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INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

**Eleventh Session
Geneva, July 3 to 12, 2007**

OVERVIEW OF ACTIVITIES AND OUTCOMES
OF THE INTERGOVERNMENTAL COMMITTEE

Document prepared by the Secretariat

1. The WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') in 2000, to consider issues relating to intellectual property (IP) and genetic resources, traditional knowledge (TK) and expressions of folklore (or traditional cultural expressions (TCEs)). The Committee met for ten sessions between 2001 and 2006. In mid-2003, at its fifth session, the Committee reviewed its work up to that point on the basis of a detailed summary (WIPO/GRTKF/IC/5/12); subsequent progress reports were provided to the WIPO General Assembly in 2004, 2005 and 2006 (WO/GA/31/5, WO/GA/32/7 and WO/GA/33/7 respectively).
2. The Annex to this document provides an update to that earlier summary and those progress reports, with the aim of providing factual background for the Committee as it reviews its work at its eleventh session. The update describes the main activities and outcomes of the Committee, and the interaction between the Committee's work and related program activities of WIPO. It also sets out some of the key issues considered by the Committee.
3. This update is intended only to provide background information, to clarify the issues before the Committee, and to provide an overview of the extensive documentation that has been developed under the aegis of the Committee. However, the Committee may also wish to draw on this information in considering possible future directions for work within the

Committee or otherwise within WIPO on IP protection relevant to traditional knowledge, traditional cultural expressions, and genetic resources.

4. The Committee is invited to take note of the contents of this document and to consider it when discussing future work within WIPO on intellectual property aspects of genetic resources, traditional knowledge and traditional cultural expressions (expressions of folklore).

[Annex follows]

ANNEX

INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND
GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE:

AN UPDATE

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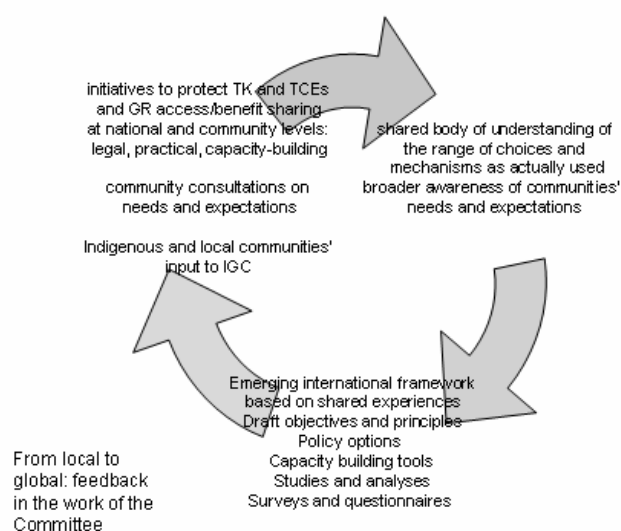
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I. INTRODUCTION

1. The WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the IGC') in 2000, to consider issues relating to intellectual property (IP) and genetic resources, traditional knowledge (TK) and expressions of folklore (or traditional cultural expressions (TCEs)). The IGC met for ten sessions between 2001 and 2006. This update builds on earlier IGC documents to describe the main activities and outcomes of the IGC, and the interaction between the IGC's work and related program activities of WIPO, and to set out some of the key issues it has considered.

2. From the outset, reflecting the breadth of issues involved, the range of concerned stakeholders, and need to take a comprehensive and holistic approach, the IGC's work has been multifaceted and cross-cutting. Addressing the three interrelated themes of TCEs, TK and GR, it has undertaken:

- information gathering, structured surveys, questionnaires and other forms of collection of diverse practical experience and many national and regional laws and policies;
- the creation of studies and analyses of aspects of protection and related issues;
- extensive policy discussion over the appropriate form of protection of TK, TCEs and the IP aspects of GR;
- formulation and debate on draft international objectives and principles for protection;
- debate and analysis of the international dimension of protection;
- development of standards, guidelines and principles for diverse areas linked to TK, TCEs and GR;
- concluding recommendations for other WIPO processes, and preparing a technical study for a sister United Nations body;
- practical capacity building tools aimed at supporting community-level initiatives.



This work has highlighted the overlapping nature of this subject matter and pointed to the benefits of an integrated approach to continuing international cooperation on these IP concerns. In particular, the IGC's approach has also illustrated the benefits of interaction and feedback between parallel processes of policy dialogue and addressing the international dimension, sharing information, and building capacity for policymakers and for communities directly.

Some key outcomes from the IGC illustrate this feedback loop. For example, the IGC has collected and analyzed extensive information about national and regional approaches to the protection of TK and TCEs. This has at once created a rich, broad-based platform of information for policy discussions as well as a resource for assessing practical options for

national and local programs to strengthen IP protection of TK and TCEs. It also provided the basis for the draft objectives and principles for protection developed by the IGC. Similarly, the IGC has overseen the creation of a database of IP licensing provisions concerning access to genetic resources: this operates both as a capacity-building tool and as a substantive input into policy discussions on IP aspects of access and benefit-sharing.

3. The range of subjects addressed by the IGC has also created challenges for wider outreach, consultation and facilitated dialogue on issues that are both technically challenging and controversial. The IGC's work builds on past consultations, including the WIPO Fact-Finding Missions in 1998-99 and the earlier work of such bodies as the WIPO Meeting on Intellectual Property and Genetic Resources. An active program of consultation and dialogue continues to complement the formal proceedings of the IGC, with emphasis on the fostering of regional dialogue, and the enhanced participation of indigenous and local communities in WIPO activities. A set of initiatives to promote the participation of indigenous and local communities has culminated in the creation of an indigenous-chaired panel as the opening segment of each session of the IGC, and the successful launch of a Voluntary Fund directly to support the participation of these communities. The IGC has provided a framework for interaction with other international processes concerned with IP aspects of TK, TCEs and genetic resources, notably the UN Permanent Forum on Indigenous Issues, the CBD, the FAO, UNESCO and the Human Rights Council.

4. Following sections describe the IGC's activities and highlight the integral nature of its key outcomes. These outcomes include broad-based materials, based on practical experience and intended to support practical programs:

- for assessing policy and legal options for IP protection systems for TK and TCEs, and undertaking legislative and policy initiatives;
- for identifying and protecting the IP-related interests of TK holders when their TK is being documented;
- for assessing and developing practical mechanisms for the legal protection of TCEs;
- for the protection of existing TK against third-party IP claims, including in the patent examination process; and
- to support access providers in dealing with IP aspects of access to genetic resources.

A coordinated series of case studies and presentations on national experiences provides an additional source of practical information for holders of TK and TCEs, and for policymakers alike.

5. The work of the IGC can be summarized under three general themes:

(i) *inclusion and consultation*: from the earlier WIPO program activities that preceded the Committee's creation, which concentrated on consultations with TK holders, through to the implementation of a Voluntary Fund directly to support active participation of local and indigenous communities and the institution of an indigenous-chaired panel at IGC sessions, a strong emphasis has laid on inclusion and consultation – while inevitably incomplete and imperfect in practice, this goal has been a consistent theme in the IGC work, with practical steps taken to implement it. Substantive documents have also been based firstly on a broad base of consultation and a review of laws and legal mechanisms in over 80 countries in every region of the world, and secondly on successive consultation, commentary and open review processes. Coordination and consultation with other international and

regional processes has also been a priority; for example, some of the Committee's work was undertaken at the direct invitation of the CBD Conference of Parties, and IGC documents have in turn been drawn on extensively in a range of international and regional processes.

(ii) *clarity and understanding*: the IGC's work addresses cross-cutting issues that are at once complex and sensitive, in a context where there has been considerable debate and uncertainty about the appropriate interaction between the law, practice and policy of intellectual property, on the one hand, and the cultural heritage, knowledge systems, and values and beliefs of indigenous, local and other cultural communities, on the other. A strong background theme in the work of the Committee has been to clarify and distil the essential issues, and to promote understanding about the actual situation – in terms of the needs, expectations and perspectives of the holders of TK, bearers of TCEs and custodians of GR, who are for the most part recent participants in IP policy discourse, although all the more vital for the same reason; the current state of play concerning national, regional and international law and policy with bearing on TK, TCEs and GR; and the essential issues, norms and practical challenges that arise in considering the IP aspects of these policy areas.

(iii) *content and context*: the IGC has worked towards documenting and clarifying the substantive content of laws and other legal mechanisms that serve to protect TK, TCEs and GR from a broad IP perspective, and to distil the essential objectives and principles of such measures; this has helped to highlight and focus upon the central issues that policymakers need to consider when analyzing, adapting or developing new forms of protection in this domain. The IGC has overseen the development of substantive materials on protection that are now widely used as concrete resources in many policy processes, at national, regional and international levels. This work has also helped to clarify the proper context of this work in the international policy environment, by elucidating those specific aspects of the full range of policy questions that are most relevant to the law and policy of IP policy, and the linkages with other areas of public international law and policy. This provides a sound conceptual basis for active cooperation and coordination between WIPO program activities and the work of other intergovernmental organizations and other partners.

Clarifying the essential function of IP systems

The essential quality of IP mechanisms has been clarified in the work of the Committee as not necessarily creating formal, severable property rights over TK or TCEs (this being an outcome that is actively rejected by a number of indigenous participants as running contrary to their values and customary laws), but rather as defining the scope of legitimate use and appropriation of TK and TCEs by third parties, beyond the original community – in other words, defining when it is legitimate and when not for third parties to make use, including commercial use, of TK and TCEs when they have been taken out of the community context, and giving holders of TK and bearers of TCEs a say (including the right to say 'no') over how their TK and TCEs are used in non-customary contexts: whether through existing or new intangible property rights, or related legal means more akin to protection of confidentiality, the suppression of unfair competition, or moral rights. The Committee has also taken up those aspects and issues of IP protection related to GR, while recognizing and respecting the established international legal framework for genetic resources, and recognizing the close linkages between many forms of TK and GR, and the holistic community context of TK, TCEs and GR.

II. KEY SUBSTANTIVE OUTCOMES

This section summarizes key outcomes that the IGC has produced, authorized or otherwise overseen. Some of these products are cumulative in nature, and are still in the process of drafting and development; others are drafts only, still under active debate and development, and may not have attracted consensus support from all Members of the IGC.

Expressions of folklore/traditional cultural expressions

- objectives and principles for the protection of expressions of folklore/traditional cultural expressions ('draft provisions')
- policy options and legal mechanisms for the protection of expressions of folklore/traditional cultural expressions
- report, survey and systematic analysis of national experiences with the legal protection of expressions of folklore
- comparative summary of *sui generis* legislation for the protection of traditional cultural expressions
- overview of legal and policy options: traditional cultural Expressions/expressions of folklore
- creative heritage: resource database and development of best practices for archiving and digitizing TCEs

Traditional knowledge

- objectives and principles for the protection of traditional knowledge ('draft provisions')
- policy options and legal mechanisms for the protection of traditional knowledge
- review of existing intellectual property protection of traditional knowledge
- elements of a *sui generis* system for the protection of traditional knowledge
- comparative summary of *sui generis* legislation for the protection of traditional cultural expressions
- composite study on the protection of traditional knowledge
- overview of legal and policy options: traditional knowledge
- Inventory of TK-related publications for reference as prior art

- recommendations for taking account of TK in patent examination
- survey of patent office practice in examining TK related patent documents

Traditional knowledge and genetic resources

- standard on databases and registries of traditional knowledge and biological/genetic resources
- toolkit for managing intellectual property when documenting traditional knowledge and genetic resources
- practical mechanisms for the defensive protection of traditional knowledge and genetic resources within the patent system
- technical study on disclosure requirements related to genetic resources and traditional knowledge

Genetic resources

- guidelines on intellectual property aspects of access to genetic resources and benefit-sharing
- database of provisions for intellectual property aspects of access to genetic resources and benefit-sharing

General

- review of operational terms and definitions
- analysis of and practical options for the international dimension of protection of traditional knowledge, traditional cultural expressions and genetic resources
- database of laws and legislative mechanisms for protection of traditional knowledge, traditional cultural expressions and genetic resources

A graphic overview of the IGC's outcomes is attached as Appendix I.

III. BACKGROUND TO THE COMMITTEE

6. The WIPO General Assembly¹ decided to establish an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in the following general terms:

“The Intergovernmental Committee would constitute a forum in which discussions could proceed among Member States on the three primary themes which they identified during the consultations: intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.”²

7. Document WIPO/GRTKF/IC/1/3 surveyed these issues for the consideration of the IGC at its first session. It outlined past work already undertaken by WIPO in this domain, and identified a range of possible tasks for the IGC to undertake. The work of the IGC has proceeded along the general lines set out in this document, but has evolved in line with successive decisions of the IGC recorded in the reports of its ten meetings to date.³

8. The IGC’s mandate was revised in 2003, when the WIPO General Assembly, “mindful of the importance of intellectual property in relation to genetic resources, traditional knowledge and folklore,” decided that: “(i) the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) will continue its work for the next budgetary biennium on questions included in its previous mandate; (ii) its new work will focus, in particular, on a consideration of the international dimension of those questions, without prejudice to the work pursued in other fora, and (iii) no outcome of its work is excluded, including the possible development of an international instrument or instruments. The General Assembly urged the IGC to accelerate its work and to present a progress report to the session of the General Assembly in September 2004. The General Assembly further requested the International Bureau to continue to assist the IGC by providing Member States with necessary expertise and documentation.” This mandate was renewed in the same terms by the General Assembly in 2005.

Distinctive aspects of the IGC’s work

9. From the outset, it was apparent that the nature of the issues under consideration would present the IGC with some particular challenges. The work has ranged widely in subject matter and in terms of the approach taken. To illustrate the range of this work, IGC documents have included:

- Member State and regional group position papers;
- overviews and analyses of policy and legal issues;
- questionnaires and surveys ;
- Guidelines and principles for IP aspects of equitable benefit sharing

¹ See documents WO/GA/26/6, paragraph 13, and WO/GA/26/10, paragraph 71.

² See document WO/GA/26/6 para. 14.

³ See documents WIPO/GRTKF/IC/1/13; WIPO/GRTKF/IC/2/16; WIPO/GRTKF/IC/3/17; WIPO/GRTKF/IC/4/15.

10. A recent focus of the IGC work has been on integrating and distilling this broad base of policy and legal analysis. To take one example of the degree of inclusiveness and breadth of this work, the IGC has developed two complementary sets of draft objectives and principles for protection of TCEs and TK (these are described below), which it commissioned at its sixth session. These 'draft provisions' have progressively distilled:

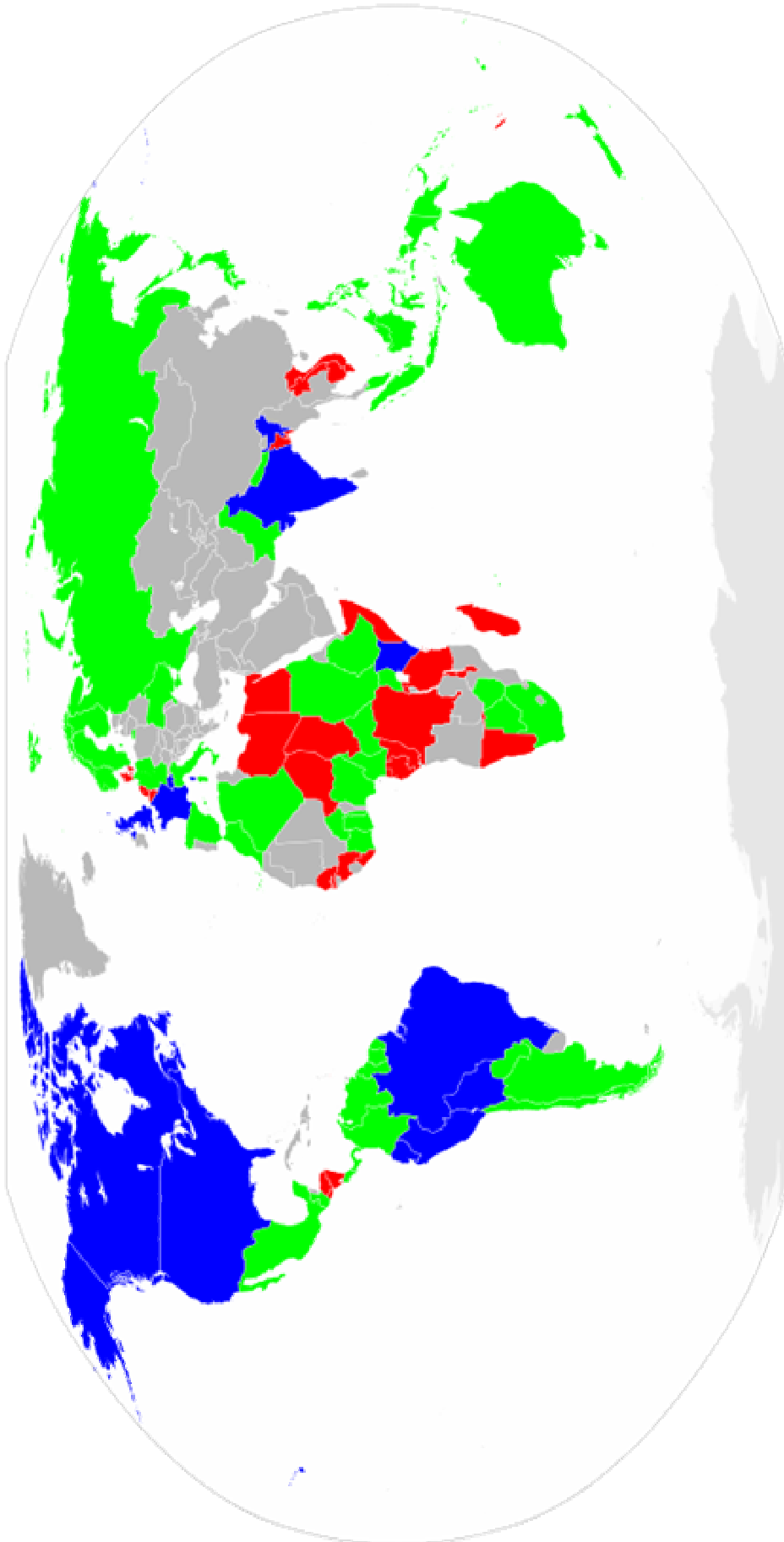
- the results of Community consultations with holders of TK/TCEs in over 60 locations around the world;
- surveys, questionnaires, case studies and Member State reports on national laws and legal mechanisms, with detailed input and guidance from the national experience of over 80 WIPO Member States, in every region;
- public international law in the fields of human rights, cultural heritage, biodiversity, plant genetic resources, and cultural policy, as well as existing international norms on intellectual property;
- panel presentations and discussions on legal measures led by national experts at IGC sessions;
- the experience of indigenous and local communities presented at IGC sessions;
- two specific intersessional commentary processes established by the IGC to develop the provisions, open to the full range of Member States and accredited observers, which led to specific drafting inputs from a wide range of Member States, indigenous and local communities and other non-governmental organizations (NGOs);

The consultative roots of IGC work

The IGC and related program activities have been guided by extensive, structured consultations with Member States, TK holders, and other stakeholders. These processes include:

- . Fact-finding consultations with TK holder communities
- . Questionnaire on folklore/TCEs
- . Questionnaire on IP protection of TK
- . Survey on the role of TK databases
- . Survey of patent disclosure mechanisms related to TK and GR
- . Two commentary processes on successive draft objectives and principles for TK protection
- . Two commentary processes on successive draft objectives and principles for TCE/folklore protection
- . Cultural heritage consultation process
- . Customary law consultation process
- . Commentary process on core issues concerning protection of TK
- . Commentary process of on core issues concerning protection of TCEs

A further *ad hoc* process was convened outside the IGC for comprehensive input to and review of a second study on the disclosure question prepared for the CBD. The range of experiences and perspectives captured in these consultative process extends to over 100 countries, from all regions of the world.



Locations of activities of organizations accredited to the Committee

- 1 organization
- 2 to 5 organizations
- more than 5 organization

Strengthening the community basis of the IGC's work

11. Stemming from the fact-finding missions undertaken by WIPO in 1998-99, the work of the IGC and the preparation of material for its consideration has entailed extensive consultation on the needs and expectations of TK holders. The report of the fact-finding missions, distilling the input from consultations with some 3,000 stakeholders, remains an important resource for the IGC.

Appendix II provides an update of outcomes and activities that respond to the needs and expectations identified by TK holders in the fact-finding consultations that launched WIPO's current program in this area.

