiding principle of “providing assistance to address the needs of traditional knowledge holders” at the request of China.

Comments and inputs reflected: African Group,³ GRULAC;⁴ Brazil, Canada, China, New Zealand, United States of America; European Community; OAPI; Call of the Earth, Indigenous Peoples’ Council on Biocolonialism, Inuit Circumpolar Conference, Saami Council, UNU-IAS.

³ African Group (WIPO/GRTKF/IC/6/12, Annex, “Objectives”)

⁴ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, “II. Objectives”)

II. GENERAL GUIDING PRINCIPLES

These principles should be respected to ensure that the specific substantive provisions concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection:

- (a) *Principle of responsiveness to the needs and expectations of traditional knowledge holders*
- (b) *Principle of recognition of rights*
- (c) *Principle of effectiveness and accessibility of protection*
- (d) *Principle of flexibility and comprehensiveness*
- (e) *Principle of equity and benefit-sharing*
- (f) *Principle of consistency with existing legal systems governing access to associated genetic resources*
- (g) *Principle of respect for and cooperation with other international and regional instruments and processes*
- (h) *Principle of respect for customary use and transmission of traditional knowledge*
- (i) *Principle of recognition of the specific characteristics of traditional knowledge*
- (j) *Principle of providing assistance to address the needs of traditional knowledge holders*

[Commentary on General Guiding Principles follows]

COMMENTARY ON
GENERAL GUIDING PRINCIPLES

Background

The substantive provisions set out in the next section are guided by and seek to give legal expression to certain general guiding principles which have underpinned much of the discussion within the Committee since its inception and in international debate and consultations before the Committee's establishment.

Elaboration and discussion of such principles is a key step in establishing a firm foundation for development of consensus on the more detailed aspects of protection. Legal and policy evolution is still fast-moving in this area, at the national and regional level, but also internationally. Equally, strong emphasis has been laid on the need for community consultation and involvement. Broad agreement on core principles could put international cooperation on a clearer, more solid footing, but also clarify what details should remain the province of domestic law and policy, and leave suitable scope for evolution and further development. It could build common ground, and promote consistency and harmony between national laws, without imposing a single, detailed legislative template.

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

Protection should reflect the actual aspirations, expectations and needs of traditional knowledge holders; and in particular should: recognize and apply indigenous and customary practices, protocols and laws as far as possible and appropriate; address cultural and economic aspects of development; address insulting, derogatory and offensive acts; enable full and effective participation by all traditional knowledge holders; and recognize the inseparable quality of traditional knowledge and cultural expressions for many communities. Measures for the legal protection of traditional knowledge should also be recognized as voluntary from the viewpoint of indigenous peoples and other traditional communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their traditional knowledge.

(b) Principle of recognition of rights

The rights of traditional knowledge holders to the effective protection of their knowledge against misappropriation should be recognized and respected.

(c) Principle of effectiveness and accessibility of protection

Measures for protecting traditional knowledge should be effective in achieving the objectives of protection, and should be understandable, affordable, accessible and not burdensome for their intended beneficiaries, taking account of the cultural, social and economic context of traditional knowledge holders. Where measures for the protection of traditional knowledge are adopted, appropriate enforcement mechanisms should be developed permitting effective action against misappropriation of traditional knowledge and supporting the broader principle of prior informed consent.

(d) *Principle of flexibility and comprehensiveness*

Protection should respect the diversity of traditional knowledge held by different peoples and communities in different sectors, should acknowledge differences in national circumstances and the legal context and heritage of national jurisdictions, and should allow sufficient flexibility for national authorities to determine the appropriate means of implementing these principles within existing and specific legislative mechanisms, adapting protection as necessary to take account of specific sectoral policy objectives, subject to international law, and respecting that effective and appropriate protection may be achieved by a wide variety of legal mechanisms and that too narrow or rigid an approach may preempt necessary consultation with traditional knowledge holders.

Protection may combine proprietary and non-proprietary measures, and use existing IP rights (including measures to improve the application and practical accessibility of such rights), *sui generis* extensions or adaptations of IP rights, and specific *sui generis* laws. Protection should include defensive measures to curtail illegitimate acquisition of industrial property rights over traditional knowledge or associated genetic resources, and positive measures establishing legal entitlements for traditional knowledge holders.

(e) *Principle of equity and benefit-sharing*

Protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and maintain traditional knowledge, namely traditional knowledge holders, and of those who use and benefit from traditional knowledge; the need to reconcile diverse policy concerns; and the need for specific protection measures to be proportionate to the objectives of protection and the maintenance of an equitable balance of interests. In reflecting these needs, traditional knowledge protection should respect the right of traditional knowledge holders to consent or not to consent to access to their traditional knowledge and should take into account the principle of prior informed consent.

The rights of traditional knowledge holders over their knowledge should be recognized and safeguarded. Respect for prior informed consent should be ensured, and holders of traditional knowledge should be entitled to fair and equitable sharing of benefits arising from the use of their traditional knowledge. Where traditional knowledge is associated with genetic resources, the distribution of benefits should be consistent with measures, established in accordance with the Convention on Biological Diversity, providing for sharing of benefits arising from the utilization of the genetic resources.

Protection which applies the principle of equity should not be limited to benefit-sharing, but should ensure that the rights of traditional knowledge holders are duly recognized and should, in particular, respect the right of traditional knowledge holders to consent or not to consent to access to their traditional knowledge.

(f) *Principle of consistency with existing legal systems governing access to associated genetic resources*

The authority to determine access to genetic resources, whether associated with traditional knowledge or not, rests with the national governments and is subject to national legislation. The protection of traditional knowledge associated with genetic resources shall be consistent with the applicable law governing access to those resources and the sharing of

benefits arising from their use. Nothing in these Principles shall be interpreted to limit the sovereign rights of States over their natural resources and the authority of governments to determine access to genetic resources, whether or not those resources are associated with protected traditional knowledge.

(g) Principle of respect for and cooperation with other international and regional instruments and processes

Traditional knowledge shall be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already codified in or established under binding legal instruments and international customary law.

Nothing in these Principles shall be interpreted to affect the interpretation of other instruments or the work of other processes which address the role of traditional knowledge in related policy areas, including the role of traditional knowledge in the conservation of biological diversity, the combating of drought and desertification, or the implementation of farmers' rights as recognized by relevant international instruments and subject to national legislation.

(h) Principle of respect for customary use and transmission of traditional knowledge

Customary use, practices and norms shall be respected and given due account in the protection of traditional knowledge, subject to national law and policy. Protection beyond the traditional context should not conflict with customary access to, and use and transmission of, traditional knowledge, and should respect and bolster this customary framework. If so desired by the traditional knowledge holders, protection should promote the use, development, exchange, transmission and dissemination of traditional knowledge by the communities concerned in accordance with their customary laws and practices, taking into account the diversity of national experiences. No innovative or modified use of traditional knowledge within the community which has developed and maintained that knowledge should be regarded as offensive use if that community identifies itself with that use of the knowledge and any modifications entailed by that use.

(i) Principle of recognition of the specific characteristics of traditional knowledge

Protection of traditional knowledge should respond to the traditional context, the collective or communal context and inter-generational character of its development, preservation and transmission, its relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values, and constantly evolving character within the community.

(j) Principle of providing assistance to address the needs of traditional knowledge holders

Traditional knowledge holders should be assisted in building the legal-technical capacity and establishing the institutional infrastructure which they require in order to effectively utilize and enjoy the protection available under these Principles, including, for example, in the setting up of collective management systems for their rights, the keeping of records of their traditional knowledge and other such needs.

[Substantive provisions follow]

III. SUBSTANTIVE PROVISIONS

ARTICLE 1

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.

COMMENTARY ON
ARTICLE 1

This provision builds on an international consensus that traditional knowledge should not be misappropriated, and that some form of protection is required to achieve this. Existing international and national laws already contain norms against misappropriation of related intangibles such as goodwill, reputation, know-how and trade secrets. These norms can be viewed as part of the broader law of unfair competition and civil liability rather than as necessarily requiring distinct exclusive rights as provided for in the chief branches of modern intellectual property law. This provision establishes a general principle against the misappropriation of TK as a common frame of reference for protection, drawing together existing approaches and building on existing legal frameworks. The provision thus reflects the African Group's proposal that the first objective of TK protection should be to "Prevent the misappropriation of ... traditional knowledge"⁵ and other expressions of commitment to "preventing the misappropriation of TK".⁶

The general norm against misappropriation is elaborated in three, cumulative steps. The provision first articulates a basic norm against misappropriation as such; second, it develops the nature of "misappropriation" by providing a general, non-exclusive description of misappropriation; and finally it catalogues specific acts of misappropriation which should be suppressed. This drafting structure (but not its legal content) mirrors the structure of a provision in the Paris Convention which has proven to be widely adaptable (Article 10*bis*) and which has engendered several new forms of protection, such as the protection of geographical indications and the protection of undisclosed information. Importantly for traditional knowledge protection, this article does not create exclusive property rights over intangible objects. Rather, it represses unfair acts in certain spheres of human intellectual activity without creating distinct private property titles over the knowledge which is being protected against those illegitimate acts. Similarly, the first paragraph in this provision defines misappropriation as an unfair act which should be repressed, without creating monopolistic property rights over TK.

The second paragraph describes the nature of misappropriation in a general and non-exclusive manner. A link with unfair competition law is suggested by the focus on acquisition *by unfair means*. Akin to Article 10*bis*, the term "unfair means" may be defined differently, depending on the specific legal settings in national law. This allows countries to take into account various domestic and local factors when determining what constitutes misappropriation, in particular the views and concerns of indigenous and local communities. The non-exclusive nature of this description of "misappropriation" allows the term "misappropriation" to become the umbrella term and structure under which the various unfair, illicit and inequitable acts, which should be repressed, may be subsumed.⁷

Paragraph 3 provides an inclusive list of those specific acts which, when undertaken in relation to TK covered by these Principles, would, at a minimum, be considered acts of

⁵ See, Objective 1, African Group proposal, Annex, WIPO/GRTKF/IC/6/12

⁶ United States of America (WIPO/GRTKF/IC/6/14, paragraph 157)

⁷ The approach taken under a misappropriation regime, as reflected in the present Principles, is thus to modulate the term "misappropriation", if and as required, rather than to subsume that term under another, broader term or structure, as suggested by one comment. This would appear to be more of a linguistic difference in the choice of terms, rather than a fundamental difference in structure of the protection provided (see WIPO/GRTKF/IC/8/INF/4, OAPI).

misappropriation. By allowing a wide range of measures as appropriate “legal means” within national law to suppress the listed acts, the chapeau of this paragraph applies the Guiding Principle of flexibility and comprehensiveness. The different subparagraphs of Article 1.3 distil specific acts of misappropriation, which include: (i) the illicit acquisition of TK, including by theft, bribery, deception, breach of contract, etc.; (ii) breach of the principle of prior informed consent for access to TK, when required under national or regional measures; (iii) breach of defensive protection measures of TK; (iv) commercial or industrial uses which misappropriate the value of TK where it is reasonable to expect the holders of TK to share the benefits from this use; and (v) willful morally offensive uses of TK which is of particular moral or spiritual value to the TK holder. The provision gives wide flexibility for countries to use different legal means to suppress these listed acts. In countries which admit this possibility, judicial and administrative authorities may even draw upon these principles directly, without requiring specific legislation to be enacted. The words “in particular” leave the choice open to national policy makers to consider additional acts as forms of misappropriation and include these in the list nationally. This could include, for example, passing-off, misrepresentation of the source of TK, or failure to recognize the origin of TK.⁸

Paragraph 4 supplements the basic misappropriation norm by clarifying that the specific acts of unfair competition already listed in Article 10*bis* do have direct application to TK subject matter. As requested by commentators, the paragraph now been extended to clarify the relation between protection against misappropriation and protection under Article 10*bis* of the Paris Convention. It expressly states that TK holders are additionally protected against misleading representations, creating confusion and false allegations in relation to products or services produced or provided by them.