The work of the IGC has also been complemented by a series of over one hundred regional and national consultative meetings, which have discussed and examined the proposals before the Committee and have shaped regional positions on key issues (see section X below).⁴ This emphasis on outreach and consultation with a broad set of interests and communities has also seen the enhanced involvement of intergovernmental and non-governmental organizations. A series of practical steps has also been taken to implement decisions by the General Assembly and the Committee itself to enhance the participation of local and indigenous communities in the IGC's work:⁵

(i) A fast-track accreditation procedure for all non-governmental and intergovernmental organizations has been in place since the first session of the IGC in April 2001. Over one hundred and fifty NGOs and IGOs have to date been given special accreditation to participate in the work of the IGC, additional to those organizations holding a general accreditation to WIPO. The majority of these ad hoc observers represent indigenous and local communities, or other holders of TK and TCEs.

(ii) The Committee decided in 2004 that its sessions should be preceded by panel presentations chaired by a representative of an indigenous or local community. Such panels, with the theme "Indigenous and Local Communities' Concerns and Experiences in Promoting, Sustaining and Safeguarding their Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources", opened the eighth, ninth and tenth sessions of the IGC.

⁴ See documents WIPO/GRTKF/IC/3/15 (document submitted by the African Group) and WIPO/GRTKF/IC/4/14 (document submitted by the Asian Group).

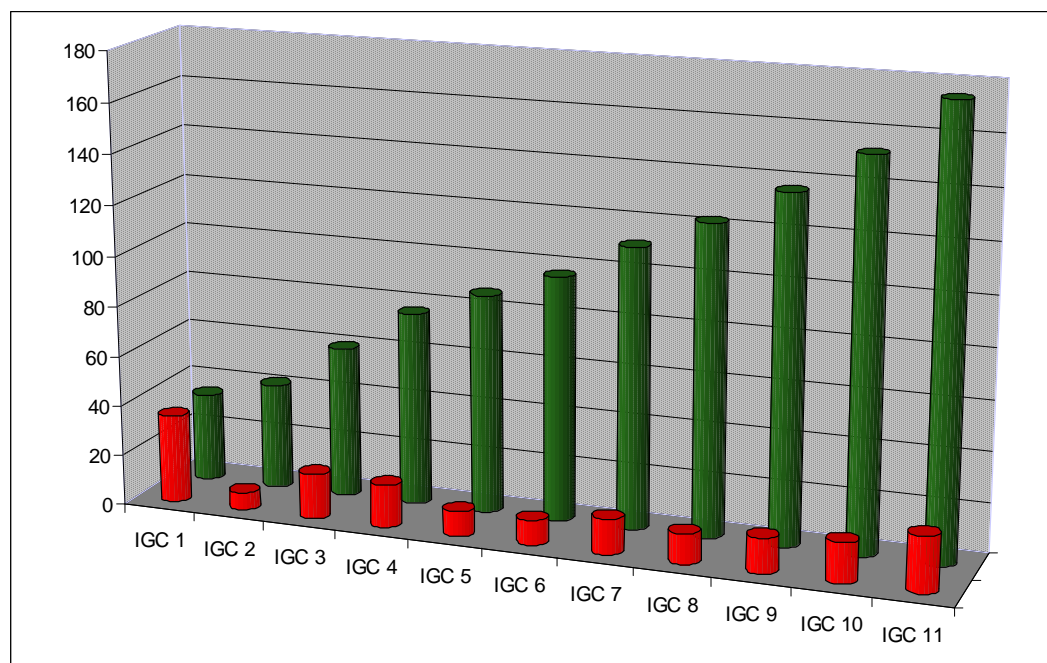
⁵ "The General Assembly decided:

(i) the Permanent Forum on Indigenous Issues should be invited to participate in the December 2002 session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore;

(ii) Member States should be encouraged to include representatives of indigenous and local communities on their delegations to the Intergovernmental Committee;

(iii) following consultations including the Secretariat and regional groups, the Intergovernmental Committee should consider suitable further mechanisms, as appropriate, for facilitating the involvement of representatives of indigenous and local communities in its work for the 2003 meetings, and to be reflected in its report to the General Assembly in 2003." (Document A/37/14, para. 290). See also documents WIPO/GRTKF/IC/4/15, para. 60; WIPO/GRTKF/IC/4/12 and WIPO/GRTKF/IC/5/11.

The panels comprise seven participants from indigenous and local communities in the geo-cultural regions recognized by the UN Permanent Forum on Indigenous Issues and their participation, as experts, is funded by WIPO. analysis of and practical options for the international dimension of protection of traditional knowledge, traditional cultural expressions and genetic resources



New and accumulated total of *ad hoc* accreditations to the Committee (omits general accreditations to WIPO)

(iii) The WIPO General Assembly has extended a formal invitation to the United Nations Permanent Forum on Indigenous Issues to take part in sessions of the IGC and many participants have welcomed the active participation of the Forum. Forum members have participated in the Indigenous panel that commences each session of the IGC.

(iv) Several WIPO Member States have adopted the practice of funding the participation of representatives of indigenous and local communities in IGC sessions.

(v) The funds provided by WIPO to support Member State participation from developing countries have been used in some cases by such countries to support the participation of leaders of their indigenous or local communities.

(vi) Consultations and workshops at the national and regional level and other fora aimed at developing focused input for the IGC have included representatives of the Forum and indigenous and local communities as speakers and participants.

(vii) The WIPO web site provides for written contributions by accredited NGOs on the issues before the IGC.

(viii) Specific briefings and consultations for NGO representatives, particularly representatives of indigenous and local communities, are undertaken within the framework of meetings of the IGC. At the initiative of representatives of indigenous communities, direct consultations between those representatives and the IGC chair were instituted at the tenth session. The IGC has also welcomed the convening of an indigenous consultative forum immediately prior to each IGC session.

(ix) The WIPO Secretariat has continued its practice of consulting with interested representatives of indigenous and local communities on draft documents and other material being developed for the IGC, as well as related capacity-building and awareness documents, including a series of case studies and a distance learning course contributed to by indigenous experts. During open commentary processes established by the IGC, draft materials, particularly the draft provisions on protection of TCEs and TK, have directly incorporated textual proposals and extensive comments by indigenous and local communities taking part in the process.

The WIPO Voluntary Fund for Indigenous and Local Communities

12. Many representatives of indigenous and local communities have stressed that their communities confront disproportionate logistical difficulties in seeking to participate in multilateral meetings in Geneva. Increased efforts to address this problem culminated in the decision of the WIPO General Assembly to establish the WIPO Voluntary Fund for Accredited Indigenous and Local Communities. This decision followed extensive consultation within the IGC and a review commissioned by the IGC of best practice on support for indigenous participation in international processes.⁶ The Fund facilitates the participation in IGC sessions of representatives of accredited indigenous and local communities, and other customary holders or custodians of TK and TCEs. Decisions on funding are determined by the recommendations of an individual Following its This WIPO Fund has so far received voluntary contributions from the. These generous donations enabled the Fund to finance the participation of eight representatives of indigenous and local communities, and other customary holders or custodians of TK and TCEs, in the tenth session of the IGC which took place in November 2006. The WIPO Voluntary Fund will also fund the participation of a further eight such representatives in the eleventh session of the IGC taking place in July 2007. This means that funding has been provided for all applicants so far considered eligible by the independent panel, which includes indigenous representation.

13. The UN Permanent Forum on Indigenous Issues noted “with appreciation the establishment of a Voluntary Fund by WIPO to enable the participation of indigenous representatives in the work of the WIPO Intergovernmental Committee on traditional knowledge and traditional cultural expressions, and encouraged donors to contribute to the Trust Fund.”⁷

⁶ WIPO/GRTKF/IC/4/12, WIPO/GRTKF/IC/5/11, WIPO/GRTKF/IC/6/10 and WIPO/GRTKF/IC/7/12

⁷ Report of Fifth Session, para 171.

Expert panelists: Indigenous and local community panels

Representatives of the following organizations and the following individuals took part in a personal capacity in the indigenous panels which have opened IGC sessions since 2005. Almost all were directly funded by WIPO in their capacity as expert speakers.

- Assembly of First Nations
- Bangla Academy
- Bindeku/Kamaneku, Papua New Guinea
- Brazilian Indigenous Intellectual Property Institute (INBRAPI)
- *Centro de Culturas Indias del Perú* (CHIRAPAQ)
- Creator's Rights Alliance
- Dr. Ikechi Mgbeoji
- Ermineskin Cree Nation
- *Federacion de Organizaciones Artesanales Ngöbe-Buglé* (FORANB)
- Indigenous Movement for Peace Advancement and Conflict Transformation (IMPACT)
- Indigenous Peoples' Biodiversity Network (IPBN)
- Indonesian Traditional Wisdom Network
- Inuit Circumpolar Conference
- Kaingang Community
- Kaska Nation
- Kichwa, Ecuador
- Laikipia Maasai, North Central Kenya.
- Maasai Cultural Heritage Foundation (MCHF)
- National Commission on Indigenous Peoples (Philippines)
- National Cultural Commission, Papua New Guinea
- Pauktuutit Inuit Womens' Association
- Quechua, Peru
- Research and Support of Indigenous Peoples of Crimea Foundation
- Russian Association of Indigenous Peoples of the North (RAIPON)
- Saami Council
- Senior Chieftainess Nkomeshya Mukamambo II, Zambia
- Torres Strait Islanders
- Tsimshian community of Kitasoo-Xai'xais Nation
- Tulalip Tribes
- United Nations Permanent Forum on Indigenous Issues
- Vanuatu Cultural Centre

Indigenous and local community participation supported by Voluntary Fund

Support under the WIPO Voluntary Fund has been provided at the tenth session or offered for the eleventh session to representatives of the following organizations:

- *Association congolaise des jeunes cuisiniers et gastrotechnie*
- Ethno-ecological Information Center “Lach”
- Foundation for Research and Support of Indigenous Peoples of Crimea
- Health and Environment Program
- Hokotehi Moriori Trust
- Indian Confederation of Indigenous and Tribal Peoples North-East Zone (ICITP NEZ)
- Indigenous Peoples (Bethechilokono) of Saint Lucia Governing Council (BCG)
- Indigenous Peoples’ Council on Biocolonialism (IPCB)
- Indonesian Traditional Wisdom Network (ITWN)
- International Indian Treaty Council (IITC)
- Maasai Cultural Heritage Foundation (MCHF)
- Mbororo Social Cultural Development Association (MBOSCUDA)
- Ogiek Peoples Development Program (OPDP)
- Russian Association of Indigenous Peoples of the North (RAIPON)
- Sustainable Development Policy Institute (SDPI)
- Tsentsak Survival Foundation (*Cultura Shuar del Ecuador*)
- West Africa Coalition for Indigenous Peoples’ Rights (WACIPR)

Consultations and studies on customary laws and intellectual property

14. The role of customary law in the appropriate protection of TK and TCEs has been consistently stressed by many community representatives, during IGC sessions and other consultations, including the original fact-finding missions. WIPO has initiated a process of study and consultation on two related questions: (i) the role of the customary laws and protocols of indigenous and local communities in relation to their TK, genetic resources and TCEs, and (ii) the relationship of customary laws and protocols with the IP system. This work builds on an extensive past background of consultation and reflection on the role of customary laws and protocols, both within the IGC and in WIPO’s broader dialogue with indigenous communities. The draft provisions for the protection of TK and TCEs already take account of the role of customary law, and the study process will complement these developments. The full background is described in an issues paper which has been developed and revised to facilitate further consultations on this question.

15. To supplement existing studies, WIPO is commissioning studies from recognized indigenous legal experts on these issues; the first such study concentrates on indigenous customary law in the Andean region. An overview of this study was provided by the lead author, Rodrigo de la Cruz, a Kichwa legal expert from Ecuador, when chairing the indigenous panel at the tenth IGC session. Other studies have addressed customary law

issues, such as the ‘Minding Culture’ case studies prepared by indigenous lawyer Terri Janke, which was launched at the IGC.

An interdisciplinary approach to cross-cutting issues

16. The issues before the IGC are cross-cutting in nature, ranging over the operation of established forms of IP protection, the underlying principles of IP law, and experiences with complementary or *sui generis* forms of legal protection beyond the conventional scope of IP rights. The IGC has taken a multi-disciplinary approach to its work, combining fact-finding, analysis, exchange of practical experience and policy debate, and reflecting the range of legal mechanisms under consideration and the great diversity of stakeholders and interests involved in its work. The IGC has considered various aspects of how IP law interact with non-IP legal systems: this applies both internationally (so that the Committee discussed, for example, the interaction between the IP system and the Convention on Biological Diversity⁸, the FAO International Treaty on Plant Genetic Resources for Food and Agriculture⁹ and Unesco instruments dealing with cultural heritage and cultural diversity¹⁰), and in terms of domestic law (so that IGC discussions covered contract law, environmental protection law, cultural heritage law, laws governing access to biological resources and protected territories such as national parks,¹¹ and laws concerned with Indigenous people, as well as the customary law and legal systems of indigenous and local communities).

Range of intellectual property laws considered

17. The main focus of the IGC’s work has nonetheless been on specific intellectual property approaches, both the content of national and regional laws and the way they have been interpreted and applied for the protection of TK and TCEs (expressions of folklore). The IGC has considered a range of laws, as well as practical tools and mechanisms, and the scope of laws considered has been drawn from the full array of established intellectual property rights as well as *sui generis* IP systems, including distinct *sui generis* systems established or envisaged for the legal protection of TK and TCEs. Other *sui generis* IP systems with potential application to TK and TCEs, such as database protection and plant variety protection, have also been touched on.

⁸ See documents WIPO/GRTKF/IC/2/11 and WIPO/GRTKF/IC/3/12.

⁹ See document WIPO/GRTKF/IC/2/INF/2.

¹⁰ Such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972, Unesco’s Program on Masterpieces of the Oral and Intangible Heritage of Humanity of 1998, the Convention for the Safeguarding of Intangible Cultural Heritage, 2003, Unesco’s Declaration on Cultural Diversity, 2001, and the Convention for the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

¹¹ For example, see document WIPO/GRTKF/IC/4/13.

OVERVIEW OF EXISTING INTERNATIONAL STANDARDS

To clarify the framework for concentrated work on the international dimension of the IGC's mandate, a study on existing international IP law (WIPO/GRTKF/IC/6/6) identified the following instruments as providing relevant background:

- The Berne Convention – economic and moral rights in artistic and literary works where these are expressions of traditional cultures, including anonymous and unpublished anonymous works (Article 15) and the possibility of protecting unfixed works (Article 2(2));
- The Paris Convention – protection of collective and certification marks, protection of armorial bearings, flags, other State emblems, official signs and hallmarks (Article 6*ter*), the protection of industrial designs, the protection of patents on innovation in a traditional context, and the suppression of unfair competition (including false indications that products are traditional or associated with an indigenous or local community);
- The WIPO Performances and Phonograms Treaty (WPPT) – the protection of performances as expressions of folklore;
- The Lisbon Agreement – the protection of appellations of origin related to products that embody traditional knowledge or are associated with traditional cultures;
- The Madrid Agreement Concerning the International Registration of Marks (and the Madrid Protocol) – the protection of certification marks relating to products of traditional origin;
- The Patent Cooperation Treaty – the PCT system may be used to facilitate protection for innovations within a traditional context; and the minimum documentation specified under the PCT is being expanded to give more explicit recognition of TK as prior art;
- The Strasbourg Convention on the IPC – the International Patent Classification has recently been revised to take better account of TK subject matter, and further proposals are under development;
- The WTO TRIPS Agreement – a range of IP rights recognized under TRIPS have been reported as applicable to traditional subject matter; apart from those categories noted above, TRIPS provides for two categories of protection that have been used for the protection of subject matter associated with TK and TCEs - geographical indications (a category broader in scope than appellations of origin) and undisclosed information (confidential information or trade secrets), linking both forms of protection to the suppression of unfair competition under the Paris Convention.

Links between legal policy discussions and capacity-building

18. Another key feature of the IGC's work was the need to clarify the interplay between capacity-building activities on the one hand, and policy discussions concerning legal norms and their operation on the other. The IGC generally dealt with these two aspects in an integrated fashion. This is because the constraints that impede holders or custodians of TK and TCEs from deriving the benefits of IP protection have been variously seen as resulting from lack of capacity to exercise rights in practice, from gaps in the rights available in national laws (and corresponding regional and international systems), or from a combination

of both factors. In addition, an inclusive and comprehensive policy debate may need to be based on an enhanced capacity to work with and explore the practical range of legal options and mechanisms, on the part of national authorities but especially on the part of holders or custodians of TK and TCEs. Equally, any proposals for legal mechanisms or practical tools need to take account of the capacity of their intended beneficiaries.

19. For example, the principle of ‘prior informed consent’ was frequently highlighted in discussions concerning both access to genetic resources (reflecting the reference to this principle in the CBD, Article 15.5) and access to and documentation of TK, and was stressed by a number of delegations as a fundamental norm. This principle may, in practice, mean that access should only be granted if the access provider is sufficiently well informed about the full implications of the proposed access, and the full range of possible ways for structuring access and determining the sharing of benefits from the access – achieving this condition may in practice be as much a question of capacity-building as of precise legal formulations. In this regard, capacity and awareness building may as important as formal legal or policy measures to achieve the desired outcome of an optimal equitable sharing of benefits when access to TK, TCEs or genetic resources does occur.

20. Similarly, discussions of how to protect TK and TCEs (expressions of folklore) ranged over specific ways of applying existing IP systems and *sui generis* legal mechanisms that have been created in several countries. In each case, the effective operation of the legal system, and the actual distribution of benefits to TK holders and traditional cultural custodians, depended not merely on the nature of IP rights per se, but also on the practical operation and availability of such rights, highlighting the need for integrated capacity-building. Reported experience has shown (for instance, in the responses to the WIPO questionnaire on TCEs¹² and the accounts of national experience in the field of TK protection) that the formal creation or legal availability of rights in TCEs does not necessarily lead to the effective exploitation of these rights and to the flow of benefits back to the custodians of TCEs.

21. In addition, the extensive information that has been gathered and exchanged within the IGC on the legal protection of TK and TCEs¹³ contributes both to policy debate and to practical capacity: it forms the basis for further international policy discussions, but can also provide information resources for national authorities, indigenous and local communities, and advisors or legal representatives, and thus may enhance understanding of policy options and their practical implications at the national level, thus contributing to national capacity for protection of TK and TCEs.

¹² See document WIPO/GRTKF/IC/3/10.

¹³ See documents WIPO/GRTKF/IC/3/10; WIPO/GRTKF/IC/4/3; WIPO/GRTKF/IC/5/3; WIPO/GRTKF/IC/5/8; WIPO/GRTKF/STUDY/1; WIPO/GRTKF/STUDY/2.

IV. THE COMMITTEE'S WORK IN ITS INTERNATIONAL LEGAL AND POLICY CONTEXT.

22. The IGC's work has taken place within an holistic legal and policy context, touching on international law and policy in a wide range of subject areas, within and well beyond the law of intellectual property. Its discussions have been characterized by two interrelated issues, consistently expressed by many participants:

- (i) how to recognize and respect other international legal instruments and processes, including the development of public international law, and
- (ii) how to avoid inappropriate forms of protection that override or substitute for communities' own values, customary law systems and collective wishes for the maintenance and use of their TK and TCEs/EoF, but instead respond to the call for an holistic approach to community-based protection.

This section highlights how the IGC's role has progressively been clarified, in response to these concerns, both through (i) creating a clearer conception of how appropriate forms of 'intellectual property' protection fit in with a broad, holistic, and cooperative international approach in multiple forums to crafting suitable regimes for protection of TK, TCEs/EoF and GR, and (ii) ensuring that the emerging forms of protection are responsive to community needs and values. Before the eighth session, these issues were discussed in the following terms:¹⁴

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

24. Equally, even before the IGC was established, during WIPO's consultations with TK holders in 1998 and 1999, many TK holders have expressed the view that inappropriate forms of intellectual property should not be imposed on the communities who hold TK and TCEs/EoF. As was identified during these dialogues, some "believe that the [IP] system is unsuitable as a modality to protect TK because of what they regard as the system's private property, exclusive rights and individual author/inventor-centric nature. One of the bases expressed for this criticism was that TK and the kind of innovation and creativity that the IP system was established to protect are too different. Certain of these persons are critical of the IP system *per se*, while others expressed opposition merely to its deployment in the TK arena. The latter stressed the holistic and communally-shared nature of TK, which, they said, should not become the subject of private IPRs in the hands of outside parties."¹⁵ In addition,

¹⁴ Document WIPO/GRTKF/IC/8/6, from paragraph 18.

¹⁵ *Needs and Expectations of TK Holders*, WIPO, 2001, p 90 (report on Fact-Finding Mission to Eastern and Southern Africa). A similar view has been reiterated in several recent commentaries on the work of the Committee. See, for example, Grain, "Community or commodity: What future for traditional knowledge?," *Seedling*, July 2004, p.1

emphasis has been laid on the need to take international action to suppress certain forms of misappropriation and misuse of TK and TCEs/EoF by third parties. This would focus on the external environment, beyond the traditional community that develops and maintains TK and TCEs/EoF in the manner it chooses, and considers the kinds of acts that should be suppressed as illegitimate use or misappropriation beyond the current reach of the community's own traditional practices and any applicable customary law. At the same time, there have been concerns that WIPO's work should also take account of broader notions of protection, preservation and promotion of TK and TCEs/EoF.

25. These diverse requirements on the IGC may be perceived as being potentially in conflict. On the other hand, they may help positively clarify the appropriate space for international norms to be developed and articulated by the IGC, and also clarify its role vis-à-vis other international processes. In particular, these considerations suggest that the normative focus of the IGC should be on defining and preventing the acts by third parties beyond the community that are considered to be forms of misappropriation and misuse of the materials developed and held by a traditional community, and should not focus on prescribing or defining the approach that traditional communities themselves take in developing, managing, and disseminating their knowledge according to traditional laws, practices and customs.¹⁶ For example, many communities holding TK or TCEs/EoF stress that they already have customary laws in place, as the Four Directions Council underscored: "Indigenous peoples possess their own locally-specific systems of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its languages."¹⁷ The diverse forms of such laws and practices is often a direct expression of the cultural identity of the communities concerned.

26. Accordingly, it may be considered an inappropriate intrusion for the IGC to endeavour to delimit or stipulate what laws and practices should apply within the traditional context, in particular within the original community. To the contrary, the draft provisions, in capturing the main points of the IGC's deliberations, have not sought to intrude in the traditional domain but rather to articulate how norms and practices established under local, customary law may be supplemented and buttressed by international safeguards against the misappropriation and misuse of TK and TCEs/EoF by third parties who act beyond the traditional community (including in foreign countries). Equally, the provisions do not propound the creation of distinct and discrete property rights as such, given the broader range of legal mechanisms that the IGC has explored, and the preference expressed by some to avoid such mechanisms. The draft provisions do, naturally, respond to the choice for specific rights that a number of national and regional *sui generis* laws create, and intangible property rights are one mechanism among several for addressing misappropriation and misuse, for empowering communities to authorize legitimate uses of their knowledge and cultural expressions, and for safeguarding the traditional domain against illegitimate acts by third

¹⁶ Complementary capacity building and awareness raising activities allow for mutual learning from the experience of other communities, increase understanding of the practical options available, and buttress the capacity of communities to determine their own choices, in line with community values and goals, but do not seek to prescribe any particular approach, and are not normative materials in themselves.

¹⁷ Cited in *Needs and Expectations of TK Holders*, WIPO, 2001, p. 220.

parties. Yet in distilling a possible common international outcome that allows sufficient space for diversity while promoting convergence around shared norms, the provisions may need to look beyond specific legal mechanisms such as property rights, and instead concentrate on clarifying the acts of third parties that are considered illegitimate. As has been noted in past documents, this would be consistent with the evolution of intellectual property in a range of other fields, when the formulation of distinct property rights remains an option, implemented only if nations choose to take that path.¹⁸

27. This approach leaves open the option for communities to determine how they wish to exercise their say over their TK/TCEs/EoF, consistently with customary law, where applicable. It would give scope for the expression of community aspirations and values, consistent with respect for the customary domain and the diverse legal and cultural norms and traditions that define it. A clearer legal framework for preventing or penalizing the misappropriation and misuse of TK or TCEs/EoF by third parties, beyond the traditional community, would have the effect of complementing and supporting traditional knowledge and cultural systems and practices, rather than commodifying or homogenizing them. It would aim to recognize, rather than interfere with, what has been called the “jurisprudential diversity” of traditional communities.¹⁹ Such a framework also recalls that laws in the general field of intellectual property have not necessarily presumed the creation of distinct and severable property rights, nor the commodification or alienation of protected subject matter, but rather focus on the kind of unauthorized third-party acts that should be repressed. This has been an approach frequently taken in the development of international mechanisms. The general law of unfair competition, and a range of international standards in fields as diverse as performances, phonograms, integrated circuit protection and unregistered marks have been consistent with legal mechanisms focused on suppressing various forms of misappropriation and misuse, rather than in constructing specific new property rights.²⁰

28. As was earlier noted:²¹ some international requirements for protecting IP are variously expressed in terms of the “possibility of preventing” certain acts,²² requiring Contracting States to “take adequate measures to prevent” unauthorized distribution,²³ or specifying that ‘legal action required for ensuring the legal protection ... may be taken ... under the provisions of national legislation (1) at the instance of the Competent Office or at the request of the public prosecutor (2) by any interested party, whether a natural person or a legal entity, whether public or private.’²⁴ In some instances, international instruments explicitly set out

¹⁸ See the example of performers’ rights in document WIPO/GRTKF/IC/6/6

¹⁹ Cited in *Needs and Expectations of TK Holders*, WIPO, 2001, p. 220.

²⁰ See background commentary on these forms of protection of intangible property and interests against misappropriation or misuse in past Committee documents, notably WIPO/GRTKF/IC/6/6, WIPO/GRTKF/IC/7/3, WIPO/GRTKF/IC/7/4, WIPO/GRTKF/IC/7/5 and WIPO/GRTKF/IC/7/6.

²¹ WIPO/GRTKF/IC/6/6, paragraphs 15 and 16.

²² Rome Convention, Article 7.

²³ Satellite Convention, Article 2.

²⁴ Lisbon Convention, Article 8; compare the Commentary to the Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition, BIRPI (1966), which indicates that ‘indications of source and appellations of origin (as distinct from marks) do not have an owner capable of ensuring their protection against misuse. The capacity to prevent or repress such misuse is therefore given to the competent authority ... and to any interested person...’ (Section 51(2)).

the range of options for the form of protection, through a broad range of IP laws or other areas of law, including criminal law. Some existing *sui generis* forms of protection allow a very wide choice of legal mechanisms under national law to give effect to general protection standards articulated at the international level. For example, under the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC), Article 4, “[e]ach Contracting Party shall be free to implement its obligations ... through a special law ... or its law on copyright, patents, utility models, industrial designs, unfair competition or any other law or combination of laws.” The Phonograms Convention²⁵ provides that its means of implementation ‘shall be a matter of domestic law ... and shall include’ protection by means of one or more of “the grant of copyright or other specific right,’ ‘the law relating to unfair competition,’ or ‘penal sanctions.’”

29. Even so, the entitlement to obtain relief against misappropriation and misuse may still be grounded in the pre-existing and fundamental rights that arise from a community’s development and custodianship of TK and TCEs/EoF, and rights associated with the distinctive relationship between a traditional community and its knowledge and cultural expressions. In other words, such mechanisms can respect and give broader effect to such rights and responsibilities beyond the original community, without seeking to constrain, redefine or supersede traditional forms of custodianship, nor the customary laws, protocols and practices that are often integral to the way TK and TCEs/EoF are held, transmitted and developed within the community.

30. This understanding, in turn, helps distinguish an appropriate role for the IGC’s norm-building activities vis-à-vis other international processes, by focussing on the specific role and function of draft provisions on defining illegitimate forms of misappropriation and misuse. This focus is akin to the earlier development of ‘protection ... against illicit exploitation and other prejudicial actions’ that was the objective of earlier norm-setting activities conducted by WIPO and UNESCO regarding folklore.²⁶

31. This broad approach, guided by the IGC’s own deliberations,²⁷ could lead to draft provisions on protection of TK and TCEs/EoF which:

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

(ii) appropriately complement work under way in other contexts, such as on indigenous rights, conservation and benefit sharing associated with biodiversity, and

²⁵ Article 3.

²⁶ WIPO-UNESCO Model Provisions for National Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions, 1982).

²⁷ See in particular the summary of views put to the Committee in Annex 2 of documents WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5, views which shaped the current provisions, and the more detailed background in documents WIPO/GRTKF/IC/7/4 and WIPO/GRTKF/IC/7/6.

intangible cultural heritage and cultural diversity, without pre-empting outcomes in those fora on the crucial issues they are addressing;

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

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

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

(vi) allow scope and opportunity for continuing capacity building and cooperation based at promoting broader goals of preservation, promotion and safeguarding of TK/TCEs/EoF, and its use in grass roots development in ways chosen by the; this would continue to emphasize those forms of capacity building and the practical tools requested by the communities themselves.²⁸

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

²⁸ For example, those materials under development in response to requests made by holders of TK and TCEs/EoF in the consultations held by WIPO in 1998-99 (see ‘Needs and Expectations of Traditional Knowledge Holders,’ WIPO, 2001.)

V. A REVIEW OF THE LEGAL AND POLICY ISSUES

33. The IGC has discussed and analyzed diverse policy considerations: some relate directly to the scope and operation of the IP system and the range of interests it embodies and mediates; other issues concern the interaction between the IP system as such, and a broader set of legal systems and policy interests. This section provides an overview of the legal and policy issues that have been discussed by the IGC, as background to the specific documents and outcomes from the IGC's work to date.

Policy objectives: preservation and protection

34. The cultural, environmental and economic importance of TK has led to concerns that it should both be *preserved* (i.e. safeguarded against loss or dissipation) and *protected* (i.e., safeguarded against inappropriate or unauthorized use by others). For instance, in recognizing the importance of TK in relation to the conservation and sustainable use of biological diversity, the CBD (Article 8(j)) requires its Contracting Parties (subject to national legislation) to:

“respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”²⁹

35. This provision embodies several complementary objectives concerning TK - first, the concept of respect for TK; second, the idea that it should be preserved and maintained; third, that its use should be promoted with the approval and involvement of TK holders; and fourth that the benefits of this use should be equitably shared. Clearly a diverse range of regulatory and legal tools is needed to achieve these various goals: IP mechanisms (whether they are conventional IP rights or specific *sui generis* forms of protection) can be useful, but are unlikely to be sufficient in themselves. For instance, by giving right holders the capacity to prevent or limit certain uses of protected matter by third parties, IP protection can be used to determine how the TK is to be respected, can help ensure that the process of preservation does not undermine the TK holders' interests and that TK is used with their approval, and can structure and define arrangements for benefit sharing. These objectives are related to one another, but require distinct ways of using IP mechanisms; the use of IP mechanisms needs in turn to form part of a coordinated protection/preservation strategy.

36. A similar linkage is manifest in the relationship between the IP protection and the conservation of intangible cultural heritage in line with international law in the area of cultural policy, in particular the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (which entered into force in April 2006). This Convention aims to

²⁹ Article 16(g) of the “International Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa” states: “subject to their respective national legislation and/or policies, exchange information on local and traditional knowledge, ensuring adequate protection for it and providing appropriate return from the benefits derived from it, on an equitable basis and on mutually agreed terms, to the local populations concerned.” (Document A/AC.241/27).

safeguard the intangible cultural heritage, ensure respect for intangible cultural heritage, raise awareness of the importance of the intangible cultural heritage, and ensure mutual appreciation thereof, as well as providing for international cooperation and assistance to achieve these goals. This is an important legal development which also provides a framework for practical initiatives to safeguard intangible cultural heritage. In parallel, the IP system – particularly *sui generis* protection of folklore/TCEs, as well as the law of copyright and performers' rights – provide mechanisms to ensure that expressions of cultural heritage, when safeguarded – documented, archived, recorded – are protected against misappropriation and misuse, such as unauthorized commercialization. Protection afforded by IP mechanisms may therefore complement the preservation of intangible cultural heritage by ensuring that original custodians of traditional cultural works maintain authority, rights of attribution and integrity, and by safeguarding their legitimate economic interests.

37. These examples highlight the need to clarify and articulate the objectives of any approach to the IP protection of TK and TCEs, and IP aspects of access to genetic resources. Depending on what the right holders wish to achieve, IP mechanisms can be used to attain diverse goals in relation to this general subject matter. General concerns have been expressed about the need both for preservation and for protection of TK and TCEs, in a manner that is responsive to the community values and legal systems of the communities that create and maintain these intellectual and cultural traditions. It has therefore been important to distinguish the distinct notions of protection and preservation, but also to clarify how they can work together most effectively. Preservation has two broad elements – first, the preservation of the living cultural and social context of TK and TCEs, so that the customary framework for developing, passing on and governing access to TK and TCEs is maintained; and second, the preservation of TK and TCEs in a fixed form, such as when traditional technical know-how or medicinal knowledge is documented, or TCEs are recorded. Preservation may have the goal of assisting the survival of the TK or TCEs for future generations of the original community and ensuring its continuity within an essentially traditional or customary framework,³⁰ or the goal of making TK/TCEs available to a wider public (including scholars and researchers), in recognition of its importance as part of the collective cultural heritage of humanity.

38. By contrast, 'protection' in the work of the IGC has tended to refer to protection of material against some form of unauthorized use by third parties. It is this kind of protection, rather than preservation, that is the general function of intellectual property systems, including in the area of TK and TCEs. The IGC's deliberations have covered several different concepts of protection, including the need for protection against:

- unauthorized commercial exploitation of TK or TCEs;
- insulting, degrading or culturally offensive use of this material;
- false or misleading indications that there is a relationship with the communities in which the material has originated; and
- failure to acknowledge the source of material in an appropriate way.

39. In each of these cases, owners and custodians of TK/TCEs can use specific IP rights to prevent others from undertaking these activities without authorization. Because this is based on the active assertion of rights, this was termed 'positive protection.' The IGC explored two

³⁰ For example, Tulalip Tribes "Cultural Stories Project: Integrating Traditional Knowledge into a Tribal Information System" (noted in document WIPO/GRTKF/IC/3/17, para. 158).

aspects of positive protection of TK by IP rights, one concerned with preventing unauthorized use and the other concerned with active exploitation of TK by the originating community itself. TK holders have used IP rights to stop unauthorized or inappropriate acts by third parties, but they have also used IP rights as the basis for commercial and dealings with external partners. For instance, a community may use IP rights to stop the illegitimate or unauthorized use of a TCE (such as a traditional design) by a manufacturer;³¹ but the community can also use the same IP rights as the basis for their own commercial enterprise,³² or to license and control appropriate use of the TCE by others and to structure and define the financial or other benefits from this authorized use.³³ Similarly, positive protection of TK may prevent others from gaining illegitimate access to TK or using it for commercial gain without equitably sharing the benefits, but it may also be used by TK holders to build up their own enterprises based on their TK.

40. The IGC also discussed the use of non-IP approaches for the positive protection of TK/TCEs: these approaches were complementary to the use of IP rights and could be used in conjunction with IP protection. This included protection by legal and technical means. Protection by legal means included other forms of legislation (e.g. laws governing the environment and access to genetic resources, and laws concerning indigenous people), as well as bilateral contracts, agreements and licenses governed by contract law, which can provide for certain undertakings and benefits in exchange for access to the TK/TCEs as well as access to genetic resources. This may include agreement on the ownership and exploitation of IP rights derived from access to TK/TCEs and genetic resources, and other ways of sharing benefits resulting from the authorized access to this material. The IGC also considered positive protection through technical means, especially information technology. For instance, data security systems could safeguard TK/TCEs by restricting access and use to those who are authorized by the community. For example, electronic databases can contain access control

³¹ For example, see *M*, Payunka, Marika and Others v Indofurn Pty Ltd* (1994) 30 IPR 209. This case referred to as the Carpet case is one of the subjects of the studies undertaken for WIPO by Ms. Terri Janke entitled “Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions.” The study is available at <http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>.

³² For example, in Canada the *Copyright Act* is used by a range of Aboriginal artists, composers and writers to protect their tradition-based creations. Examples include wood carvings of Pacific coast artists, silver jewelry of Haida artists, songs and sound recordings of Aboriginal artists, and sculptures of Inuit artists (WIPO/GRTKF/IC/5/INF/2); A governmental poverty alleviation programme “Investing in Culture” for the Khomani San people in South Africa is revitalizing the community’s craft-making and enabling the community for the first time to generate its own income from their crafts. While previously dependent on government grants, each crafts-maker now earns in the region of USD 600 per year. The community is considering entering more sophisticated local and foreign markets where items can be sold for higher prices. The community is becoming interested in exploring the use of IPRs to protect its crafts. (WIPO/GRTKF/IC/5/3).

³³ For example, the Maori Arts Board, *Te Waka Toi*, of New Zealand has developed the *Toi Iho*TM Maori Made Mark which is a trademark of authenticity and quality and indicates to consumers that the creator of the goods is of Maori descent and produces a work of a particular quality (WIPO/GRTKF/IC/4/3, para. 143). In Australia, the National Indigenous Arts Advocacy Association (NIAAA) certification mark has a similar role (WIPO/GRTKF/IC/3/10, para. 126(ii)). See also the *Artesanías de Colombia* trademark at <http://www.artesaniasdecolombia.com.co/> and the *Tairona Culture Case* (WIPO/GRTKF/IC/5/INF/2, Annex I).

systems that correspond with customary law restrictions on who may access and use certain traditional knowledge.³⁴

41. In summary, the range of positive protection measures for TK/TCEs considered by the IGC included:

- using IP rights (the conventional IP system or *sui generis* rights specifically created to protect TK or TCEs) to prevent unauthorized use, and to seek remedies when unauthorized use has occurred (especially commercial use, or offensive and abusive use);
- using the same rights as the basis for commercial, research and cultural partnerships with third parties, including for defining and sharing benefits from use of TK/TCEs beyond the traditional environment;
- using other non-IP legal tools to protect TK/TCEs (as well as genetic resources), such as contracts and legislation for the protection of the environment and the interests of indigenous communities; and
- using technical tools, such as databases with security systems, to prevent third parties from gaining unauthorized access to TK/TCEs.

42. The application of these specific forms of positive protection has responded to deeper concerns about the misappropriation of traditional cultures and knowledge, violation of cultural and spiritual norms and values, misleading representations to the public about the involvement or endorsement of indigenous and local communities, failure to respect the cultural concerns and customary laws of indigenous and local communities, and commercial exploitation of TK and TCEs without equitable sharing of the benefits. These concerns reflect, at a basic level of principle, many of the policy objectives of IP law. The debates in the IGC therefore considered the extent to which these underlying objectives could be met through existing IP mechanisms, through the adaptation of the IP system, or through the development of new, *sui generis* IP systems specifically designed to apply these general principles directly to the protection of TK or TCEs.

43. In relation specifically to TCEs, the IGC has considered the protection of TCEs within the context of cultural policies for the preservation of cultural heritage, the promotion of cultural diversity and the stimulation of creativity, including tradition-based creativity, as well as in relation to freedom of expression and access to information. In this regard, the need to clarify the contours and boundaries of the “public domain” was a key concern, as was the

³⁴ For example, in the United States of America the Tulalip Tribes in Washington State are compiling a database of their traditional environmental knowledge named “StoryBase.” While compiling this database, the tribes have distinguished between “Type A knowledge,” which they wished to reserve exclusively for the members of the tribal communities, and “Type B knowledge,” which the tribes wished to make available to the public at large. The software which is being developed to operate the database is being programmed to restrict access for Type A knowledge in the StoryBase to community members, whereas Type B knowledge will be disclosed and made available either to the general public or to patent examiners only. In distinguishing between Type A and Type B knowledge, intellectual property considerations are being taken into account and in the technical structure of the database this distinction will be reflected in the access privileges of different users. The access privileges are complex and are still being developed on the basis of discussions within the Tribes.

relationship between IP protection and these cultural and other policy objectives (see documents WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/5/INF 3).

Preservation or protection?