Since the notion of misappropriation would need to be more closely interpreted under national law, paragraph 5 suggests that concepts such as “unfair means”, “equitable benefits” and “misappropriation” should in particular cases be guided by the traditional context and the customary understanding of TK holders themselves. The traditional context and customary understandings may be apparent in a community’s traditional protocols or practices, or may be codified in customary legal systems.

Changes reflecting stakeholder comments and inputs received on this provision

Several comments requested the addition of a further category of acts to the list of specific acts of misappropriation. Accordingly, sub-paragraph 3(v) was added, which would repress willful offensive use by third parties of TK which is of moral or spiritual value to the TK holders. In paragraph 4 the relationship between those acts of unfair competition which are repressed under Article 10*bis* of the Paris Convention and the protection against misappropriation have been further clarified through an additional sentence as requested by China. It expressly states that the acts of unfair competition listed in Article 10*bis*(3)2 and 10*bis*(3)3 Paris Convention should also be repressed, namely acts which create confusion with TK products or services and false allegations which discredit the TK products or services.

Comments and inputs reflected: Brazil, China, United States of America; European Community, OAPI, Saami Council, UNU/IAS;

⁸ For example, the conceptions of “unfair” in the Indian Arts and Crafts Act of the United States of America and Peruvian Law.

ARTICLE 2

LEGAL FORM OF PROTECTION

1. *The protection of traditional knowledge against misappropriation may be implemented through a range of legal measures, including: a special law on traditional knowledge; laws on intellectual property, including laws governing unfair competition and unjust enrichment; the law of contracts; the law of civil liability, including torts and liability for compensation; criminal law; laws concerning the interests of indigenous peoples; fisheries laws and environmental laws; regimes governing access and benefit-sharing; or any other law or any combination of those laws. This paragraph is subject to Article 11(1).*

2. *The form of protection need not be through exclusive property rights, although such rights may be made available, as appropriate, for the individual and collective holders of traditional knowledge, including through existing or adapted intellectual property rights systems, in accordance with the needs and the choices of the holders of the knowledge, national laws and policies, and international obligations.*

COMMENTARY ON
ARTICLE 2

Existing *sui generis* measures for TK protection at the level of domestic law already display a high diversity of legal forms and mechanisms. If the current provisions are not to pre-empt or supersede existing national and regional choices for TK protection, this diversity of legal mechanism would need to be accommodated in these international standards. Again, this approach is not new in the articulation of international standards. Provisions similar to this Article can be found in existing international instruments covering diverse fields of protection. Examples that have earlier been cited include the Washington Treaty,⁹ the Paris Convention, and the Rome Convention.¹⁰ This provision applies the guiding principle of flexibility, to ensure that sufficient space is available for national consultations with the full and effective participation of TK holders, and legal evolution as protection mechanisms are developed and applied in practice.

Accordingly, in order to accommodate existing approaches and ensure appropriate room for domestic policy development, paragraph 1 gives effect to the Guiding Principle of flexibility and comprehensiveness and reflects the actual practice of countries which have already implemented *sui generis* forms of TK protection. It allows the wide range of legal approaches which are currently being used to protect TK in various jurisdictions, particularly in the African Union, Brazil, China, India, Peru, Portugal and the United States of America. It leaves national authorities a maximum amount of flexibility in order to determine the appropriate legal mechanisms which best reflect the specific needs of local and indigenous communities in the domestic context and which match the national legal systems in which protection will operate. The paragraph is modeled on a provision from a binding international instrument, namely Article 4 of the Washington Treaty.

Paragraph 2 clarifies that these principles do not require the creation of exclusive property titles on TK, which are perceived by many TK holders as inappropriate (see commentary on Article 1). Many TK holders have expressed the concern that new forms of protection of TK against misappropriation should not impose private rights on their TK. On the contrary, these principles give effect to an underlying norm against misappropriation by third parties, and thus against the illegitimate privatisation or commodification of TK, including through the improper assertion of illegitimate private property rights. Instead they leave open the scope for using alternative legal doctrines in formulating policy on these issues as suggested by several Committee participants. However, since several countries have already established *sui generis* exclusive rights over TK, the paragraph gives scope for such exclusive rights, provided that they are in accordance with the needs and choices of TK holders, national laws and policies, and international obligations.

Changes reflecting stakeholder comments and inputs received on this provision

Comments by Committee participants informed that in some jurisdictions fisheries laws and environmental laws are also relevant to the protection of some forms of TK and therefore these references have been added to the possible means of implementation of the Principles.

⁹ *Treaty on Intellectual Property in Respect of Integrated Circuits* (1989) (hereinafter, “the Washington Treaty”)

¹⁰ *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (1961) (hereinafter, “the Rome Convention”)

The listing of laws has also been amended to bring it into line with the civil law tradition in continental Europe and francophone African countries.

Comments and inputs reflected: OAPI, Australia, New Zealand, ICC, Saami Council, UNU-IAS.

ARTICLE 3

GENERAL SCOPE OF SUBJECT MATTER

1. These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking externally to define the diverse and holistic conceptions of knowledge within the traditional context. These principles should be interpreted and applied in the light of the dynamic and evolving nature of traditional knowledge and the nature of traditional knowledge systems as frameworks of ongoing innovation.

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.

COMMENTARY ON
ARTICLE 3

This provision does two things: it clarifies the general nature of traditional knowledge for the purposes of these provisions, and it sets appropriate bounds to the scope of protectable subject matter. It therefore gives effect to concerns that international provisions on TK should reflect the distinctive qualities of TK, but also responds to concerns that provisions against misappropriation of TK should not intrude on the traditional context and should not place external constraints or impose external interpretations on how TK holders view, manage or define their knowledge in the customary or traditional context.