44. The IGC's discussions therefore highlighted the need for balance and coordination between preservation and protection, and a clearer relationship between the exercise of positive protection and the maintenance of the public domain. This arose in a practical way in the process of preservation of TK or TCEs, because this very process can trigger concerns about lack of protection and can run the risk of unintentionally placing TK/TCEs in the public domain or inadvertently giving third parties unrestricted capacity to use TK/TCEs against the originating community's own values and interests. This occurs most obviously when preservation is undertaken without the authorization of the traditional owner or custodian, for example the unauthorized recording of performances of expressions of folklore³⁵ or the documentation or dissemination without consent of traditional medical knowledge that may be considered confidential or secret. But this tension also arises when the process of preservation is undertaken with the consent or involvement of the TK holder, but unwittingly or incidentally undermines protection of TK or TCEs - this can occur when material is recorded or documented without full understanding of the implications. Hence the process of preservation can be in tension with the desire to protect TK and TCEs when disclosure, recording or documentation of this material undermines interests and precludes potential IP rights, and may place it in the public domain without the originating community's or TK holder's awareness of or consent to the full implications of preservation. Concern to avoid this was widely voiced in the IGC's discussions.

45. Various practical initiatives to address these concerns included the development of a draft toolkit,³⁶ a practical guide on the protection of TCEs,³⁷ and a database of contracts relating to the IP aspects of access to genetic resources.³⁸ Technical discussion of TK databases has also addressed the need for appropriate security mechanisms,³⁹ and specific databases initiatives demonstrated included access limitations.⁴⁰ The common thread of these

³⁵ See WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996) available at: <<http://www.wipo.int/clea/docs/en/wo/wo034en.htm>>.

For example, the "Deep Forest" CD produced in 1992, fused digital samples of music from Ghana, the Solomon Islands and African 'pygmy' communities with 'techno-house' dance rhythms; "Boehme" was produced in 1995, similarly fusing music from Eastern Europe, Mongolia, East Asia and Native Americans; rights to the well-known "The Lion Sleeps Tonight" – based upon the 1930s composition "Mbube" by the late South African composer Solomon Linda - continues to be disputed in a complex matter. See also *Protection of Indigenous Dance Performances* "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions" available at:

<<http://www.wipo.int/globalissues/studies/cultural/minding-culture/studies/performances.pdf>>.

³⁶ For example, see documents WIPO/GRTKF/IC/4/5; WIPO/GRTKF/IC/5/5.

³⁷ For example, see document WIPO/GRTKF/IC/3/10, para. 155.

³⁸ For example, see documents WIPO/GRTKF/IC/3/4; WIPO/GRTKF/IC/4/10; WIPO/GRTKF/IC/Q.2 at

<<http://www.wipo.int/globalissues/questionnaires/ic-q2/questionnaire.doc>>.

³⁹ For example, see documents WIPO/GRTKF/IC/4/14.

⁴⁰ For example, the Society for Research Into Sustainable Technologies and Institutions (SRISTI) has compiled a database of more than 5000 informal innovations from 2300 villages within

was the informed use of legal and other tools to ensure that when TK and TCEs are recorded, documented or otherwise preserved in a new medium, the traditional owners have the capacity to enhance their interests, rather than see their interests diluted or weakened. The remedies employed generally involved a mix of legal or normative development and adaptation, together with capacity building to understand and effectively exercise legal rights and options.

Defensive protection

46. Each of the forms of positive protection of TK/TCEs mentioned above has been considered as an important element in ensuring that preservation and protection function effectively together. But this dilemma also arose in the context of *defensive* protection. The IGC considered defensive protection as a distinct way of defending the interests of TK/TCE holders: in contrast to positive protection, which involved the active exercise of rights over the TK/TCEs, defensive protection was identified as a set of strategies to ensure that third parties did not gain illegitimate or unfounded IP rights over TK/TCE subject matter and related genetic resources. The need for defensive protection arose in various scenarios discussed in the IGC; these included taking measures to preclude or to oppose:

- Patent rights on claimed inventions that make direct use of TK or are based on unauthorized access to and use of genetic resources (e.g., a patent claim to an invention which is an obvious use of publicly known TK);
- Trade mark rights making use of TK/TCE subject matter (e.g., a trade mark based on a traditional cultural symbol) or creating a misleading link with a traditional community; and
- Assertion of copyright in literary or artistic works that make illegitimate use of traditional cultural works or traditional performances (e.g., a sound recording that includes sampled performances of expressions of folklore).

A positive protection strategy is based on obtaining and asserting rights in the protected material, while a defensive protection strategy is aimed at preventing others from gaining or maintaining adverse IP rights. Both strategies are typically used in conjunction, in a coordinated manner, and usually a range of positive and defensive forms of protection may be applicable to the interests of any group of TK/TCE holders. Defensive strategies are well established in general intellectual property practice, with the possibility, for instance, of commercial defensive publication services,⁴¹ a practice of filing patent applications not with a view to gain patent rights but to ensure later patents on the same subject matter are not granted,⁴² defensive trade mark registers,⁴³ specific register of prohibited material⁴⁴, and other defensive publication strategies.

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India. The publication of the innovations within the database could preempt the future options of the innovator to acquire industrial property rights. This dilemma is being resolved through access restrictions and the dissemination of traditional practices in synoptic form. See http://knownetgrin.honeybee.org/innovation_database.asp.

⁴¹ For example, see “IP.com’s Prior Art Database” at <http://www.ip.com/>.

⁴² For example, in Japan it is relatively common practice to apply for patents for inventions that the applicant does not intend to use, but which he or she does not want to fall in the hands of competitors who may independently reinvent them. A practical solution is to file a patent application, to wait for it to be published (or “laid open for public inspection”) and not to

[Footnote continued on next page]

47. The IGC considered the documentation of TK, and the use of documented TK, as one form of defensive strategy. This was generally aimed at ensuring that patent rights were not granted on TK subject matter. However, the IGC discussed a wide range of possible objectives for TK documentation, by no means all aimed at defensive protection. It was highlighted that documentation of TK need not, and in some cases should not, lead to the public availability of TK, but could rather serve as an adjunct to preservation of TK within the existing traditional community, and not for further disclosure beyond the circle permitted by customary law. As a form of defensive protection, documentation was chosen in some cases as a way of ensuring that the TK was clearly taken into account in the process of patent examination. The IGC developed various practical tools to assist defensive protection:

- a portal of on-line databases,⁴⁵ featuring both patent and non-patent documentation of TK, that demonstrated how these tools could be used by examiners when assessing the novelty and inventiveness of patent claims;
- inventories of periodicals containing TK subject matter⁴⁶ and of on-line databases⁴⁷ containing TK material, based on widely-circulated questionnaires,⁴⁸ as resources for those seeking ways of strengthening patent examination of TK-related subject matter by ensuring relevant prior art is taken into account;
- a proposal for certain of these periodicals to be incorporated within the minimum documentation for the Patent Cooperation Treaty (PCT) system,⁴⁹ thus increasing the degree to which international search and examination of patent applications takes account of TK subject matter (this proposal has since been developed by the relevant PCT decision making bodies);⁵⁰ and

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request the subsequent examination. Such application thereby falls into public domain and as such it will necessarily be taken into account by patent examiners when assessing the patentability of claims filed by competitors. See Robert J. Girouard, *U.S. Trade Policy and the Japanese Patent System*, Working Paper 89, August 1996, The Berkely Roundtable on the International Economy, available at <www.ciaonet.org/wps/gir01/#txt115> (last visited on January 3, 2003), (see document WIPO/GRTKF/IC/5/7, para 15).

⁴³ For example, Snuneymuxw First Nation of Canada in 1999 used the Trademarks Act to protect ten petroglyph (ancient rock painting images). Members of the Snuneymuxw First Nation subsequently indicated that local merchants and commercial artisans had indeed stopped using the petroglyph images, and that the use of trade-mark protection, accompanied by an education campaign to make others aware of the significance of the petroglyphs to the Snuneymuxw First Nation, had been very successful. (WIPO/GRTKF/IC/5/INF/2, Annex I).

⁴⁴ The United States Patent and Trademark Office (USPTO) has established a comprehensive database for purposes of containing the official insignia of all State and federally recognized Native American tribes (WIPO/GRTKF/IC/4/3, para. 139(i)).

⁴⁵ The Traditional Knowledge Portal of Online Databases can be found at <<http://www.wipo.int/globalissues/databases/tkportal/index.html>>.

⁴⁶ See document WIPO/GRTKF/IC/3/5.

⁴⁷ See documents WIPO/GRTKF/IC/3/6; WIPO/GRTKF/IC/4/10.

⁴⁸ See documents WIPO/GRTKF/IC/Q.2; WIPO/GRTKF/IC/Q.3.

⁴⁹ See documents WIPO/GRTKF/IC/2/6, paras 77 to 81; WIPO/GRTKF/IC/3/5 and WIPO/GRTKF/IC/3/6.

⁵⁰ See documents PCT/CTC/20/4, paras 4 to 8 and 10.

- a proposal for revision of the International Patent Classification (IPC) to include categories specifically for TK subject matter,⁵¹ to facilitate the access of patent examiners to TK-related information which is relevant to the claims of a patent application that is under scrutiny (this has also been developed further by the Committee of Experts of the Special Union for the International Patent Classification (IPC Union)⁵²).

48. The TK Documentation Toolkit is also being developed as a means of supporting indigenous and local communities in assessing their IP-related interests and objectives before undertaking a documentation exercise (including documentation initiatives intended partially or fully as a defensive IP strategy), and supporting the management of IP issues and interests during and after documentation, so that documentation activities operate directly to support these interests and do not inadvertently undercut them. In the area of trade mark law, defensive protection mechanisms discussed included identifying grounds for refusal of registering a trade mark where its registration or use would offend a significant part of the relevant community.⁵³

49. The role and place of cultural heritage collections, databases and registers raises specific questions relevant to both defensive and positive protection of TCEs. WIPO is addressing several questions arising when (i) cultural heritage and TCEs are first accessed by folklorists, ethnographers, ethnomusicologists, cultural anthropologists and other fieldworkers, and (ii) TCEs are documented, recorded, displayed and made available to the public by museums, inventories, registries, libraries, archives and the like. The activities of collectors, fieldworkers, museums, archives etc., are important for the preservation, conservation, maintenance and transmission to future generations of intangible and tangible forms of cultural heritage. Museums also play a valuable educational role. However, the “public domain” status of cultural heritage and TCEs that are not protected by IP challenges efforts to protect the interests of indigenous and local communities. This is particularly so in view of the growing trend of museums to digitize their cultural heritage collections and make them publicly available for both museological/curatorial as well as commercial purposes.⁵⁴ These issues are being explored further in several practical and capacity-building contexts, within the Creative Heritage Project.⁵⁵

The role of IP protection and the interests of local and Indigenous communities

50. The IGC’s discussion of positive and defensive IP protection of TK and TCEs stemmed from, and was linked to the concerns and interests expressed by local and Indigenous communities. This raised the question of whether protection systems based on IP rights were appropriate and suitable for promoting the interests of traditional communities, who may see the IP system as reflecting values incompatible with their own. In some cases, the concern was expressed that IP protection of TK and TCEs was inappropriate as it could lead to the alienation, deterioration and commodification of culturally sensitive subject matter.

⁵¹ See document IPC/CE/32/12, para. 91.

⁵² See document IPC/CE/32/12, paras. 83 to 91.

⁵³ For example, see documents WIPO/GRTKF/IC/4/INF/2, Annex II; WIPO/GRTKF/IC/4/3, para.139 (ii).

⁵⁴ See document WIPO/GRTKF/IC/5/3.

⁵⁵ See <http://www.wipo.int/tk/en/folklore/culturalheritage/index.html>

Similarly, the concern was expressed that traditional communities should be supported in their endeavors to preserve and maintain traditional methods of preserving traditional knowledge and cultures and passing them between generations within the communities. In other cases, traditional communities sought to make some commercial use of TK and TCEs in national and international markets, or generally to disseminate their TK and TCEs beyond the community.

51. Various approaches to TK/TCE protection discussed in the IGC demonstrated the possibility of addressing some of these concerns through the judicious use of IP systems. This pivoted on the understanding that – however the community wished to preserve, protect, develop or make commercial use of its intellectual and cultural heritage – positive IP protection provided opportunities to prevent third parties from making undesirable, unauthorized or offensive use of TK or TCEs, and defensive protection ensured that IP rights were not secured by third parties over TK/TCE subject matter. The challenge was to use IP rights to supplement and extend the effective reach of customary law and practices, without undermining the traditional framework. This arose particularly when TK or TCEs were removed from the traditional environment, with or without the consent of the owners, and were used beyond the reach of traditional law and custom. For communities which sought only to preserve the traditional framework in which TK/TCEs are created and sustained, positive protection would allow action to be taken against abusive use of TK or TCEs, in particular if this diluted or eroded community values and interests, while defensive protection would safeguard against illegitimate third party IP rights that create a sense of misappropriation of traditional heritage. Inasmuch as communities wish to use their TK or TCEs in commercial activities beyond the traditional context, for instance in developing a community-based industry based on TK, positive protection would safeguard the community against the commercial activities of third parties that may otherwise undercut the community's interests; and defensive protection would ensure that there are no third party IP rights that impede the community from commercializing and developing its own cultural and intellectual heritage in the wider marketplace.

Needs and capacity: focus on the point of access

52. The IGC's work took two general approaches in addressing the needs identified for enhanced protection of TK and TCEs, and the IP aspects of genetic resources. First, it worked on analyzing, clarifying and extending the legal application of norms and principles (both conventional IP systems and *sui generis* approaches), and second, it developed a range of practical tools and considered the need to build community's capacity to use IP-related tools to promote their interests effectively. Both aspects of the IGC's work recognized the need to concentrate on the capacity and the interests of TK holders and traditional communities at the point where and when their TK, TCEs or genetic resources are being accessed by external parties. It was pointed out that it was crucial for these communities to identify and promote their interests exactly at that point, before they granted actual access to TK or TCEs, or genetic resources – this is because it can subsequently be extremely difficult retrospectively to rectify problems that arose from inappropriate access. This entailed an integrated approach to strengthening capacity to use existing rights and defensive options and to enhancing the practical availability of legal avenues for protection.

53. Accordingly, the work of the IGC is leading towards three complementary outcomes:
- the *strengthened capacity* of TK holders, bearers of TCEs, and custodians of GRs to make effective use of existing IP systems, to adapt IP mechanisms better to advance their collective interests and community values, and to define, articulate and promote their needs and interests in relation to the IP system, in a way that combines an enhanced understanding of legal concepts and systems and their practical application with a stronger capacity to make effective use of these systems, consistent with community values and interests;
 - a *richer empirical understanding* of the nature of IP protection of TK and TCEs and its proper policy and legal context, and the IP issues arising from international framework on GRs: policy discussions in WIPO and elsewhere, national policymakers, and many other stakeholders, are therefore informed by the rich array of practical experience at the national, regional and international levels;
 - greater ability on the part of policymakers to *adopt and effectively implement* policy options at the national level; and a stronger, information-rich basis for international cooperation on policy and legal questions, on practical capacity building and on legal and technical assistance, including the cooperative development of national, regional and international measures with the aim of better protecting TK, TCEs and GRs within a sound and inclusive policy context.

VI. LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

Scope and definition of legal protection

54. One of the key issues the Committee considered was how to refer to and how to define the subject matter of protection – what terms to use, and what definitions to give them.⁵⁶ This corresponded to a need widely identified in the Fact-Finding Missions in 1998-99. In the Committee's subsequent discussions, this emerged as an important basis for international policy debate. Discussions frequently stressed⁵⁷ the holistic nature of traditional cultural and knowledge systems, and the need to recognize the complex interrelations between a community's social and cultural identity, and the specific components of its knowledge base, where traditional technical know-how, cultural expressions and traditional narrative forms, traditional ecological practices, and aspects of lifestyle and spiritual systems may all interact, so that attempts to isolate and separately define particular elements of knowledge or culture may create unease or concern. On the other hand, it has been argued that, while recognizing the links between them, TCEs and technical TK should be dealt with in two parallel and complementary tracks, at least as a methodological device.⁵⁸ Discussions have pointed to the need for some clarity and a common understanding of the subject matter of protection as the basis for international cooperation in this area: this has also led to a need to clarify the very role of definitions of protected subject matter in international IP instruments.⁵⁹ Broadly speaking, the discussion highlighted a tension between an approach to defining TK/TCE subject matter that aimed at inclusiveness and recognition of the diverse local characteristics of traditional knowledge and cultures, and an approach that saw value in establishing a common set of terms and a general understanding of their signification at the international

⁵⁶ See document WIPO/GRTKF/IC/3/9.

⁵⁷ "The Brazilian position differed from the suggested approach in paragraphs 22 and 23, as protection of TK should be based on a holistic approach, given that the very essence of TK would be missed if a "piecemeal" model of protection were adopted." (WIPO/GRTKF/IC/3/17, para. 220); ".the document should be open-ended, to provide more examples to find how existing IP could be used to protect TK in a holistic approach to cover not only the knowledge itself, but also the culture and all heritage related to it" (WIPO/GRTKF/IC/3/17, para. 187, see also paras. 188 to 285); "..TK was holistic and was inextricably linked to the lives of communities and TK holders." (WIPO/GRTKF/IC/4/15, para. 147, see also paras. 138, 148, 152, 158).

⁵⁸ For example, at the third session of the Committee, the European Union and its Member States stated that "the Committee should continue to work to establish a dividing line between TK and folklore. . . and that the different legal tracks be explored which may be complementary in analyzing these two facets. . . it [is] necessary to define the scope of traditional TK with regard to biodiversity and leave folklore and handicrafts to be covered by other measures" (WIPO/GRTKF/IC/3/17 at para. 218). See also paras. 235, 242, 286, and 254.

⁵⁹ See documents WIPO/GRTKF/IC/3/9, paras. 12(iii) and 17 and WIPO/GRTKF/IC/5/8 para. 44. See also WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, WIPO, 2001, pp. 210-213, 216. "Given this highly diverse and dynamic nature of traditional knowledge it may not be possible to develop a singular and exclusive definition of the term. However, such a singular definition may not be necessary in order to delimit the scope of subject matter for which protection is sought. This approach has been taken in a number of international instruments in the field of intellectual property." (See document WIPO/GRTKF/IC/1/3, para. 65).

level. Committee discussions therefore showed contrasting emphases that definitions of TK should reflect its holistic quality, and that there should be some precision and clarity in the notion of TK, as a sounder basis for future international policy development and cooperation.

55. The terms ‘folklore’ and ‘expressions of folklore’ have been discussed for many years in international policy debate on IP questions, and are identified as an object of protection in international IP law⁶⁰ and other policy instruments;⁶¹ they are also the object of protection of many national laws, including in copyright laws⁶² and distinct *sui generis* laws for the protection of folklore.⁶³ While there is no exhaustive definition of ‘folklore’ at the international level, there is a long established international and national usage of the term as the object of specific protection (whether it is folklore as such, or expressions of folklore, that is the direct object of protection). The more recently coined term ‘traditional cultural expressions’ was used in the work of the Committee as a close synonym for ‘expressions of folklore;’ for some community representatives and commentators it has the advantage of being a more direct description, and one that lacked the negative associations that ‘folklore’ has for some communities.⁶⁴ In the documents it submits to the Committee, the Secretariat has adopted the practice of using these two terms synonymously.

56. ‘Traditional knowledge’ has been used in the Committee and in the earlier WIPO fact-finding missions as a broader and more diverse concept,⁶⁵ a convenient umbrella term

⁶⁰ WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996) available at: <<http://www.wipo.int/clea/docs/en/wo/wo034en.htm>>.

⁶¹ WIPO-*Unesco* Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982.

⁶² For example, see document WIPO/GRTKF/IC/3/10, paras 118 and 119. See also the Barbados Copyright Act, 1998; Ghana Copyright Law PNDCL 110 of 1985; Indonesia Copyright Law No. 12, 1997; the Islamic Republic of Iran’s “Act on the Protection of Authors’, Artists’ and Composers’ Rights”, 1969; Kenya Copyright Act No. 5 of 1975; Mexico *Ley Federal del Derecho de Autor*, 1997; Mozambique Copyright Law (published February 27, 2001); Nambian Copyright and Neighbouring Right Protection Act 6 of 1994 as amended in 2000; Sri Lanka’s Code of Intellectual Property Act No. 52 of 1979; Togo *Loi No. 91-12 du 10 Juin 1991*; United Republic of Tanzania “Copyright and Neighbouring Rights” Act 7 of 1999; Viet Nam “Civil Code of Socialist Republic of Vietnam”, October 28, 1995. For further information see also responses to “Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/2/7) at <<http://www.wipo.int/globalissues/questionnaires/ic-2-7/index.html>>

⁶³ For example, see Panama Law No. 20 of June 26, 2000, regulated by Executive Decree No. 12 of March 20, 2001, entitled “Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples, for the Protection and Defense of their Cultural Identity and their Traditional Knowledge, and Other Provisions”; “WIPO-*Unesco* Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions”, 1982; “South Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture” (2002).

⁶⁴ For example, see documents WIPO/GRTKF/IC/3/9, para. 22 and WIPO/GRTKF/IC/4/INF/2 Annex II, para. 3.

⁶⁵ “‘traditional knowledge’ ... refer[s] to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. “Tradition-based” refers to knowledge systems, creations, innovations and cultural expressions which: have

that has been used to refer to a wide range of subject matter (TK *lato sensu*). The use of this term is a direct reflection of the broadening international agenda, and the increasing interest in the IP protection of traditional knowledge systems and specific elements of traditional know-how, beyond the longer-standing interest in the IP protection of traditional cultural expressions (expressions of folklore). Indeed, ‘traditional knowledge’ has been used in its most general sense to cover material such as ecological and medicinal knowledge and the form of its expression, as well as to embrace the terms ‘folklore’ and ‘traditional cultural expressions.’ The Committee adopted⁶⁶ the approach of working with the terms ‘traditional knowledge’ and ‘expressions of folklore/traditional cultural expressions,’ reflecting two distinct, but closely complementary and interrelated areas of substantive discussion. However, the surveys⁶⁷ and studies⁶⁸ considered by the Committee on specific national approaches to legal IP protection have disclosed a need for a clear working understanding of the interaction between a more focussed conception of ‘traditional knowledge’ (TK *stricto sensu*) and traditional cultural expressions. The Committee was advised of various national approaches to *sui generis* protection of TK which disclose a range of different approaches to defining this term in national law.⁶⁹

The subject matter of IP protection

57. The Committee’s discussions have highlighted how the use and definitions of terms in the context of protection of TK/TCEs can be clarified by distinguishing between:

- the holistic traditional knowledge, cultural and spiritual system associated with a local or indigenous community, including customary law systems;
- those distinct aspects of the traditional knowledge and traditional cultural expressions that are protected by specific IP legal mechanisms beyond the customary context; and

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generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; “expressions of folklore” in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of TK would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of “heritage” in the broad sense.” (WIPO/GRTKF/IC/3/9, para. 25).

⁶⁶ See documents WIPO/GRTKF/IC/1/3 para. 20 and WIPO/GRTKF/IC/3/17 paras. 266 and 306.

⁶⁷ For example, see documents WIPO/GRTKF/IC/4/7; WIPO/GRTKF/IC/5/7.

⁶⁸ For example, see documents WIPO/GRTKF/IC/4/3; WIPO/GRTKF/IC/4/8; WIPO/GRTKF/IC/5/3; WIPO/GRTKF/IC/5/8.

⁶⁹ For example, see the legislation provided in document WIPO/GRTKF/IC/5/INF/2, namely Brazil’s Provisional Measure No. 2186-16 of August 23, 2001; Panama Law No. 20 of June 26, 2000, regulated by Executive Decree No. 12 of March 20, 2001, entitled “Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples, for the Protection and Defense of their Cultural Identity and their Traditional Knowledge, and Other Provisions”; Peru Law No. 27811 (Published On August 10, 2002); Portugal Decree-Law No. 118/2002, of April 20, 2002.

- the actual subject matter of specific IP rights concerning TK or TCEs.⁷⁰

58. The holistic quality of protection is most apparent within the traditional context, where legal protection is often embedded in deeper cultural norms and practices, and integrated in the life of the community. It is generally when TK or TCE subject matter is removed from that context, and engages other interests (such as commercial or research interests), that community concerns and IP policy issues arise, and thus the perceived need for distinct new forms of IP protection. Therefore the conceptual breadth and holistic quality of TK (incorporating its integral relationship with the traditional context) needs to be recognized in taking a broad and inclusive approach to defining the scope and background to the subject matter. But the implementation of specific legal mechanisms for IP protection of TK/TCE subject matter may require greater focus and a degree of selectiveness if they are to be applied in separate jurisdictions – whether through general or *sui generis* protection systems. For instance, some *sui generis* systems for TK protection focus on traditional ecological knowledge rather than traditional knowledge in a broader sense.

Forms of IP protection

59. While the categories are general and the boundaries between them are necessarily indistinct, the Committee's work has covered three general clusters of TK/TCE subject matter that may be covered by specific forms of IP protection:

- Protection extended to the *content, substance* or *idea* of knowledge and culture (such as traditional know-how about the medicinal use of a plant, or traditional ecological management practices) – corresponding roughly to the subject matter of patents, utility models and know-how or trade secrets;
- Protection extended to the *form, expression* or *representation* of traditional cultures (such as a traditional song, performance, oral narrative or graphic design) – corresponding roughly to the subject matter of copyright and performer's rights and rights in industrial and textile designs; and
- Protection extended to the *reputation* and *distinctive character* of signs, symbols, indications, patterns and styles associated with traditional cultures, including the suppression of misleading, deceptive and offensive use of this subject matter – corresponding roughly to the subject matter of trademarks and geographical indications, as well as specific protection for material such as the names of IGOs, hallmarks and national symbols.

60. Practical protection scenarios⁷¹ considered by the Committee illustrate how the protection of TK and TCEs may involve the use of a range of specific IP tools, potentially

⁷⁰ For example, see documents WIPO/GRTKF/IC/3/8 and WIPO/GRTKF/IC/3/9.

⁷¹ “A short fable may help illustrate the nature of TK and the availability of existing mechanisms of intellectual property that fit its characteristics. Let us imagine that a member of an Amazon tribe does not feel well and requests the *pajé*'s medical services (*pajé* is the tupi-guarani word for shaman). The shaman, after examining the patient, will go to his garden (many shamans in the Amazon rain forest are plant breeders indeed) and collect some leaves, seeds and fruits from different plants. Mixing those materials according to a method only he knows, he prepares a potion according to a recipe of which he is the sole holder. While preparing the potion and, afterwards, while administering it to the patient (according to a dosage he will likewise

[Footnote continued on next page]

drawing on established IP titles as well as specific, *sui generis* approaches, each protecting one facet of the underlying subject matter, rather than relying on a single IP tool that would cover every distinct aspect of TK/TCEs as a composite whole. When policy debate turned to specific forms of IP protection for TK, TCEs or folklore, the terms were used in a more focussed way that corresponded with the nature of the legal protection intended – in particular, whether the protection related to the content of TK, or the form of expression, or the use of distinctive signs or symbols.

Protection of content or expression?

61. This meant that terms such as ‘traditional knowledge,’ ‘traditional culture’ or ‘folklore’ could operate on one level as general descriptive terms, but could also operate as specific references to the subject matter protected by distinct forms of IP protection. TK *stricto sensu* has been associated with protection of knowledge as such, whereas TCEs and expressions of folklore have been associated with protection of the characteristic manner or form in which TK and traditional cultures have been expressed. When an ethnobotanist records the fact that a traditional community uses a certain plant extract in a particular way to treat a disease, the policy concern is that this knowledge should be protected, not the manner or form in which the ethnobotanist writes down the knowledge. When a traditional song is recorded, or a traditional painting motif is copied, the concern is that these forms of expression should be protected, even if the song or motif themselves convey knowledge that might also be protected. If a business enterprise seeks to market its product on the basis of a misleading claim that it had a traditional cultural quality, or by using a traditional symbol or other indication to create a misleading association with a traditional community, then the concern is that protection be available against such misleading or deceptive behavior. An integrated approach to protection of TK and TCEs would require sufficient legal tools to protect each aspect in this way; the one legal mechanism need not be distinctly relied upon to protect each of these aspects.

Three aspects of protection beyond the community: content of knowledge, form of expression, and distinctive signs

62. Accordingly, one possibility that emerged from the various approaches taken in the Committee would be to use these terms so as to recognize the distinct forms of protection that would correspond with them.

[Footnote continued from previous page]

prescribe), the *pajé* prays to the gods of the forest and performs a religious dance. He may also inhale the smoke of the leaves of a magical plant (the “vine of the soul”). The potion will be served and saved in a vase with symbolic designs and the *pajé* will wear his ceremonial garments for the healing. In certain cultures, the *pajé* is not seen as the healer, but as the instrument that conveys the healing from the gods to the patient.” (WIPO/GRTKF/IC/4/8, para.38). For further examples, see documents WIPO/GRTKF/IC/4/3 with reference to the USPTO’s Database of Native American Tribal Insignia (para. 139), the registration of traditional designs in Kazakhstan (para. 157), the use of trade marks and collective marks (paras 142 to 143); WIPO/GRTKF/IC/5/INF/2; Janke, Terri “Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions.”

- For instance, traditional knowledge (TK) *stricto sensu* could refer to the content or substance of traditional know-how, skills, practices and learning, while recognizing that this content or substance may be considered integral with traditional ways of expressing the knowledge and the traditional context in which the knowledge is developed, preserved and transmitted. This reflects the view that TK must refer to ‘knowledge’ in a general sense, but knowledge with a specifically traditional character. Protection would apply to the knowledge as such, and restrain the unauthorized use of the knowledge; this could include unauthorized disclosure of secret or sacred TK.
- Traditional cultural expressions (TCEs) could be used synonymously with *expressions of folklore* and generally in line with existing national *sui generis* laws on folklore and the UNESCO-WIPO model provisions, to mean tangible or intangible works or productions, and forms or expressions of traditional knowledge and traditional cultural heritage, which have the characteristics of a traditional heritage associated with a community. This reflects the way in which protection may be given to an expression as such, and not only to the content.
- Protection can also potentially apply to misleading or deceptive use of TK or TCE material or any related signs or symbols, and any use that falsely suggested an association with or endorsement by an indigenous or local community. This suggests that laws or specific IP rights may be developed that define or give notice of the distinctive reputation, signs and symbols of traditional communities and indigenous cultures (for instance, authenticity labels and certification marks, and prohibitions on the use of certain terms and symbols).

Definitions of TK and TCEs

63. The Committee considered several specific definitions of TK and TCEs/expressions of folklore which could form the basis for continued international work in this area. As there are no established definitions of TK internationally,⁷² the discussions focussed on some of the factors that should be included within a definition that is suitably general and flexible to accommodate the diverse range of cultural and legal traditions concerned, but could still serve as the basis of a form of IP protection. An analysis⁷³ of the definition issue and a survey of approaches to definition suggested that TK could be defined as knowledge which is:

- generated, preserved and transmitted in a traditional context;
- distinctively associated with the traditional or Indigenous culture or community which preserves and transmits it between generations;
- linked to a local or Indigenous community or other group of persons identifying with a traditional culture through a sense of custodianship, guardianship or cultural responsibility, such as a sense of obligation to preserve the knowledge, or a sense that

⁷² See the range of definitions cited in the Annex to document WIPO/GRTKF/IC/3/9

⁷³ See document WIPO/GRTKF/IC/3/9, at paragraph 35. At the fourth session of the IGC, the delegation of Switzerland noted that the elements as set out in that paragraph would be a good basis for further work in this area. See *Report*, WIPO/GRTKF/IC/4/15 at para. 135.

to permit misappropriation or demeaning usage would be harmful or offensive, a relationship that may be expressed formally or informally by customary law;

- knowledge in the sense that it originates from intellectual activity in a wide range of social, cultural, environmental and technological contexts; and
- identified by the community or other group as being traditional knowledge.

64. Some of the factors submitted to the Committee as being relevant to defining ‘traditional cultural expressions’ and ‘expressions of folklore’ included a similar requirement that they are expressions of cultural heritage that is generated and preserved in a traditional context. The expressions may be intangible, tangible or a combination of the two. The underlying traditional culture or folkloric knowledge from which the expression is derived is generally intangible (a legend or story may form part of the underlying intangible “folklore,” as well as certain motifs or patterns, whereas a painting of that legend or story in a traditional mode is a tangible expression of that folklore). Some legal systems distinguish between:

- pre-existing, underlying traditional culture (traditional culture or folklore *stricto sensu*), generally characterized as being traditional, related to culture, intangible, trans-generational, shared by one or more groups or communities, and of anonymous origin, inasmuch as the notion of authorship is relevant at all; and
- literary and artistic productions created by current generations of society and based upon or derived from pre-existing traditional culture or folklore (this latter category often being eligible for copyright protection).

The Unesco-WIPO Model Provisions of 1982 provided an inclusive and descriptive definition that covers intangible and tangible expressions, and affirms its basis in traditional culture. This definition has contributed to the updated definition now included in the draft provisions for the protection of TCEs/EoF.

WORKING DEFINITIONS:

TRADITIONAL CULTURAL EXPRESSIONS AND TRADITIONAL KNOWLEDGE

Directly based on the work of the Committee, the following working definitions of the key terms traditional cultural expressions and traditional knowledge have been developed and are under active review in the Committee. While not receiving consensus support in this form, they are based on extensive consultations and discussion, and have already been used as a guide for defining these key terms in many other policymaking processes.

“Traditional cultural expressions” or “expressions of folklore”:

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

- (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (ii) musical expressions, such as songs and instrumental music;

(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances;

whether or not reduced to a material form; and

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

which are:

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

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

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.

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.

Source: WIPO/GRTKF/IC/8/4, WIPO/GRTKF/IC/8/5

Mechanisms for protecting TK/TCEs

65. Beyond the question of definition and clarification of protected subject matter, the Committee discussed a wide range of mechanisms for the IP protection for TK/TCEs. These can be broadly categorized in three groups:

- existing IP systems applied to TK/TCE subject matter (such as copyright protection of traditional cultural works⁷⁴ and of “works derived from national folklore”⁷⁵ and patent protection of traditional medical knowledge⁷⁶);
- adaptations and *sui generis* elements of existing IP systems to ensure their application to TK/TCE subject matter (for instance, the incorporation of TK subject matter in the IPC,⁷⁷ the protection of indigenous text and imagery in trade mark

⁷⁴ For example, see Janke, Terri “Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions” available at:

<<http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>>.

⁷⁵ Section 1(3), Tunis Model Law on Copyright for Developing Countries (1976).

⁷⁶ For example, see “China Traditional Chinese Medicine Patents Databases” available at:

<<http://www.wipo.int/globalissues/databases/tkportal/index.html>>.

⁷⁷ See document IPC/CE/32/12, paras. 83 to 91.

- systems,⁷⁸ and the award of special damages associated with cultural offense in the breach of copyright in TCEs⁷⁹); and
- stand alone *sui generis* IP systems, whether for the protection of the content of TK as such,⁸⁰ for the protection of TCEs or expressions of folklore,⁸¹ or for both content and expression⁸²).

Policy choices for sui generis protection

66. Discussions in the IGC about the role and operation of *sui generis* systems for protection of TK and TCEs have been wide-ranging. The various surveys conducted of national experience with the use of conventional IP systems to protect TK or TCEs disclosed a range of perceived shortcomings, which may be relevant to the development of *sui generis* systems, for instance:

- (i) difficulty meeting formal requirements such as novelty or originality, and inventive step or non-obviousness (this may be due at least in part to the fact that TK or TCEs often date back prior to the time periods associated with conventional IP systems, or are developed in a more diffuse, cumulative and collective manner, making specific steps such as invention or authorship difficult to establish at a fixed time);
- (ii) requirements in many IP laws for protected subject matter to be fixed in material form (given that TK and TCEs are often preserved and transmitted by oral narrative and other non-material forms);
- (iii) the frequently informal nature of TK/TCEs and the customary laws and protocols that define ownership (or other relationship such as custody and guardianship) that forms the basis of claims of affinity and community responsibility;
- (iv) the concern that protection systems should correspond to a positive duty to preserve and maintain TK/TCEs, and not merely provide the means to prevent others from making unauthorized use (the characteristic function of IP rights);

⁷⁸ For example, see the provisions on the inappropriate registration of Maori text and imagery, WIPO/GRTKF/IC/4/INF/2, Annex II, paragraph 10ff; see also USPTO's Database of Official Insignia of Native American Tribes. See *supra* note 26.

⁷⁹ For example, see *M*, Payunka, Marika and Others v Indofurn Pty Ltd* (1994) 30 IPR 209. The Carpet Case, one of the subjects of the studies undertaken for WIPO by Ms. Terri Janke entitled "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions" available at <<http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>>.

⁸⁰ For example, Peru Law No. 27811 (Published On August 10, 2002); Portugal Decree-Law No. 118/2002, of April 20, 2002.

⁸¹ For example, WIPO-*Unesco* Model Provisions, 1982; Bangui Agreement, 1999; South Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture", 2002.

⁸² For example see documents WIPO/GRTKF/IC/4/INF/2, Annex IV and WIPO/GRTKF/IC/5/INF 3; Panama Law No. 20 of June 26, 2000, regulated by Executive Decree No. 12 of March 20, 2001, entitled "Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples, for the Protection and Defense of their Cultural Identity and their Traditional Knowledge, and Other Provisions"; Philippine Republic Act No. 8387 (October, 1997).

(v) the perceived tension between individualistic notions of IP rights (the single author or inventor), as against the tendency for TK/TCEs to be originated, held and managed in a collective environment, often making it difficult to identify the specific author, inventor or analogous creator that IP law is viewed as requiring); and

(vi) limitations on the term of protection in IP systems (calls for better recognition of TK/TCEs often highlight the inappropriate nature of relatively brief terms of protection in conventional IP systems, as interests and need for protection are seen as enduring beyond individual life-spans for TK and TCE subject matter).

67. Some of the practical case studies and reports of national experience have shown that these perceived shortcomings can be overcome in particular cases in which conventional IP systems have been used to protect TK or TCEs, whether by crafting more flexible laws, adapting them to the specific interests of the holders of TK/TCEs, or undertaking specific initiatives at the community level. Nonetheless, a debate continued on the need for a broader policy response to the concerns about IP protection of TK/TCEs. Some of the general issues that have arisen in this debate have included:

- The need for distinct and focussed *sui generis* approaches, for instance for the protection of folklore or traditional knowledge in a particular context (such as traditional medicinal knowledge or ecological knowledge⁸³) or responding to the need to express the elements of particular customary law, as against the need for an approach that is inclusive and comprehensive;
- The need to analyze and to clarify the scope of application of existing IP systems to TK and TCE subject matter, so as to shed light on the gaps in protection that may need to be filled by *sui generis* mechanisms;
- What mechanisms are needed to extend the reach internationally of *sui generis* legal measures defined either at the local, customary or national level;
- The need to weigh the benefits of formality and registration based systems, which provide legal certainty and clarity and give formal legal notice, against the benefits of informal systems, which do not require any positive action on the part of owners of TK/TCE related rights; and
- The implications of introducing new laws on TK or TCE protection, when this has the effects of creating retrospective claims

68. The Committee discussed at length the policy needs and possible means of *sui generis* protection of TK. A range of specific national experiences were reported,⁸⁴ and there was a wide-ranging debate on the policy choices that were available in relation to *sui generis* TK.

⁸³ For example, Portugal's Decree-Law No. 118, of April 20, 2002, document WIPO/GRTKF/IC/5/INF/2.

⁸⁴ See for example WIPO/GRTKF/IC/3/7, WIPO/GRTKF/IC/4/7 and WIPO/GRTKF/IC/5/7, and the detailed background material in WIPO/GRTKF/IC/5/INF/2,

To clarify the options and their various advantages and drawbacks, the following issues were identified as a useful analytical framework:⁸⁵

- (i) the policy objective of TK protection;
- (ii) the subject matter of protection;
- (iii) the criteria that subject matter had to meet to be protected;
- (iv) the owners of rights in protected TK;
- (v) the nature and legal effect of these rights;
- (vi) how rights are acquired;
- (vi) how rights are administered and enforced; and
- (vii) how rights are lost or expire (if at all).

69. Document WIPO/GRTKF/IC/5/8 provides a detailed account of the policy options that have been explored on each of these issues, drawing also on reporting and analysis in previous documents.⁸⁶ This illustrated that the way TK was defined and the nature of the rights extended depended to some extent on the policy aims of the protection system. For instance, protection systems may be focussed on traditional ecological knowledge (or TK associated with genetic resources) or on traditional medical knowledge.⁸⁷ Important practical questions included the need for rights to be clear and enforceable; the creation of structures for ownership of rights that reflect community expectations and customary law systems; the balance between clear notice about the existence and scope of rights, such as through registration systems, and the availability of rights without formalities; and the implications of rights with retrospective effect.