International IP standards typically defer to the national level for determining the precise scope of protected subject matter. The international level can range between a description in general terms of eligible subject matter, a set of criteria for eligible subject matter, or no definition at all. For example, the Paris Convention and the TRIPS Agreement do not define “invention”. The Paris Convention defines ‘industrial property’ in broad and expansive terms. This provision takes a comparable approach which recognizes the diverse definitions and scope of TK that already apply in existing national laws on TK, and does not seek to apply one singular and exhaustive definition. Guided by existing national laws, however, this provision clarifies the scope of TK in a descriptive way. Its wording draws on a standard description that has been developed and consistently used by the Committee, which was based in turn on the Committee’s analysis of existing national laws on the protection of TK. In essence, if intangible subject matter is to constitute traditional knowledge for the purposes of these provisions, it should be “traditional”, in the sense of being related to traditions passed on from generation to generation, as well as being “knowledge” or a product of intellectual activity.

The second paragraph clarifies that these provisions cover traditional knowledge as such. This means that they would not apply to TCEs/EoF, which are treated in complementary and parallel provisions (document WIPO/GRTKF/IC/8/4). In its general structure, but not its content, the paragraph is modeled on Article 2(1) of the Berne Convention which delineates the scope of subject matter covered by that Convention by first providing a general description and then an illustrative list of elements that would fall within its scope. In following a similar approach, this paragraph does not seek to define the term absolutely. A single, exhaustive definition might not be appropriate in light of the diverse and dynamic nature of TK, and the differences in existing national laws on TK.

Changes reflecting stakeholder comments and inputs received on this provision

Comments by Committee participants suggested that the evolving and dynamic nature of indigenous knowledge over time should be further emphasized and reflected in this provision. A sentence to this effect has been added. Other comments suggested to develop and qualify certain prerequisites and terms used in the provision, such as “resulting from intellectual activity”, and thus the description of traditional knowledge has been further specified, drawing on well-known language in existing international IP and other instruments.¹¹

¹¹ For example, the terms “resulting from intellectual activity” has a long established, clear usage in Article 2 of the WIPO Convention, and the term “embodying traditional lifestyles” has a similar long-established and clear usage in the context of Article 8(j) CBD. See comments of the European Community and its Member States.

Comments reflected: European Community, Indigenous Peoples' Committee on Biocolonialism, International Publishers' Association, UNU IAS.

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.*

COMMENTARY ON
ARTICLE 4

This provision clarifies what qualities TK should have at least to be eligible for protection against misappropriation in line with these provisions. Again without intruding on the traditional domain, this provision would help set out the criteria that TK should meet in order to be assured protection against misappropriation by third parties in the external environment, beyond the traditional context. It leaves open the possibility of wider eligibility for protection, where this is in line with particular national choices and needs.

This provision is guided by the criteria that are applied in existing national *sui generis* TK laws and by the extensive Committee discussions on the criteria that should apply for TK protection. These national laws and Committee discussions cover diverse criteria, but certain common elements have emerged. This provision articulates those common elements: in essence, providing that TK should have (i) a traditional, intergenerational character, (ii) a distinctive association with its traditional holders, and (iii) a sense of linkage with the identity of the TK holding community (which is broader than conventionally recognized forms of ‘ownership’ and embraces concepts such as custodianship). For example, TK might be integral to the identity of an indigenous or traditional community if there is a sense of obligation to preserve, use and transmit the knowledge appropriately among the members of the community or people, or a sense that to allow misappropriation or offensive uses of the TK would be harmful. Some guidance on these concepts may be found in existing national laws. For example, the Indian Arts and Crafts Act in the United States of America specifies that a product is a product of a particular tribe when “the origin of a product is identified as a named Indian tribe or named Indian arts and crafts organization¹²”. This could be a form of ‘distinctive association’ as suggested in subparagraph (ii).

This provision builds on the general description of TK in Article 3, and provides a conceptual link with the beneficiaries of protection, who are specified in Article 5. Together, these three articles clarify the minimal traditional linkage that would apply between TK and its holders, in order for protection against misappropriation to be assured under these provisions. They do not rule out broader scope of protection, since they define a minimum only (this is the intent of the term ‘at least’ in the chapeau). Yet the reference to “at least” in the chapeau of this provision clarifies that policymakers can choose more inclusive criteria to meet with national needs and circumstances.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on whether specific TK elements, which were of specific importance to the commentators, such as TK utilized by environmental impact assessment projects,¹³ would fulfill the criteria of eligibility. Such a question would depend primarily on whether the knowledge was intergenerational, how it was associated with the community, and whether the community itself saw it as integral to its identity, as well as on national interpretation and existing national jurisprudence.

Comments and inputs reflected: IPA, ICC, OAPI, Saami Council, UNU-IAS.

¹² (Section 309.2(f), 25 CFR Chapter II 309 (Protection of Indian Arts and Crafts Products)).

¹³ Inuit Circumpolar Conference (ICC).

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.

COMMENTARY ON
ARTICLE 5

Preceding principles have focussed on the subject matter of protection. This provision seeks to clarify who should principally benefit from protection of TK. It articulates the principle that the beneficiaries should be the traditional holders of TK. This draws on established practice in existing national systems and the consistent theme in international TK debates. The same approach is found in existing proposals for international protection frameworks. For example, the third objective of the international instrument or instruments proposed by the African Group is “to ensure that these benefits are harnessed for the benefit of traditional knowledge holders”.¹⁴

Because TK is in general held by, associated with and related to the cultural identity of a community, the basic principle provides for that community collectively to benefit from its protection. Studies and actual cases have, nonetheless, shown that in some instances a particular individual member of a community may have a specific entitlement to benefits arising from the use of TK, such as certain traditional healers or individual farmers, working within the community. This provision therefore clarifies that beneficiaries may also include recognized individuals within the communities. Typically, the recognition will arise or be acknowledged through customary understandings, protocols or laws.

Entitlement to and distribution of benefits within a community (including the recognition of entitlements of individuals) may be governed by the customary law and practices that the community itself observes. This is a key area where external legal mechanisms for protection of TK may need to recognize and respect customary laws, protocols or practices. Case law suggests that financial penalties imposed for IP infringement can be distributed according to customary law. The mutually agreed terms for access and benefit-sharing agreements can also give effect to customary laws and protocols by allowing the communities to identify internal beneficiaries of protection according to their own laws, practices and understandings. This option is recognized in the third sentence.