70. The *sui generis* systems for TK protection reported to the Committee illustrate a diversity of approaches to the issues cited above.⁸⁸ The subject matter of *sui generis* TK protection could be restricted to specific areas of policy interest, such as biodiversity-related TK, TK associated with plant genetic resources, or medicinal knowledge, or it could be extended to TK in a more general sense. The criteria to determine whether subject matter should be eligible for protection included a sense of traditional cultural identification, the susceptibility of the TK for commercial use, and novelty (either novelty in the technical or patent sense, or novelty in the commercial sense). Rights under *sui generis* TK systems were typically held in a collective manner by indigenous and local communities, defined in various

⁸⁵ Initially in document WIPO/GRTKF/IC/3/8, and applied subsequently in documents WIPO/GRTKF/IC/4/8 and WIPO/GRTKF/IC/5/8, as well as in broader discussion in the Committee.

⁸⁶ For example, see documents WIPO/GRTKF/IC/2/9; WIPO/GRTKF/IC/3/7; WIPO/GRTKF/IC/3/8; WIPO/GRTKF/IC/4/7; WIPO/GRTKF/IC/4/8; based on 61 responses to the “Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge” (WIPO/GRTKF/IC/2/5) and “Revised Questionnaire for the Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge” (WIPO/GRTKF/IC/Q.1).

⁸⁷ For example, see WHO Traditional medicine strategy 2002-2005 (document WHO/EDM/TRM/2002); WIPO/GRTKF/IC/3/6, para. 28; WIPO/GRTKF/IC/3/17, para. 160.

⁸⁸ See in particular the four systems reported in detail in document WIPO/GRTKF/IC/5/7 and attached to document WIPO/GRTKF/IC/INF/2 in Annex III;

ways according to national law and circumstances. In some instances, individuals may also be recognized as right holders in their own right. One issue was whether, and if so how, foreign nationals may be recognized as right holders – by analogy with other areas of IP rights, this may be determined through application of the principle of national treatment or through reciprocity. The range of rights made available under *sui generis* TK systems varied considerably, but could be broadly categorized as copyright style rights (rights to prevent or authorize reproduction, and rights of attribution) or patent style rights (rights to prevent or authorize use or exploitation, such as commercial or research usage). Rights could variously be acquired automatically, without taking specific formal steps, or through a formal registration system, involving formal or substantive examination. Reported legal sanctions available included a range of administrative, civil and criminal measures. The duration of rights in the systems reported to the Committee could be indefinite (although subject to loss in certain circumstances), or for fixed terms.

71. The development of new standards of protection, under a *sui generis* approach, raised two broader issues related to social costs. The first issue concerns proportionality between the social gains derived from TK protection and social costs of establishing legal and administrative systems. Because TK protection is often viewed in more than utilitarian terms and is often expressed in terms of human rights and equity, a close calculation of the cost/benefit equation may not be appropriate. Nonetheless, the need for systems to be essentially workable and not burdensome has been an important consideration, both in terms of promoting accessibility and utility to TK holders, but also to reduce costs to society. The experience of those Committee Members that have adopted *sui generis* mechanisms for the protection of TK⁸⁹ suggests that some formal recognition of protected subject matter may be preferred, for the sake of legal security, but such formalities should be kept as much simple as possible. Greater use of such systems, and greater experience with their operation in broader contexts, including through successful benefit-sharing and other commercial arrangements, may disclose the need over time for more elaborate or precise legal mechanisms, just as other areas of IP law have evolved in the light of changing needs and operating environment.

72. A second issue concerned the degree to which *sui generis* TK systems should build on existing IP law and legal concepts. There are distinctive demands on *sui generis* TK systems: they are naturally more imbued with direct social and cultural objectives than standard IP regimes, and bolster the cultural identity of indigenous and local communities, and there is concern that this should not be done in a reductive manner. However, the creation of a parallel IP jurisprudence may create legal uncertainties with negative impact for TK holders. One approach to minimize this risk is to sustain and adapt well established legal principles, such as those that prevail in standard IP: “[u]sing available [statutory] elements has the advantage of avoiding uncharted waters. Moreover, concerns with biopiracy and transaction costs in the areas of expressions of folklore and biodiversity-associated traditional knowledge are better (if not only) overcome by resorting to the adaptation of tested systems, and the legal principles that they contain.”⁹⁰ The recent experience of WIPO Member States, as notified to the Committee, suggests that *sui generis* systems can be mirrored in standard IP regimes, rather being created entirely separately from scratch. This enables the use of such measures such as: attributing the authority for registering and managing records of registered TK to the same governmental agency in charge of registering IP rights; providing for conditions of

⁸⁹ See documents WIPO/GRTKF/IC/5/7 and WIPO/GRTKF/IC/INF/2.

⁹⁰ See document WIPO/GRTKF/IC/3/8, paragraph 58.

registrability or eligibility for protection that are similar to conditions of protection of standard IP rights, such as novelty (be it technical or commercial) and inventorship (although collective);⁹¹ and setting the scope of effective rights and the means for their enforcement in a way that is common, or at least parallel, to those that apply to general IP infringement.

Protection of TCEs

73. The IP protection of TCEs, which have both cultural and economic dimensions, raises several questions concerning the relationship between IP and the preservation of cultural heritage, the promotion of multiculturalism and cultural diversity and the stimulation of creativity and innovation as ingredients of sustainable economic development. These questions formed the backdrop for continued examination of the uses and limits of existing IP and for the review of *sui generis* options.⁹²

74. Reflecting the wide range of practical experience already gained with the legal protection of folklore in national legal systems, the Committee's discussions of *sui generis* systems for the protection of TCEs extensively reviewed these national experiences⁹³ and also drew on the UNESCO-WIPO Model Provisions as an important international reference point. *Sui generis* protection of TCEs was often closely linked to the copyright system, either as a *sui generis* element within copyright law, or as a distinct but complementary law linked to copyright law. The Committee's work on TCEs has however been marked by a broader perspective and its examination of TCE protection has encompassed also performers' rights, trademarks, including certification and collective marks, industrial designs, geographical indications, patents and unfair competition (see WIPO/GRTKF/IC/5/3).

75. Discussion on the policy options and the range of national experiences was wide-ranging, and the following issues were identified as a way of structuring consideration of *sui generis* approaches:

- (i) policy context and objectives;
- (ii) subject matter (scope of protection);
- (iii) criteria the subject matter must meet as a condition for its protection;
- (iv) holder of the rights;
- (v) rights conferred, including exceptions and limitations;
- (vi) procedures and formalities, if any, for the acquisition and maintenance of the rights conferred;
- (vii) responsibilities of new or existing authorities, associations and other institutions to exercise and/or manage the rights;
- (viii) sanctions and enforcement procedures;

⁹¹ This means that a community that has not developed an element of TK cannot claim property rights in that element; only the community (or communities) that have indeed contributed to its creation can.

⁹² See document WIPO/GRTKF/IC/5/3.

⁹³ See document WIPO/GRTKF/IC/3/10 based on the 64 responses to Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore (WIPO/GRTKF/IC/2/7).

- (ix) how rights are lost and expire;
- (x) interaction between the *sui generis* system and IP and other laws, such as cultural heritage laws, especially the extent to which they overlap or complement each other;
- (xi) incorporation and/or recognition of any relevant customary laws and protocols;
- (xii) regional and international protection, including the question of the protection of the same or similar cultural expressions from neighboring countries (so-called “regional folklore”); and
- (xiii) transitional arrangements.

76. At the Committee’s fourth session, a panel discussion analyzed and contrasted a range of national and regional approaches to the protection of folklore or TCEs according to each of these issues.⁹⁴ The experience gained from a range of national approaches and case studies has been compiled and distilled in a series of working documents, such as WIPO/GRTKF/IC/5/3.⁹⁵ The information obtained from this panel discussion and from case-studies has been compiled in the form of an analytical and comparative table, which uses the above list of issues as its framework, available as WIPO/GRTKF/IC/5/INF/3.

77. A key question in regard to TCEs is whether IP protection available for only contemporary, tradition-based cultural expressions is adequate in meeting intellectual property and cultural policy objectives. As discussed in WIPO/GRTKF/IC/5/3, does it best serve creativity and development? Does it best serve cultural diversity and heritage preservation? While some States believe that existing IP strikes the right balance, others argue for the establishment of some forms of protection over pre-existing cultural heritage which is currently, from the IP perspective at least, in the public domain. However, calls for blanket protection for all forms of public domain TCEs raise a number of challenges, such as how to accommodate indefinite terms of protection, how best to manage such new rights, how non-traditional cultural expressions would be dealt with, how beneficiary communities would be identified and how individuals who continue to practice their traditions but live outside their communities would be treated, and how prior uses of TCEs would be addressed.

78. The possibility for the defensive protection for only certain TCEs, such as sacred TCEs and/or other specific TCEs identified through registration, as well as the use of consumer protection and labeling laws, was also discussed. Clarity on the distinction between preservation and safeguarding of cultural heritage, on the one hand, and IP protection for TCEs, on the other, was also identified as a key issue. (These matters are fully set out and discussed in a series of studies considered by the Committee, such as documents WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.)

⁹⁴ For example, see documents WIPO/GRTKF/IC/4/INF/2; WIPO/GRTKF/IC/4/INF/3; WIPO/GRTKF/IC/4/INF/4; WIPO/GRTKF/IC/4/INF/5; WIPO/GRTKF/IC/4/INF/5 Add.

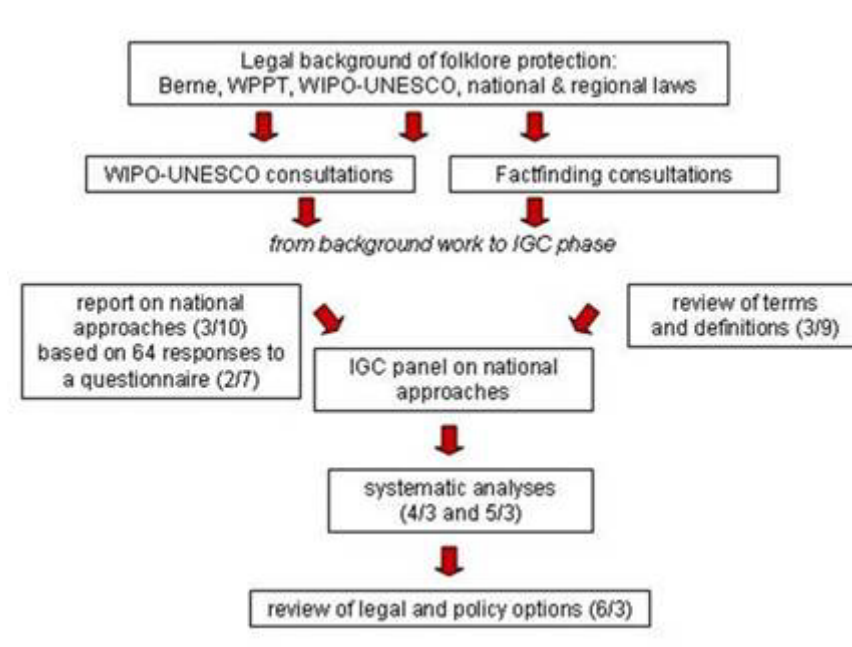
⁹⁵ See also documents WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/4/4

VII. DEVELOPMENT OF DRAFT OBJECTIVES AND PRINCIPLES

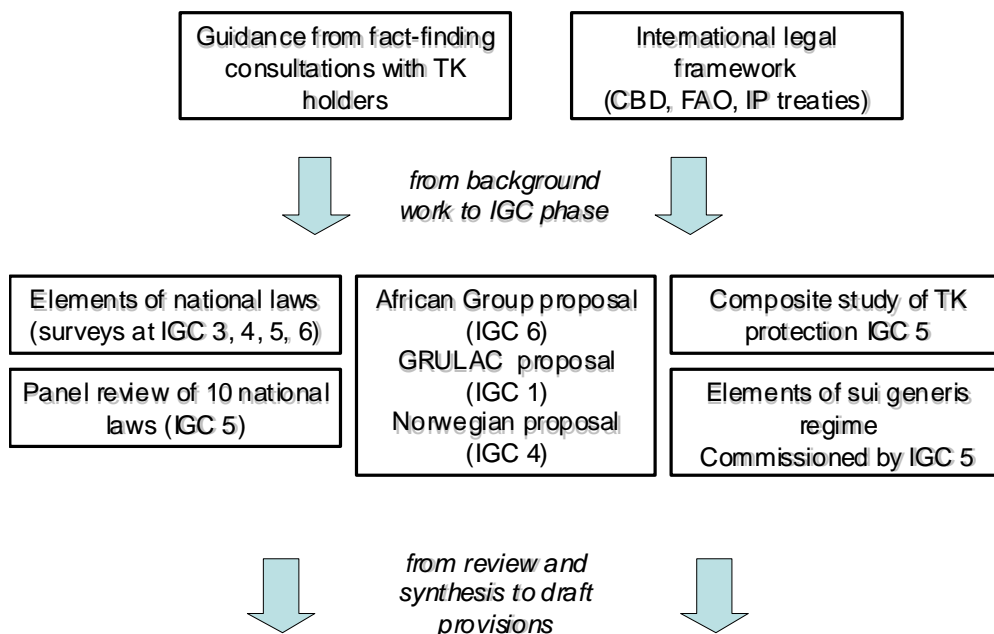
79. The Committee has extensively reviewed legal and policy options for the protection of TCE/EoF and TK. This work has built on extensive international, regional and national experience with the protection of TCEs/EoF, which dates back several decades, and more recent initiatives to protect TK. This review has covered comprehensive analyses of existing national and regional legal mechanisms, panel presentations on diverse national experiences, common elements of protection of TCEs/EoF and TK, case studies, ongoing surveys of the international policy and legal environment as well as key principles and objectives of the protection of TCEs/EoF and TK that received support in the Committee's earlier sessions.

80. At its sixth session, the Committee reviewed the issues and range of experience with the protection of TCEs/EoF and TK which had reflected its previous work and decided to develop two complementary sets of policy objectives and core principles for the protection of TCEs/EoF and TK. On the basis of guidance provided by the Committee and the wide range of national and regional approaches reported to the Committee, these draft sets of objectives and principles were provided for the Committee to consider at its seventh session. An intersessional commentary process, drawing extensive comments from a wide range of Member States and Committee observers, provided further guidance for the revision of the draft objectives and principles that was considered at the eighth and ninth sessions. At its ninth session, the Committee extensively considered and discussed the revised draft objectives and principles.

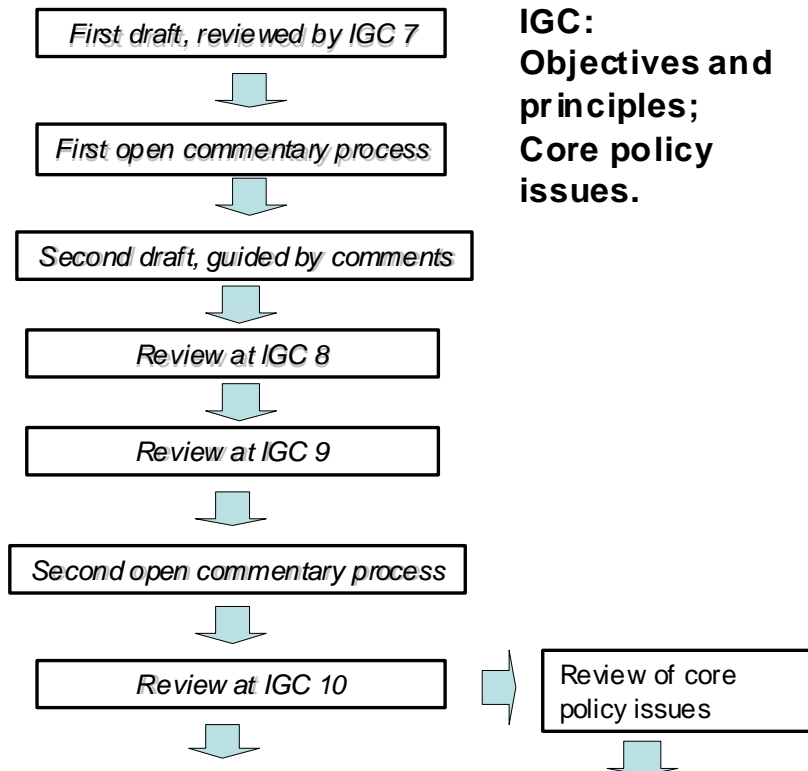
Background to the development of draft objectives and principles on TCE protection:



Background to the development of draft objectives and principles on TK protection:



Development of the draft objectives and principles on TCE and TK protection:



Implementing the objectives and principles through policy options and legal mechanisms

81. At its sixth session, the Committee also requested the Secretariat to prepare two complementary outlines of the policy options and legal mechanisms for the protection of TCEs/EoF and 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 drafts at its seventh session 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 drafts at its ninth session (WIPO/GRTKF/IC/9/INF/4 and WIPO/GRTKF/IC/INF/5).

VIII. SUBSTANCE AND CONTENT OF THE OBJECTIVES AND PRINCIPLES

82. 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.

83. These texts were prepared without prejudging their status or legal implications. They do, 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 TCEs/EoF and 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. The recurring issues include the following:

- (a) nature of the subject matter of TCEs/EoF and TK, and possible descriptions or definitions;
- (b) criteria for protection of subject matter;
- (c) identity of owners, bearers or custodians of TCEs/EoF and 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 such questions as cultural heritage, rights of indigenous peoples, and cultural policy;
- (i) transitional measures, retroactivity of protection and the role and status of the public domain;
- (j) international and regional protection;
- (k) recognition of foreign right holders and other foreign beneficiaries of protection.

WHAT FORM OF PROTECTION? DRAFT OBJECTIVES AND PRINCIPLES ON TCES

84. As a distillation of the forms of IP related protection of TCES/EoF discussed within the Committee, the form of protection outlined in the provisions has the following general characteristics:

(a) The subject matter of protection is “traditional cultural expressions” or “expressions of folklore”, two terms which are intended to be interchangeable, in view of the different practice internationally. The specific choice of terms would be determined at the national and regional levels (see draft Article 1).

(b) TCES/EoF include tangible and intangible forms in which traditional culture and knowledge are expressed, communicated, appear or are manifested. They may be verbal expressions or symbols, musical expressions, expressions by action, such as dances and other performances, and tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms (see draft Article 1).

(c) To be eligible for specific protection, TCES/EoF would need to meet three criteria. They should be: the products of creative intellectual activity, including individual and communal creativity; characteristic of a community’s cultural and social identity and cultural heritage; and, maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community (see draft Article 1).

(d) Protection of TCES/EoF would benefit indigenous peoples and traditional and other cultural communities who have custody, care and safeguarding of TCES/EoF in accordance with their customary law and practices; and who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage. The term “communities” is broad enough to include also the nationals of an entire country, a “nation”, in cases where TCES/EoF are regarded under national law and custom as “national treasures” and belonging to all the people of a particular country (see draft Article 2).

(e) Acts of misappropriation of such protected TCES/EoF are defined at three optional levels (see draft Article 3):

TCES/EoF ‘of particular cultural or spiritual value or significance’, if registered or notified, would be protected against a wide range of uses and forms of reproduction and dissemination without the free, prior and informed consent (FPIC) of the community concerned. They would also be protected against failure to acknowledge the source of the TCES/EoF and distortion, mutilation or other modification of, or other derogatory action as well as the acquisition or exercise of IP rights over TCES/EoF or adaptations of them. Protection would also be available against the use of words and symbols that creates a misleading or disparaging link with the concerned community;

Other TCEs/EoF (which are not registered or notified, but which still have the required linkage with the community concerned) would be protected through regulation of how they may be used by third parties. Such uses, which would not require free, prior and informed consent, should be made in such a way that ensures the relevant community is identified as appropriate, prevents distortion, mutilation or other modification of, or other derogatory action, as well as false, confusing or misleading linkages with the concerned community, and makes provision for equitable remuneration or benefit sharing when the use or exploitation is for gainful intent;

Secret TCEs/EoF would be protected against unauthorized disclosure, subsequent use, and the acquisition and exercise of IP rights by third parties.

(f) Prior authorizations to use TCEs/EoF, where required (see the three optional levels of protection above), would be obtained either directly from the community concerned or from an agency acting at the request of and on behalf of the community. This choice would be left to national law. The agency, which could be an existing office or authority, would also have additional awareness raising, educational and advisory functions (see draft Article 4).

(g) Exceptions and limitations are set out to ensure the continuing customary use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community. Exceptions or limitations would also apply to illustration for teaching and learning; non commercial research or private study; criticism or review; reporting news or current events; use in the course of legal proceedings; making of recordings and other reproductions for archives or inventory for non commercial cultural heritage safeguarding; and incidental uses. In confirmation that national laws might wish to allow all nationals to use TCEs/EoF, as discussed above on the question of “Beneficiaries”, national measures for the protection of TCEs/EoF might also allow unrestricted access and sue by all nationals of a country (see draft Article 5).

(h) Protection would continue for as long as TCEs/EoF continue to meet the criteria for protection, including the required linkages with an eligible community. Specific provisions on term could be put in place for registered TCEs/EoF (see (e) above) and secret TCEs/EoF (see (e) above) (see draft Article 6).

(i) As a general principle, protection would not be subject to any formality, although the stronger protection for specific TCEs/EoF of particular cultural or spiritual value or significance would require some form of notification or registration. Such registration is optional and would secure a higher level of protection. Non registered TCEs/EoF remain protected but at a less high level. When registration or notification involves recording or other fixation of TCEs/EoF, the resulting IP rights would be held by the relevant community. The office receiving applications for registration should seek to resolve disputes as to which communities are entitled to register which TCEs/EoF (see draft Article 7).

(j) Regarding past and ongoing uses of TCEs/EoF, these should be brought into conformity with the provisions within a reasonable time, subject to respect for acquired rights (see draft Article 9).

(k) The protection provided for in the draft provisions complements and does not replace the protection already available under conventional IP systems, as well as laws and programs for the preservation and promotion of cultural heritage (see draft Article 10).

(l) International and regional protection would be achieved on the basis of a “national treatment” approach (see draft Article 11 and “Addressing the international dimension” following).

WHAT FORM OF PROTECTION? DRAFT OBJECTIVES AND PRINCIPLES ON TK

85. 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

86. The Committee has decided to deal with the international dimension integrally with its work on the protection of TK and TCEs/EoF. 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.

87. 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 TK or TCEs/EoF of one country are to be recognized under the law of another country.

Addressing the national dimension

88. As other policy and legislative processes continue to address these issues, further experience has accumulated with protection of TK and TCEs/EoF. 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 TCEs and TK at the national and regional levels was set out in document WIPO/GRTKF/IC/7/4 and WIPO/GRTKF/IC/7/6, and the revised and updated documents, WIPO/GRTKF/IC/9/INF/4 and WIPO/GRTKF/IC/9/INF/5.

89. These supplementary documents therefore provide additional information on how national and regional processes are implementing objectives and principles, and taking specific policy choices, for protection of TCEs and TK. 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 IGC's draft provisions.

IX. OVERVIEW OF INTERGOVERNMENTAL COMMITTEE OUTCOMES

Clarifying norms, principles and practical tools for TK and TCE protection:

90. This section presents the main elements of the Committee's work to date, setting out its outcomes according to its three broad themes. This work has yielded a detailed, integrated set of materials that draw together a wide range of national experience with IP protection of TK and TCEs, which at once provides a consolidated foundation for international discussions on new or adapted IP protection systems, and provides an informed basis for capacity building and national policymaking processes.

Traditional knowledge

91. The Committee developed a series of studies on legal protection of TK, based on some 61 responses to two questionnaires.⁹⁶ This included surveys of national experiences with IP protection of TK,⁹⁷ analysis of the elements of a *sui generis* TK system,⁹⁸ analysis of the definition of TK,⁹⁹ and a composite study distilling this material into a single document.¹⁰⁰ These documents included details of the relatively small number of national *sui generis* laws for protection of TK, and the range of experiences reported using IP laws (*sui generis* and otherwise) to protect TK. These materials are available both as the basis for continuing

⁹⁶ See document WIPO/GRTKF/IC/2/7 and WIPO/GRTKF/IC/Q.1

⁹⁷ See documents WIPO/GRTKF/IC/2/9, WIPO/GRTKF/IC/3/7, WIPO/GRTKF/IC/4/7 and WIPO/GRTKF/IC/5/7

⁹⁸ See documents WIPO/GRTKF/IC/3/8 and WIPO/GRTKF/IC/4/8

⁹⁹ See document WIPO/GRTKF/IC/3/9

¹⁰⁰ See document WIPO/GRTKF/IC/5/8

international policy discussions on specific TK protection, and to support national policymaking and the assessment of practical options both for the use of existing IP tools and the development of new forms of IP protection.

92. The Committee gave extensive consideration to the use of databases, registries and other collections and inventories for the protection of TK, and this discussion clarified that databases could be used for the preservation, positive protection and defensive protection of traditional knowledge (as well as related TCEs and information about related genetic resources, both of which could form part of the material recorded and preserved in a database). The role of databases for the positive protection of TK was shown in the use of databases with security or access controls which give effect to customary laws and protocols governing the authorized access and distribution of knowledge.¹⁰¹ A database of patents granted on traditional medical knowledge illustrated another way of linking positive protection and TK databases.¹⁰²

93. Extensive analysis was also given to the use of databases and other collections of information in the context of general defensive protection strategies. This focussed on approaches to ensuring that existing TK was taken into account in the patent examination process. Based on responses to widely distributed questionnaires, inventories of relevant on-line databases¹⁰³ and periodicals¹⁰⁴ were developed to assist in the creation of tools for more ready access to publicly disclosed TK in searches for relevant prior art. This in turn led to the creation of a TK portal as a pilot version of a potential searching tool for patent examiners.¹⁰⁵ The purpose of this was not to induce the disclosure of TK, but to ensure that any TK already disclosed would be taken into account when potentially relevant patent claims were being assessed. This approach has been taken further in forums beyond the Committee, with steps being taken to enhance the coverage of documented TK in the minimum documentation of the Patent Cooperation Treaty (PCT) system¹⁰⁶ and to expand the International Patent Classification to provide for more accurate and focussed searching for relevant TK during the patent examination process.¹⁰⁷

94. A further defensive mechanism that was considered by the Committee concerned the use of disclosure requirements in the patent system to ensure disclosure of TK (and potentially also its origin and the legal circumstances surrounding its access) that is used in the development of a claimed invention. This was studied in conjunction with comparative defensive measures concerning genetic resources used in inventions (discussed below).

95. The Committee's discussions on TK protection considered the wide range of potential applications of databases, registries and other collections as both positive and defensive protection tools: this ranged from databases or registries which contained information about IP rights over TK subject matter (granted under conventional or *sui generis* IP systems),

¹⁰¹ See document WIPO/GRTKF/IC/3/17, para. 158.

¹⁰² See document WIPO/GRTKF/IC/3/17, para 160.

¹⁰³ See document WIPO/GRTKF/IC/3/6.

¹⁰⁴ See document WIPO/GRTKF/IC/3/5.

¹⁰⁵ The TK Portal of Online Databases:

<http://www.wipo.int/globalissues/databases/tkportal/index.html>

¹⁰⁶ See documents PCT/CTC/20/5; PCT/MIA/7/3 and PCT/MIA/7/5.

¹⁰⁷ See document IPC/CE/32/12.

through databases establish to preserve TK subject to strictly limited access based on customary protocols, to databases which may be entitled to distinct *sui generis* protection (either of the database itself or of its individual elements), and databases that facilitate access for patent examiners to TK already in the public domain.

96. This discussion also highlighted concerns about the need to clarify the purpose and the implications of documentation of TK and the inclusion of TK onto databases. Committee members expressed concern that when TK is documented and then published, the rights and interests of TK holders may be weakened or prejudiced, often before the full implications of documenting and especially of publishing the TK had been made clear. Given the wide range of TK documentation projects currently planned or under way, aimed at diverse goals (ranging from preservation to various forms of positive and defensive protection), and the potential damage to TK holders' interests and cultural integrity that may arise from documentation of TK, the Committee endorsed the development of a toolkit for the management of the IP implications of TK documentation.¹⁰⁸ This is being developed with extensive consultation with TK stakeholders and in coordination with other international initiatives, so that traditional communities may be in a stronger position to identify and defend their IP-related interests in advance of any documentation project.

97. Subsequent work of the Committee looked closely at what the protection of TK entailed, at two levels focused on the development of legal and policy options for the protection of TK (WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/6/3Add.), and of policy objectives and core principles for the protection of TCEs (WIPO/GRTKF/IC/7/3). This latter document was the subject of an open commenting process, which led to the development of a next draft of the document (WIPO/GRTKF/IC/8/4). The draft objectives and principles in document WIPO/GRTKF/IC/8/4 were carried forward for discussion, unchanged as per the decisions of the next three Committee sessions (WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/10/4 and WIPO/GRTKF/IC/11/4(c)). Document WIPO/GRTKF/IC/9/4 was also subject to a second commenting process and the comments received were made available online and published in WIPO/GRTKF/IC/11/4(b). At the 10th session of the Committee the Committee initiated a parallel and related discussion of a "List of Issues" relating to the protection of TCEs, and invited responses to the List. The responses to the List of Issues were published in WIPO/GRTKF/IC/11/4(a).

Traditional knowledge: key outcomes in summary:

- objectives and principles for the protection of traditional knowledge ('draft provisions')
- policy options and legal mechanisms for the protection of traditional knowledge
- review of existing intellectual property protection of traditional knowledge
- elements of a *sui generis* system for the protection of traditional knowledge

¹⁰⁸ See documents WIPO/GRTKF/IC/4/5 and WIPO/GRTKF/IC/5/5.

- comparative summary of *sui generis* legislation for the protection of traditional cultural expressions
- composite study on the protection of traditional knowledge
- overview of legal and policy options: traditional knowledge
- inventory of TK related publications for reference as prior art
- recommendations for taking account of TK in patent examination
- survey of patent office practice in examining TK-related patent documents

Key outcomes dealing with TK and genetic resources together:

- standard on databases and registries of traditional knowledge and biological/genetic resources
- toolkit for managing intellectual property when documenting traditional knowledge and genetic resources
- practical mechanisms for the defensive protection of traditional knowledge and genetic resources within the patent system
- technical study on disclosure requirements related to genetic resources and traditional knowledge

Traditional cultural expressions/expressions of folklore

98. The Committee's work on TCE protection included a report of national approaches to the legal protection of folklore and TCEs (WIPO/GRTKF/IC/3/10), based on 64 responses to a questionnaire (WIPO/GRTKF/IC/2/7). On the basis of this work, the Committee commissioned a systematic analysis of national experiences, key concepts and legal and policy options, which was prepared in a preliminary form (as WIPO/GRTKF/IC/4/3) and an updated form (WIPO/GRTKF/IC/5/3). Further practical information on legal protection of expressions of traditional culture and folklore was provided in a series of presentations to the Committee on national and regional experiences (WIPO/GRTKF/IC/4/INF/2 to 5), including the recently-developed Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture presented by the Secretariat of the Pacific Community. Approaches to defining TCEs and folklore were also reviewed in detail (WIPO/GRTKF/IC/3/9).

99. This material is available as a distillation of practical experience with the IP protection of TCEs for any future discussions on international directions for the protection of TCEs or folklore, within the Committee or in other forums. Yet it also forms a practical resource for enhanced legal-technical assistance for the establishment, strengthening and effective

implementation of existing systems and measures for the legal protection of expressions of folklore at the national level,¹⁰⁹ and for the current development of a WIPO Practical Guide on the legal protection of TCEs and related technical TK.¹¹⁰ Further case studies have been developed and published¹¹¹ as source materials both for any future normative discussions and for capacity-building activities. Additional empirical data and information on national legal experiences will be available in the form of a practical case study on relationship between customary laws and protocols and the formal intellectual property system.¹¹²

100. Subsequent work of the Committee focused on the development of legal and policy options for the protection of TCEs (WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/6/3Add.), and of policy objectives and core principles for the protection of TCEs (WIPO/GRTKF/IC/7/3). This latter document was the subject of an open commenting process, which led to the development of a next draft of the document (WIPO/GRTKF/IC/8/4). The draft objectives and principles in document WIPO/GRTKF/IC/8/4 were carried forward for discussion, unchanged as per the decisions of the next three Committee sessions (WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/10/4 and WIPO/GRTKF/IC/11/4(c)). Document WIPO/GRTKF/IC/9/4 was also subject to a second commenting process and the comments received were made available online and published in WIPO/GRTKF/IC/11/4(b). At its tenth session the Committee initiated a parallel and related discussion of a “List of Issues” relating to the protection of TCEs, and invited responses to the List. The responses to the List of Issues were published in WIPO/GRTKF/IC/11/4(a).

Traditional cultural expressions: key outcomes in summary:

- objectives and principles for the protection of expressions of folklore/traditional cultural expressions (‘draft provisions’)
- policy options and legal mechanisms for the protection of expressions of folklore/traditional cultural expressions
- report, survey and systematic analysis of national experiences with the legal protection of expressions of folklore
- comparative summary of sui generis legislation for the protection of traditional cultural expressions
- overview of legal and policy options: traditional cultural expressions/expressions of folklore
- creative heritage: resource database and development of best practices for archiving and digitizing TCEs

¹⁰⁹ See Task 1 of document WIPO/GRTKF/IC/3/10, para. 156, with subsequent progress reported in documents WIPO/GRTKF/IC/4/4 and WIPO/GRTKF/IC/5/4.

¹¹⁰ See Task 3 of document WIPO/GRTKF/IC/3/10, para. 168.

¹¹¹ See WIPO/GRTKF/STUDY/1; WIPO/GRTKF/STUDY/2.

¹¹² See Task 4 of document WIPO/GRTKF/IC/3/10, para. 171.

Genetic resources

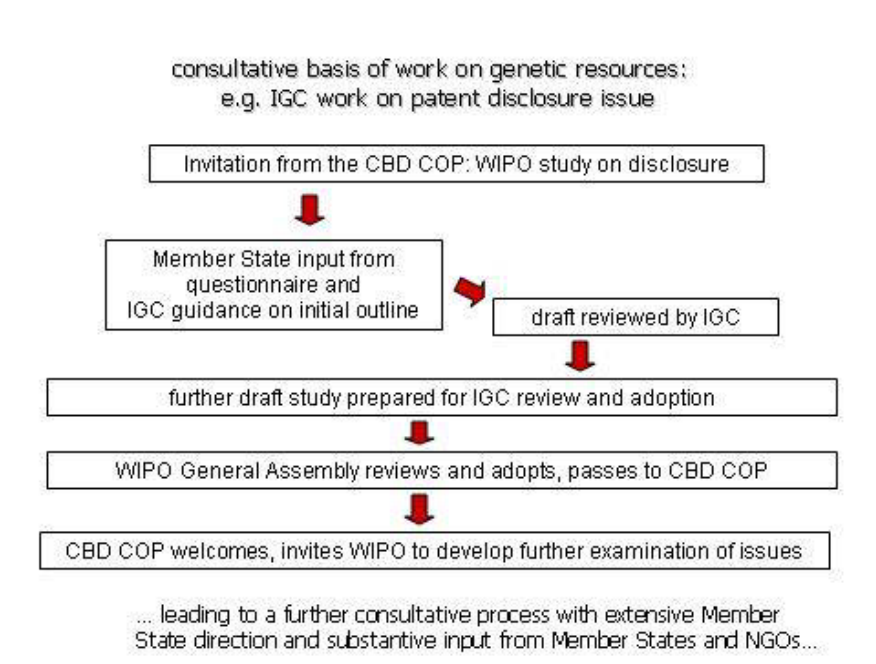
101. The work of the Committee on IP aspects of genetic resources took two general directions. First, it considered licensing practices concerning IP aspects of access to genetic resources; and second, it considered the role of patent disclosure requirements in relation to inventions that are based on access to genetic resources.

102. Document WIPO/GRTKF/IC/2/3 considered operational principles for intellectual property clauses of contractual agreements concerning access to genetic resources and benefit-sharing. Further study of IP and genetic resources licensing was based on a widely-circulated survey (document WIPO/GRTKF/IC/Q.2) and the development of a database of contractual practices (based on a proposal in document WIPO/GRTKF/IC/3/4). This process had two complementary objectives: first, to create a practical tool so as to provide actual information on contracts concerning access to genetic resources to those with a practical or policy need to consider the range of licensing practices that have been employed; and second, to provide an empirical basis for proposed work towards developing guidelines or principles on the IP aspects of licensing access to genetic resources. Document WIPO/GRTKF/IC/5/9 provides a discussion on this process and some interim insights developed to date, and the on-line database has been commissioned gives access in three languages to details of relevant contracts that have been provided in the course of this survey.

103. Building on earlier work within WIPO, and responding also to a request from the Conference of Parties of the Convention on Biological Diversity (CBD),¹¹³ the Committee requested a technical study on disclosure requirements in patent law that were relevant to traditional knowledge or genetic resources used in the course of developing a claimed invention. An initial report (document WIPO/GRTKF/IC/4/11) and a draft study (document WIPO/GRTKF/IC/5/11) were developed for the Committee's consideration; these documents considered the interaction between legal systems governing access to TK and genetic resources on the one hand and established patent law in line with existing international standards, and aim at providing input for policymakers. Following the adoption of this technical study by the WIPO General Assembly, it was forwarded to the CBD Conference of Parties which welcomed the study and invited further work on this issue by WIPO.

104. The Committee also took up further work on guidelines for dealing with IP aspects of mutually agreed terms for access and benefit sharing, based on the principles identified by the Committee during its first sessions. Successive drafts were reviewed by the Committee, and this material has also been used as a point of reference for capacity-building activities at the national level.

¹¹³ See document WIPO/GRTKF/IC/4/11 for details of earlier WIPO work and the CBD request.



Genetic resources: key outcomes in summary:

Apart from those listed above which deal with GR together with TK, the outcomes include:

- guidelines on intellectual property aspects of access to genetic resources and benefit-sharing
- database of provisions for intellectual property aspects of access to genetic resources and benefit-sharing

General outcomes or cross-cutting resources:

- review of operational terms and definitions
- analysis of and practical options for the international dimension of protection of traditional knowledge, traditional cultural expressions and genetic resources
- database of laws and legislative mechanisms for protection of traditional knowledge, traditional cultural expressions and genetic resources

A graphic overview of the IGC's outcomes is attached as Appendix I.

X. RELATIONS WITH OTHER INTERNATIONAL PROCESSES

105. A feature of the work of the Committee has been cooperation and coordination with other international processes, reflecting the need for such coordination that has been repeatedly stressed by Member States. This section highlights a number of coordination initiatives, not as an exhaustive list but as an illustration of how this process has worked in practice.

United Nations Educational Scientific and Cultural Organization (UNESCO)

106. Unesco has undertaken several initiatives at the international, regional and national levels concerning the identification, conservation, preservation and dissemination of expressions of folklore (or, as is referred to in Unesco's activities, "intangible cultural heritage" and/or "traditional culture and folklore"). These are described in WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/9/INF 4.

107. WIPO and Unesco's cooperation on this matter dates back to the development and adoption in 1982 of the Model Provisions¹¹⁴, developed in response to concerns that expressions of folklore, which represent an important part of the living cultural heritage of nations, were susceptible to various forms of illicit exploitation and prejudicial actions. Several countries have used the Model Provisions as a basis for national legal regimes for the protection of folklore. Many of these countries have enacted provisions for the protection of folklore within the framework of their copyright laws.¹¹⁵

108. A number of participants stressed at the meeting of the Committee of Governmental Experts which adopted the Model Provisions that international measures would be indispensable for extending the protection of expressions of folklore of a given country beyond the borders of the country concerned. WIPO and UNESCO jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property, which met in December, 1984, to consider the need for a specific international regulation on the international protection of expressions of folklore by intellectual property and the contents of an appropriate draft.

109. However, the great majority of the participants considered it premature to establish an international treaty since there was not sufficient experience available as regards the protection of expressions of folklore at the national level, in particular, concerning the implementation of the Model Provisions. Two main problems were identified by the Group of Experts: the lack of appropriate sources for the identification of the expressions of folklore to be protected and the lack of workable mechanisms for settling the questions of expressions of folklore that can be found not only in one country, but in several countries of a region. The Executive Committee of the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention, at their joint sessions in Paris in June 1985, considered the report of the Group of Experts and, in general, agreed with its findings. The overwhelming majority of the participants was of the opinion that a treaty for the protection of expressions of

¹¹⁴ "Model Provisions for the National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions" (1982). See also document WIPO/GRTKF/IC/3/10.

¹¹⁵ See documents WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/4/3.

folklore was premature at that time. If the elaboration of an international instrument was to be realistic at all, it could not be more than a sort of recommendation for the time being.