This provision reflects a balance between the diverse forms of custodianship of TK at national and community levels, and the need for guidance on the determination of the beneficiaries of protection, entailing a trade-off between flexibility and inclusiveness on the one hand, and precision and clarity on the other hand. Existing national and community laws may already define the communities who would be eligible for protection. (See further detailed discussion of this question in document WIPO/GRTKF/IC/8/6). In contrast to seeking to create a new body of law *ab initio* concerning the identity of indigenous and other local communities, this text currently allows scope for reference to the national laws of the country of origin to determine these matters. Relevant law at the national or local levels can define relevant communities and/or individuals.¹⁵

¹⁴ See Objective 3, page 1, Annex, WIPO/GRTKF/IC/6/12.

¹⁵ For example, the Indian Arts and Crafts Act in the United States of America, at WIPO/GRTKF/IC/5/INF/6, specifies that an “Indian tribe” means “any Indian tribe, band, nation, Alaska Native village, or any organized group or community which is recognized as eligible ... by the United States ...; or (2) Any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority”. (Section 309.2(e), 25 CFR Chapter II 309).

Comments and inputs received and changes regarding this provision

Comments received on this provision suggested that the beneficiaries should be defined with further precision even in the international layer of protection. This would apply both if the entitled TK holders are “indigenous or traditional communities or peoples” as such, and if they are “recognized individuals within these communities”. More precise qualifiers have thus been incorporated by reference into the provision.

Comments and inputs reflected: OAPI, UNU-IAS

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.*

COMMENTARY ON
ARTICLE 6

The misappropriation of traditional knowledge may include gaining benefits, especially commercial benefits, from the use of the knowledge without equitable treatment of the holders of the knowledge. This is generally congruent with the concerns expressed that TK should not be the subject of unjust enrichment or should not give rise to inequitable benefits for third parties. Accordingly, the elaboration of a system of protection of TK against misappropriation may entail providing for positive standards for equitable sharing of benefits from the use of TK. Such equitable benefit-sharing is also a means of implementing such policy objectives as “recognition of the value of TK”; “ensuring respect for TK and TK holders”; and “promoting equitable benefit-sharing” (Objectives (i), (ii) and (xi), above).

This provision therefore supplements the broad reference to equitable benefit-sharing in the general description of misappropriation (Article 1 above), and covers commercial or non-commercial uses. Internationally agreed guidelines on biodiversity-related TK suggest that basic principles for benefit-sharing can include (i) covering both monetary and non-monetary benefits and (ii) developing different contractual arrangements for different uses.¹⁶ Accordingly, this provision differentiates between commercial and non-commercial uses of TK and specifies different benefit-sharing principles for these uses.

Paragraph 1 establishes the general principle that TK holders are entitled to the sharing of benefits arising from commercial or industrial uses of their TK. The paragraph is worded in such a way that benefits would be shared directly with the TK holder, i.e. the traditional and local communities.

In contrast to the first paragraph, paragraph 2 concerns non-commercial uses of TK and concedes that such uses may give rise only to non-monetary benefit-sharing. The paragraph gives an illustration of non-monetary benefits that could be shared, namely access to research outcomes and involvement of the source community in research and educational activities. Other examples might include institutional capacity building; access to scientific information; and institutional and professional relationships that can arise from access and benefit-sharing agreements and subsequent collaborative activities.

The third paragraph concerns the recognition of TK holders and specifies that users should identify the source of the knowledge and acknowledge its holders. It also provides that TK should be used in a manner that respects the cultural values of its holders.

The final paragraph specifies that civil judicial procedures should be available to TK holders to receive equitable compensation when the provisions in paragraph 1 and 2 have not been complied with. It also specifies the possible role of customary laws and protocols in benefit-sharing since, as has been observed, “customary laws within local communities may play an important role ... in sharing any benefits that may arise” from access to TK.¹⁷

¹⁶ See Section IV.D.3 (“Benefit-sharing”), *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (Decision VI/24A, Annex)

¹⁷ United States of America, WIPO/GRTKF/IC/6/14, paragraph 76.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on fair and equitable benefit-sharing rather than equitable compensation and the provision has been redrafted accordingly. Other comments highlighted the role of customary laws and protocols in benefit-sharing and an additional sentence has thus been added. As requested by some comments, concrete principles regarding the determination of compensation and damages have also been added to the provision.

Comments and inputs reflected: Australia, Brazil, China, IPA, Saami Council, United States of America, UNU-IAS

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.*

COMMENTARY ON
ARTICLE 7

The application of the principle of prior informed consent is central to the policy debates and existing measures concerning TK protection. The expanded conception of misappropriation of TK in Article 1 includes violation of legal measures that require the obtaining of prior informed consent. Prior informed consent has been recognized by some Committee members as a key legal principle and by others as “a valuable practice”.¹⁸ The principle essentially requires that at the point of access, when an external party first gains access to traditional knowledge held within a community, formal consent is required on the part of the community that holds the knowledge. National laws stipulate a contract or permit, containing mutually agreed terms, is agreed between TK users and providers, based on which consent is granted for access to the TK. The principle has been widely implemented through permits, contract systems or specific statutes.

The general principle, as expressed in the first paragraph, provides that TK holders should be both informed about the potential use of TK and should consent to the proposed use, as a condition of fresh access to their TK. The second paragraph expresses the roles and responsibilities concerning the prior informed consent principle, but leaves flexibility to adapt the application of the principle to national legal systems, stakeholder needs and custodianship structures. The third paragraph sets out basic features of mechanisms to implement prior informed consent, applying the guiding principle ‘effectiveness and accessibility of protection’ to prior informed consent mechanisms, so as to ensure that such mechanisms provide for legal certainty and are appropriate. An explicit link with equitable benefit-sharing is made through the requirement that prior informed consent should also entail concluding mutually agreed terms on the use and sharing of benefits arising from the use.

The provision recognizes and accommodates the diversity of existing approaches to prior informed consent and merely provides *that* the principle should be applied. In practice, prior informed consent systems might follow certain basic principles that have been developed and agreed internationally,¹⁹ such as providing for legal certainty and clarity; minimizing transaction costs for access procedures; ensuring that restrictions on access are transparent and legally based. However, from the point of view of these principles, as long as the basic principle is applied, the provision leaves the precise modalities of application to the national law of the country where the TK is located, given the numerous and diverse existing TK laws and the diverse needs of TK holders and custodianship structures.

Changes reflecting stakeholder comments and inputs received on this provision

Some comments suggested that the application of prior informed consent principles should be limited to “access” to TK and should not apply to the “acquisition” of TK. Consequently, the term “acquisition” has been deleted. Following a range of comments on

¹⁸ United States of America (WIPO/GRTKF/IC/6/14, paragraph 76)

¹⁹ See Section IV.C.1 (‘Basic Principles of a Prior Informed Consent System’), *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (Decision VI/24A, Annex)

the basic features of prior informed consent measures, which are described in the provision, the features have been adapted to directly implement Guiding Principle A.3 on “Effectiveness and accessibility of protection”.

Comments and inputs reflected: Brazil, ICC, Saami Council, OAPI, United States of America

ARTICLE 8

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.*

2. *In particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is already readily available to the general public, provided that users of that traditional knowledge provide equitable compensation for industrial and commercial uses of that traditional knowledge.*

COMMENTARY ON
ARTICLE 8

Like the rights and entitlements granted in other fields of legal protection, rights in traditional knowledge may be limited or qualified so as to avoid unreasonable prejudice to the interests of society as a whole, to the customary transmission of TK systems themselves, and other legitimate interests. This provision sets out such exceptions and limitations in relation to the entitlements and rights provided in the preceding provisions. It ensures that *sui generis* protection does not adversely affect the customary availability of TK to the TK holders themselves by interfering with their customary practices of using, exchanging, transmitting and practicing their TK. It also foresees that TK protection should not interfere with household uses and public health uses of traditional medicine. Besides the general exclusions in paragraph 1 which apply to misappropriation in general, a specific optional exclusion is foreseen for the prior informed consent requirement. It concerns knowledge that is already readily available to the general public and the exclusion is subject to the requirement that users provide equitable compensation for industrial and commercial uses.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on two aspects. First, a clarification was requested on subparagraph 8.1(ii) regarding use in government hospitals. This exception derives from the Thai law on traditional medicine and is focused on ensuring that TK protection does not restrain and hamper the public health benefits which derive from the use of traditional medicine in non-profit government hospitals, especially at the local and district level, to which traditional medicine practitioners may often be attached. Following the request for clarification, the language of subparagraph (ii) was specified accordingly. The second comment proposed that fair use should not be addressed in this provision and the first paragraph was modified accordingly.

Comments and inputs reflected: Brazil, China, OAPI.

ARTICLE 9

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.*
2. *If competent authorities make available through national or regional measures additional or more extensive protection for traditional knowledge than is set out in these Principles, those laws or measures shall specify the duration of protection.*

COMMENTARY ON
ARTICLE 9

An important element of any protection measure is the duration of the rights or entitlements which are made available by that measure. In the field of TK protection this has been a particularly difficult element and most conventional IP rights have been considered inappropriate for this field because they foresee a limited term of protection. Existing *sui generis* systems for TK protection have utilized a range of options to define the duration of protection: a single, limited term of protection; successively renewable limited terms; or an unlimited term of protection. Given the inter-generational transmission and creation of traditional knowledge, TK holders have called for a long or unlimited term of protection.

This provision foresees a duration of protection which is not limited to a specific term. This is because TK protection under these Principles is not comparable to those IP titles which grant a time-limited exclusive property right (e.g., a patent or a trademark), but rather resembles those forms of protection which deal with a distinctive association between the beneficiaries of protection and the protected subject matter, and which last as long as that association exists (e.g., the protection of goodwill, personality, reputation, confidentiality, and unfair competition in general). Therefore, the entitlement of TK holders to be protected against misappropriation has been described by one delegation as “an inalienable, unrenouncable and imprescriptable right”.²⁰ In analogy with other forms of unfair competition law based on this distinctive association and based on “support [for] the protection of TK through the suppression of unfair competition”²¹, this provision stipulates that the duration of protection against misappropriation should last as long as the distinctive association remains intact and the knowledge therefore constitutes “traditional knowledge”. The distinctive association exists as long as the knowledge is maintained by traditional knowledge holders, remains distinctively associated with them, and remains integral to their collective identity (see Articles 4 and 5). So long as these criteria of eligibility are fulfilled, the protection of TK under these Principles may be unlimited.

Since numerous countries already make available through their national or regional laws more extensive TK protection than is required in these Principles, the second paragraph specifies that the duration of this more extensive or additional protection should be specified in the relevant laws or measures. The provision is silent on the whether the duration of such additional rights should be for a limited term or not. It merely requires that the duration should be specified and thus leaves to national policy making the decision what the specified duration should be. This accommodates all existing national *sui generis* laws, whether or not they provide for a limited term of protection.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on simplifying and streamlining the first paragraph of the provision and thus the latter part of the first paragraph has been deleted as compared to the version contained in document WIPO/GRTKF/IC/7/5. In order to address the question of duration of possible additional protection and in order to accommodate existing *sui generis* TK systems, the second paragraph has been added.

Comments and inputs reflected: Brazil, OAPI, Saami Council, IPCB.

²⁰ Brazil (WIPO/GRTKF/IC/7/15 Prov, paragraph 110)

²¹ United States of America (WIPO/GRTKF/IC/6/14, paragraph 76)

ARTICLE 10

TRANSITIONAL MEASURES

Protection of traditional knowledge newly introduced in accordance with these principles should be applied to new acts of acquisition, appropriation and use of traditional knowledge. Acquisition, appropriation or use prior to the entry into force of the protection should be regularized within a reasonable period of that protection coming into force. There should however be equitable treatment of rights acquired by third parties in good faith.

COMMENTARY ON
ARTICLE 10

The application of a new requirement for legal protection may have retrospective effect, may exclude retroactivity, or may adopt a range of intermediate approaches which apply varying degrees of retroactivity. Applying protection with retrospective effect can create difficulties because third parties may have already used the protected material in good faith, believing it not to be subject to legal protection. In some legal and policy contexts, the rights and interests of such good faith third parties are recognized and respected through measures such as a continuing entitlement to use the protected material, possibly subject to an equitable compensation, or a prescribed period within which to conclude any continuing good faith use (such as sales of existing goods that would otherwise infringe the new right). On the other hand, the traditional context of TK means that proponents of protection have sought some degree of retrospectivity.

Between the extreme positions of absolute retroactivity and non-retroactivity, this provision seeks to provide an intermediate solution, in terms of which recent utilizations, which become subject to authorization under the law or under any other protection measure, but were commenced without authorization before the entry into force, should be regularized as far as possible within a reasonable period. This requirement of regularization, however, is subject to equitable treatment of rights acquired by third parties in good faith. With this arrangement, the provision conforms broadly with the approach taken in other protection systems, and is consistent with the exceptions and limitations set out in Article 8, above.

Changes reflecting stakeholder comments and inputs received on this provision

Following comments by Committee Members, the provision has been renamed as “transitional measures”. Member States comments also suggested that the reference to “a certain period” be replaced with “a reasonable period” and that use in good faith not be addressed in this provision. The changes are reflected accordingly.

Comments and inputs reflected: Brazil, OAPI

ARTICLE 11

FORMALITIES

1. *Eligibility for protection of traditional knowledge against acts of misappropriation should not require any formalities.*

2. *In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may maintain registers or other records of traditional knowledge, where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of traditional knowledge holders. Such registers may be associated with specific forms of protection, and should not compromise the status of hitherto undisclosed traditional knowledge or the interests of traditional knowledge holders in relation to undisclosed elements of their knowledge.*

COMMENTARY ON
ARTICLE 11

Existing TK protection systems take a variety of approaches towards formalities as a requirement of protection: they may expressly require registration of the knowledge as a condition of protection; they may establish registries or databases, but not link them as a requirement to the acquisition of rights; or they may provide that protection does not require formalities. In the legal protection of know-how and innovation, there are trade-offs between legal predictability and clarity on the one hand, and flexibility and simplicity on the other hand. A registration-based system provides greater predictability and makes it easier in practice to enforce the rights. But it can mean that the TK holders need to take specific legal steps, potentially within a defined time-frame, or risk losing the benefits of protection; this may impose burdens on communities who lack the resources or capacity to undertake the necessary legal procedures. A system without formalities has the benefit of automatic protection, and requires no additional resources or capacity for the right to be available.

This provision clarifies that the general safeguard against misappropriation would not be conditional on registration of TK in databases, registries or any other formalities. This reflects concerns and skepticism which certain countries and communities have expressed about the use of registry and database systems.

However, a number of countries have already established *sui generis* systems which provide for registration as a condition of acquiring exclusive rights over registered knowledge. Therefore, paragraph 2 clarifies that such additional protection, established subject to national law and policies, may require such formalities. It thereby recognizes the diversity of existing protection systems which include registration-based systems, but does not prescribe any approach which requires formalities. In addition, it clarifies that appropriate registration or recordal should not jeopardize or compromise the rights and interests of TK holders in relation to undisclosed elements of their knowledge.

Comments and inputs reflected: OAPI, UNU/IAS

ARTICLE 12

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

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.

COMMENTARY ON
ARTICLE 12

Traditional knowledge protection would inevitably interface with other legal systems, especially legal systems regulating access to genetic resources which are associated with the protected TK. This provision ensures consistency with those frameworks, while allowing for appropriate independence of the two regulatory systems. The first sentence of the provision is a direct counterpart to paragraph 37 of the Bonn Guidelines which establishes the independence of prior informed consent procedures for access to genetic resources from access to TK related to those resources. The sentence in this provision mirrors the same approach by establishing that independence from the direction of prior informed consent for TK related to biodiversity components.

Changes reflecting stakeholder comments and inputs received on this provision

The wording in the second sentence has been clarified to cover both access to, and use of, TK and associated genetic resources. Furthermore, the scope of this provision has been significantly narrowed to address only the interfaces between TK protection and legal frameworks regulating access to associated genetic resources, rather than addressing the general legal framework at large.

Comments and inputs reflected: Australia, Brazil, OAPI, Saami Council

ARTICLE 13

ADMINISTRATION AND ENFORCEMENT OF PROTECTION

1 (a). An appropriate national or regional authority, or authorities, should be competent for:

(i) distributing information about traditional knowledge protection and conducting public awareness and advertising campaigns to inform traditional knowledge holders and other stakeholders about the availability, scope, use and enforcement of traditional knowledge protection;

(ii) determining whether an act pertaining to traditional knowledge constitutes an act of misappropriation of, or an other act of unfair competition in relation to, that knowledge;

(iii) determining whether prior informed consent for access to and use of traditional knowledge has been granted;

(iv) determining fair and equitable benefit-sharing;

(v) determining whether a right in traditional knowledge has been infringed, and for determining remedies and damages;

(vi) assisting, where possible and appropriate, holders of traditional knowledge to use, exercise and enforce their rights over their traditional knowledge.

(b) The identity of the competent national or regional authority or authorities should be communicated to an international body and published widely so as to facilitate cooperation and exchange of information in relation to protection of traditional knowledge and the equitable sharing of benefits.

2. Measures and procedures developed by national and regional authorities to give effect to protection in accordance with these Principles should be fair and equitable, should be accessible, appropriate and not burdensome for holders of traditional knowledge, and should provide safeguards for legitimate third party interests and the public interest.

COMMENTARY ON
ARTICLE 13

Traditional knowledge protection can be administered and enforced in diverse ways. Typically, TK protection measures identify certain procedures as well as national authorities which ensure effectiveness and clarity in the protection of TK. This provision sets out the key tasks and functions of such a “competent authority”, without seeking to specify any particular form of institutional structure, since institutional and administrative arrangements may vary widely from country to country.

A general role of the competent authority may be to assist in awareness raising about and general administration of the protection of TK. This could entail, for example, providing information about TK protection to raise awareness of TK holders and the general public about TK protection; playing a role in determining misappropriation, prior informed consent and equitable benefit-sharing; and providing a national or regional focal point for TK protection matters.

A specific role may be envisaged for competent authorities in enforcing protection of TK. Most existing *sui generis* laws provide that acts that contravene the laws shall be punished with sanctions such as warnings, fines, confiscation of products derived from TK, cancellation/revocation of access to TK, etc. For example, the Indian Arts and Crafts Act of the United States of America contains extensive enforcement provisions, constituting some of the strongest enforcement provisions of all *sui generis* TK laws described to the Committee.²² There may be practical difficulties for holders of TK to enforce their rights, which raises the possibility of a collective system of administration, or a specific role for government agencies in monitoring and pursuing infringements of rights. In the above-mentioned Indian Arts and Crafts Act, for example, the Indian Arts and Crafts Board has a specific role in monitoring violations of this law.²³

The wording in the chapeau specifies that the “appropriate competent authority” could be national or regional. Indeed, several regional institutions and authorities have already decided to examine this possibility, such as ARIPO, OAPI, the South Asian Association for Regional Cooperation (SAARC) and the Pacific Community. This reflects the possibility of addressing the issue of regional TK through appropriate regional and sub-regional institutional arrangements and competent authorities *inter alia*.

Changes reflecting stakeholder comments and inputs received on this provision

Subparagraph 1(iv) has been brought into line with the amendment of Article 6 from an equitable compensation approach towards an equitable benefit-sharing model. The competencies of the national or regional authority have been accordingly revised. References to the “acquisition” and “maintenance” of rights have been deleted, since Committee members considered that the rights of indigenous peoples to their traditional knowledge constituted inalienable prior rights, and could not be “acquired” or alienated on the marketplace.

Comments and inputs reflected: Brazil, OAPI, Saami Council

²² A person who sells a product falsely suggesting it is Indian produced can be subject to very heavy fines and imprisonment, with penalties escalating for repeat infringement.

²³ See WIPO/GRTKF/IC/5/INF/6, Annex.

ARTICLE 14

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.

COMMENTARY ON
ARTICLE 14

The General Assembly has instructed the Committee “to focus its work on the international dimension”. An essential element of addressing this dimension is to establish standards of treatment which apply to foreign nationals in respect of the protection of TK. Existing systems have utilized several standards which enable nationals of one country to enjoy legal protection in a foreign jurisdiction. These include national treatment, assimilation, fair and equitable treatment, the most-favored nation principle, reciprocity, and mutual recognition. A concise summary of each of these standards and their possible implications for international TK protection are contained in document WIPO/GRTKF/IC/8/6.

To date Committee members have provided limited guidance on how the international dimension should be addressed on a technical level. However, one Member State proposal on ‘Elements of an international instrument, or instruments’, which was put forward by the African Group and widely supported by Committee members, foresees some form of application of the principle of national treatment.²⁴ This provision therefore sets out a flexible form of national treatment, which would ensure that eligible foreign TK holders should be entitled to protection against misappropriation and misuse of their TK, provided that they are located in a country which is prescribed as eligible. “National treatment” is a principle whereby a host country would extend to foreign TK holders treatment that is at least as favorable as the treatment it accords to national TK holders in similar circumstances. In this way national treatment standards seek to ensure a degree of legal equality between foreign and national TK holders. It is important to note that national treatment is a relative standard whose content depends on the underlying state of treatment for domestic TK holders.

The function of the illustrative language contained in this draft provision is not to prescribe any particular approach, but rather to help identify and highlight the important policy choices that must be made in the formulation of an international instrument or instruments in this area, and to invite further guidance from the Committee members.

While a national treatment approach would, in the light of precedent and past experience in the IP field, appear to be an appropriate starting point, the very nature of TK and the *sui generis* forms of protection being called for by many Committee participants, suggests that national treatment be supplemented by certain exceptions and limitations or other principles such as mutual recognition, reciprocity and assimilation, especially when this concerns the legal status and customary laws of beneficiaries of protection. Under one strict conception of national treatment, a foreign court in the country of protection would have recourse to its own laws, including its own customary laws, to determine whether a foreign community qualifies as a beneficiary. This may not satisfactorily address the situation from the community’s viewpoint which would, reasonably, wish for its own customary laws to be referred to. Under mutual recognition and assimilation principles, a foreign court in the country of protection could accept that a community from the country of origin of the TK has legal standing to take action in country A as the beneficiary of protection because it has such legal standing in the country of origin. Thus, while national treatment might be appropriate as a general rule, it may be that mutual recognition, for example, would be the appropriate principle to address certain issues such as legal standing.

²⁴ Proposal by the African Group, ‘General Elements’ (WIPO/GRTKF/IC/6/12, Annex)

The protection of foreign holders of rights in TK is, however, a complex question as Committee participants have pointed out. Concerning TCEs/EoF, the Delegation of Egypt, for example, stated at the seventh session that “TCEs/EoF were often part of the shared cultural heritage of countries. Their regional and international protection was therefore 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”.²⁵ Morocco noted the need for “wider consultation involving all interested parties before the establishment of legal protection mechanisms”.²⁶ In view of this complexity, Committee discussions have thus far provided little specific guidance on this technical question and existing TK *sui generis* national laws either do not protect foreign rightsholders at all or show a mix of approaches.

[End of Annex and of document]

²⁵ WIPO/GRTKF/IC/7/15 Prov. Paragraph 69.

²⁶ WIPO/GRTKF/IC/7/15 Prov. Paragraph 85.