110. Pursuant to the recommendation made during the 1996 Diplomatic Conference which led to the adoption of the WCT and the WPPT, the WIPO-Unesco World Forum on the Protection of Folklore was held in Phuket, Thailand, in April 1997. Many needs and issues related to intellectual property and folklore were discussed during this meeting.¹¹⁶ WIPO and Unesco organized four Regional Consultations on the Protection of Expressions of Folklore in 1999,¹¹⁷ pursuant to the suggestion included in the Plan of Action adopted at the WIPO-Unesco World Forum on the Protection of Folklore. Each of the Regional Consultations adopted resolutions or recommendations which identify intellectual property needs and issues, as well as proposals for future work, related to expressions of folklore. They were addressed to States, and to WIPO and Unesco. This has provided a valuable framework and substantive input for the work of the Committee on protection of expressions of folklore/TCEs.

111. Most recently, UNESCO Member States adopted the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, which came into force on April 20, 2006 (see discussion above), and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, which came into force on March 18, 2007. --These instruments complement UNESCO's other international instruments in the field of cultural heritage and cultural diversity and are directly relevant to the Committee's work on TCEs. The draft provisions before the IGC explicitly seek to build on and complement these UNESCO conventions. Practical cooperation between WIPO and UNESCO has since the adoption of the 2003 Convention addressed issues such as the intellectual property implications of the making of inventories and lists of intangible cultural heritage as required by the Convention.

Convention on Biological Diversity (CBD)

112. Since the first session of the Committee, the Committee members have expressed a strong indication that the Intergovernmental Committee should work closely with the CBD and the FAO, in order to ensure that its work is consistent with and supportive of the work undertaken by these organizations on genetic resources and TK. Following these indications and pursuant to Decisions IV/9¹¹⁸ and VI/20¹¹⁹ of the Conference of the Parties (COP) to the CBD, the WIPO Secretariat and the Secretariat of the CBD (SCBD) entered into a Memorandum of Understanding (MOU) in order to formalize the already existing cooperation between them. Within the framework of the MOU as well as prior to its signature, an extensive program of cooperation was conducted which included the following activities:

¹¹⁶ See WIPO Publication Number 758 (E/F/S).

¹¹⁷ The regional consultations were held for African countries in Pretoria, South Africa (March 1999); for countries of Asia and the Pacific region in Hanoi, Viet Nam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999). The four regional consultations were attended by 63 Governments of WIPO's Member States, 11 intergovernmental organizations, and five non-governmental organizations.

¹¹⁸ See Decision IV/9 of the COP to the CBD, paragraph 17.

¹¹⁹ See Decision IV/20 of the COP to the CBD, paragraph 36.

- (a) WIPO and UNEP jointly submitted to the fifth meeting of the COP three case studies on the role of IP rights in the sharing of benefits arising from the use of biological resources and associated TK, as requested by Decision IV/9 of the COP;¹²⁰
- (b) As stipulated in Decision IV/9, the Executive Secretary transmitted to WIPO those Decisions and documents of the fourth COP which relate to IP rights for integration into the relevant subprograms of WIPO's Main Program 11, entitled Global Intellectual Property Issues;¹²¹
- (c) As requested in Decision V/26 of the COP,¹²² WIPO assisted the Executive Secretary of the CBD in the preparation of a "Report on the Role of IP Rights in the Implementation of Access and Benefit-sharing Arrangements"¹²³ for the first meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing of the CBD, which led to the development and adoption of the draft Bonn Guidelines;
- (d) The Executive Secretary of the CBD transmitted to the Committee the Report of the CBD Working Group on Access to Genetic Resources and Benefit-sharing¹²⁴ as well as certain Decisions of the sixth COP to the CBD, which contained, respectively, the draft and final texts of the Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from Their Utilization ("the Bonn Guidelines");¹²⁵
- (e) The CBD Ad Hoc Open-ended Intersessional Working Group on Article 8(j) and Related Provisions contributed to the compilation of the WIPO Inventory of TK-related Periodicals and the Inventory of TK-related Databases;¹²⁶
- (f) In 2002 WIPO and UNEP submitted a draft Study to the sixth COP on the role of IP rights in the sharing of benefits arising from the use of biological resources;
- (g) WIPO is contributing to the 'Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities' currently under preparation by the SCBD, as requested in Decision VI/10;¹²⁷
- (h) the Committee will consider a draft technical study on patent disclosure requirements relating to genetic resources and associated TK,¹²⁸ for possible transmission to the seventh meeting of the COP, as requested in Decision VI/24;¹²⁹
- (i) the CBD Open-ended Inter-Sessional Meeting on the Multi-Year Programme of Work of the Conference of the Parties up to 2010 (MYPOW) has recommended that WIPO be invited by the Executive Secretary to further explore and analyse the role of IP rights in technology transfer in the context of the CBD;¹³⁰ and

¹²⁰ See Decision IV/9 of the COP to the CBD, paragraphs 10(b) and 10(e).

¹²¹ See Decision IV/9 of the COP to the CBD, paragraphs 14 and 16.

¹²² See Decision VI/26 of the COP to the CBD, paragraph 15(c).

¹²³ See document UNEP/CBD/WG-ABS/1/4.

¹²⁴ See document WIPO/GRTKF/IC/2/11.

¹²⁵ See document WIPO/GRTKF/IC/3/12.

¹²⁶ See documents WIPO/GRTKF/IC/3/5 and WIPO/GRTKF/IC/3/6.

¹²⁷ See Decision VI/10 of the COP to the CBD, Annex I, paragraphs 15, 23 and 24(d).

¹²⁸ See documents WIPO/GRTKF/IC/4/11 and WIPO/GRTKF/IC/5/10.

¹²⁹ See Decision VI/24 of the COP to the CBD, Section C, paragraph 4.

¹³⁰ See document UNEP/CBD/COP/7/5, Annex, Section 4, paragraph 2(e).

(j) as requested in Decision VI/24 and in accordance with the MOU, WIPO will provide assistance to the Executive Secretary of the CBD in undertaking further information gathering and analysis on certain intellectual property questions related to access to genetic resources and benefit-sharing;¹³¹

113. Further collaboration between the Secretariats of the CBD and WIPO within the framework of the MOU may include the linking of the CBD Clearing-house Mechanism¹³² with certain components of the WIPO Intellectual Property Digital Libraries (IPDL),¹³³ pursuant to the recommendations issued by the CBD-MYPOW on technology transfer.¹³⁴

Food and Agriculture Organization of the United Nations (FAO)

114. The basic terms of reference for the Intergovernmental Committee, as adopted by the General Assembly, foresee that the Committee may address IP issues which arise in the context of multilateral systems for access to genetic resources and benefit-sharing.¹³⁵ In this context, WIPO has collaborated extensively with FAO during the negotiations for the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), which establishes a Multilateral System of Access and Benefit-sharing.¹³⁶ At its first session, the Intergovernmental Committee reached general agreement on undertaking a possible task on IP issues relating to this Multilateral System,¹³⁷ taking into account the conclusions of the FAO negotiations.¹³⁸ Pursuant to the mandate and decisions of the Intergovernmental Committee, WIPO has collaborated extensively with FAO, including on the following activities:

(a) WIPO provided technical-level information on IP matters during the negotiations for the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR or “International Treaty”) for resolving certain IP issues which had arisen in the context of the negotiations;¹³⁹

(b) WIPO contributed information on IP and genetic resources for food and agriculture to the Committee on Agriculture of the FAO, the Intergovernmental Technical Working Group on Plant Genetic Resources for Food and Agriculture, and the Intergovernmental Technical Working Group on Animal Genetic Resources for Food and Agriculture;¹⁴⁰

¹³¹ See Decision VI/24 of the COP to the CBD, Section C, paragraph 3.

¹³² See <<http://www.biodiv.org/chm/default.aspx>>

¹³³ See <<http://ipdl.wipo.int/>>

¹³⁴ See document UNEP/CBD/COP/7/5, Annex, Section 4, paragraph 2(b).

¹³⁵ See document WIPO/GA/26/6, paragraph 21(iii).

¹³⁶ See Part IV of the International Treaty on Plant Genetic Resources for Food and Agriculture, as adopted by the FAO Conference through Resolution 3/2001 in November 2001.

¹³⁷ See document WIPO/GRTKF/IC/1/3, paragraphs 48 to 54 (Task A.3).

¹³⁸ See summary of the Chair at paragraph 128 in document WIPO/GRTKF/IC/1/13.

¹³⁹ See Verbatim of the Thirty-first Session of the FAO Conference, Rome, November 2 to 13, 2001.

¹⁴⁰ See documents CGRFA/WG-PGR-1/01/REPORT and CGRFA-9/02/3.

(c) The FAO regularly informed the Committee of the progress of negotiations on plant genetic resources and formally transmitted the ITPGR to the Committee as an information document, once the Treaty had been adopted;¹⁴¹

(d) WIPO has contributed to the Interim Committee for the International Treaty and was requested to provide technical assistance to the Expert Group on the Terms of the Standard Material Transfer Agreement;¹⁴² and

(e) At its ninth session, the FAO Commission on Genetic Resources for Food and Agriculture (CGRFA) requested “that WIPO cooperate with FAO in preparing a study on how intellectual property rights may affect the availability and use of material from the International Network and the International Treaty”.¹⁴³ In response to this request, WIPO and FAO have cooperated to analyze how IP rights might affect the availability and use of plant genetic resources for food and agriculture.¹⁴⁴ The exercise illustrated the need for more extensive examination of the patent landscape, and the broader legal context that surrounds particular crops, before any practical assessment could be made about the effect on availability and use of material that may be covered by patents. The Commission “welcomed this Preliminary Report, which was of significant value to the agricultural community, and the continuing cooperation with WIPO”¹⁴⁵ and “looked forward to receiving the report of the next stage of this work, in line with the follow-up activities identified in the preliminary report”.¹⁴⁶ WIPO provided a second progress report on the follow-up work identified in its first findings to the first session of the Governing Body of the International Treaty.¹⁴⁷ This Progress Report contained a factual description of the international patent landscape surrounding gene promoters relevant to rice. Rice had been selected by FAO and WIPO for the draft patent landscape because of its crucial importance for food security. FAO selected gene promoters as an illustrative technology for the initial set of patent searches and analysis. Gene promoters regulate the transcription of genetic information from DNA (gene expression), and are therefore key tools in agricultural biotechnology and in the use of plant genetic resources for food and agriculture in research and development. Some initial observations that arose from this progress report included a first review of trends in research and development on these key research tools, including the comparative degree of public and private sector activity, the emergence of research collaborations, and the genes and the traits they express that are of interest to the research community. The Progress Report noted that similar searches would be conducted for maize, potato and soybean, and would subsequently be added to the Report.

¹⁴¹ See document WIPO/GRTKF/IC/2/INF/2.

¹⁴² See document CGRFA/MIC-1/02/REP, Appendix D, paragraph 8.

¹⁴³ CGRFA-9/02/REP, paragraph 31.

¹⁴⁴ *Preliminary report on work towards the assessment of patent data relevant to availability and use of material from the International Network of Ex-Situ Collections under the Auspices of FAO and the International Treaty*, CGRFA/MIC-2/04/Inf.5, <ftp://ftp.fao.org/ag/cgrfa/mic2/m2i5e.pdf>

¹⁴⁵ CGRFA/MIC-2/04/REP, paragraph 31.

¹⁴⁶ Ibid.

¹⁴⁷ *Progress Report on Work Towards the Assessment of Patent Data Relevant to Agricultural Biotechnology and the Availability and Use of Material from the International Network of Ex-Situ Collections Under the Auspices of FAO and the International Treaty: A Draft Patent Landscape Surrounding Gene Promoters Relevant to Rice*, IT/GB-1/06/Inf.17.

115. Further work is continuing to consolidate and extend the scope of this analysis, with a view to producing a preliminary report for peer review and further consultation, with a consolidated draft expected in the course of 2008.

116. WIPO has also participated in thematic meetings organized by the FAO which address specific IP issues, such as an Expert workshop on public agricultural research and the impact of IP rights on biotechnology in developing countries, and has undertaken to contribute information on global patenting trends in respect of plant genetic resources for food and agriculture, covered by the ITPGR, to the FAO.¹⁴⁸

UN Permanent Forum on Indigenous Issues

117. The United Nations Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council (the Council) with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights. According to its mandate, the Permanent Forum should:

- provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council;
- raise awareness and promote the integration and coordination of activities related to indigenous issues within the UN system;
- prepare and disseminate information on indigenous issues.

118. The Permanent Forum continues to play an important bridging, advisory and expert role, and WIPO cooperates actively with it. In 2002, the WIPO General Assembly extended a formal invitation to the Forum to take an active role in the work of the Committee. The former Chair of the Forum was also personally invited to take part on the inaugural Indigenous Panel established by the Committee, and the Forum Secretariat has participated actively in the work of the Committee, including through providing substantive commentary on the draft objectives and principles under development by the Committee (see WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/5(a)). The Forum communicated to the IGC its decisions and recommendations relevant to the work of the IGC, to guide it in its work (WIPO/GRTKF/IC/7/13).

119. Cooperation also has an important practical element. In January 2005, for example, WIPO participated in an International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples organized by the Forum, and in September 2005, the Inter-Agency Group on Indigenous Issues (of which WIPO is a member) convened a Technical Workshop on Indigenous Traditional Knowledge, held in Panama and hosted by the Regional Office for Latin America and the Caribbean of the United Nations Children's Fund (UNICEF).¹⁴⁹ The Forum, in its six sessions to date, has provided valuable guidance for

¹⁴⁸ See "Report of the FAO/TorVergata Expert Workshop on Public Agricultural Research: The Impact of IPRs on Biotechnology in Developing Countries." Rome, June 24–27, 2002.

¹⁴⁹ The Report of this Workshop is available as WIPO/GRTKF/IC/9/INF/10

WIPO's activities, called for the renewal and strengthening of the IGC's mandate, and encouraged representatives of indigenous and local communities to participate in WIPO's work. The Forum has in particular welcomed the creation of the WIPO Voluntary Fund for Indigenous and Local Communities.

The Working Group on Indigenous Populations, the Human Rights Council and the Committee on Economic, Social and Cultural Rights

120. In the human rights area, renewed attention has been paid by the UN's Working Group on Indigenous Populations to draft "Principles and Guidelines on the Heritage of Indigenous Peoples", last discussed by the Working Group in July 2005, and in 2006, the Human Rights Council adopted, in a landmark step, the "Draft United Nations Declaration on the Rights of Indigenous Peoples". The latter awaits further discussion by the UN General Assembly. Mention should also be made of the adoption by the UN Committee on Economic, Social and Cultural Rights (CESCR) of a General Comment on Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (the ICESCR), 1966 in November 2005, during the drafting of which WIPO provided several comments.

XI. REGIONAL DIALOGUE AND TECHNICAL COOPERATION

121. The work of the Committee has not been undertaken in isolation from other WIPO activities relating to TK, TCEs and genetic resources: the work of the IGC has informed, and it has in turn been informed by, many policy forums, formal and informal consultations, training and educational activities, community projects, and other awareness raising activities and partnerships undertaken by WIPO and in cooperation with many partners. Capacity-building and policy debate have necessarily unfolded in close coordination: on the one hand, policy and legal development must be fully cognizant of the practical resource constraints and capacity-building needs identified by indigenous and local communities; on the other hand, practical capacity-building activities must take account of the full international policy environment and current policy and legal processes, and strengthen the capacity of TK holders, bearers of TCEs and GR custodians to take an active role in policy debate and legal development.

122. Technical cooperation of the demanding nature of these issues and the fast-changing and complex international and national legal environment, and because policy deliberations need to be informed by a practical understanding of the resource constraints and the practical options open to policy dialogue and capacity. In addition, partly due to the influence of the IGC, these issues and the specific legal and policy legal mechanisms developed to deal with them, have now entered the mainstream of IP policy and IP law and are no longer considered 'emerging' or abstract issues. Accordingly, general policy forums, training programs, and advisory missions conducted by WIPO now usually contain a strong component on these issues, frequently at the request of Member States, intergovernmental organizations and other partners.

123. Many activities on IP more generally, such as symposiums, seminars, conferences and advisory missions undertaken by the WIPO Secretariat now routinely include TCEs/folklore, TK and/or GR as a topic. The WIPO Secretariat has received many requests for specific forms of legal-technical assistance, including in the normal course of WIPO's program of cooperation for development and continues to provide a wide range of technical cooperation

on this topic through workshops and meetings, expert and fact-finding missions, legislative drafting and advice, and education and training.

124. Regional workshops, expert meetings and other consultations have also led to tangible outcomes which have formed part of the Committee's documents or otherwise contributed to the work of the Committee. To cite several examples:

- regional consultations, held with the support of the Secretariats of WIPO, the then Organization of African Unity (OAU) and the Economic Commission for Africa (ECA), in Abidjan (Côte d'Ivoire) in April, 2002, in Lusaka (Zambia) in May, 2002, and in Addis Ababa (Ethiopia) also in May, 2002, led to the development of a proposal paper, document WIPO/GRTKF/IC/3/15, which was submitted by the African Group to the third session of the Committee;
- Regional consultations supported by WIPO also helped to develop the outline of an international instrument submitted by the African Group (WIPO/GRTKF/IC/6/12), including the WIPO Roundtable on Policy and Legal Options for the Protection of Genetic Resources, Traditional Knowledge and Expressions of Folklore, Kampala (Uganda), October 13 and 14, 2003;
- The conclusions of the WIPO Asia-Pacific Regional Seminar on Intellectual Property Rights, Genetic Resources, Traditional Knowledge and Folklore, held in Cochin, India, in November, 2002, were the basis of document WIPO/GRTKF/IC/4/14, "Technical Proposals on Databases and Registries of Traditional Knowledge and Biological/Genetic Resources" adopted by the Committee at its fourth session as the first formal technical standard for TK and GR documentation;
- the Asia-Pacific Regional Seminar on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, held in Daeduk, Republic of Korea, from October 11 to 13, 2004, developed detailed commentary on the draft objectives and principles for protection of TCEs and TK, as one element of the intersessional commentary process established by the Committee between its seventh and eighth sessions; and
- the WIPO/South Asian Association for Regional Cooperation (SAARC) Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, New Delhi, November 17 and 18, 2003, developed a draft framework for protection of TK and folklore that reflected the emerging approach in the IGC and contributed to its development.

125. Numerous other international, national, regional and sub-regional seminars, workshops and fora have been convened to support national and regional policymaking in this domain, and to strengthen dialogue, consultation and coordination on the work of the Committee, too numerous to list in this document. A brief illustrative sample of selected regional processes conducted at the initiative of Member States and supported by WIPO includes:

- the development of the Isfahan Declaration in 2003 (WIPO/GRTKF/IC/5/14) by the WIPO Interregional Seminar on Intellectual Property and Genetic Resources,

Traditional Knowledge and Folklore, Isfahan (Islamic Republic of Iran), June 16 to 18, 2003;

- the development of the Declaration by the countries of the South Asian Association for Regional Cooperation (SAARC) at the WIPO SAARC Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, New Delhi, November 17 and 18, 2003;
- the development of the Cochin Declaration by the Asia-Pacific Policy Forum on Traditional Knowledge and Traditional Cultural Expressions, held at Cochin, India, from April 4 to 6, 2006, together with detailed commentary on the draft IGC provisions on protection of TK and TCEs;
- regional forums such as the WIPO International Forum on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Moscow, June 3 to 5, 2003; the WIPO Regional Meeting on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Ottawa, September 7 to 9, 2003; WIPO Sub-Regional Seminar on the Protection of Traditional Cultural Expressions, Rabat, May 20 and 21, 2003; and the WIPO Workshop on Access to Genetic Resources, Traditional Knowledge and Folklore in Latin America, Lima, Peru, from May 12 to 14, 2003;
- the recent review of the work of the IGC undertaken (i) at the Regional Expert Meeting on traditional knowledge, traditional cultural expressions and genetic resources, organized by WIPO in cooperation with the Secretariat General of the Andean Community and the Peruvian *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI) with the cooperation of the Spanish Office of Patents and Trademarks in Lima, from April 23 to 24, 2007 and (ii) at the Subregional Forum on Traditional Knowledge, Traditional Cultural Expressions and Related Genetic Resources, jointly convened by WIPO and the Latin American Integration Association, in Montevideo, from April 26 to 27, 2007;
- the forthcoming Asian-African Forum on Traditional Cultural Expressions, Traditional Knowledge, and Genetic Resources to be held in Bandung, from June 18 to 20, 2007, an initiative under the New Asia Africa Strategic Partnership.

126. In addition to cooperation at the request of Member States, technical cooperation was also undertaken in partnership with regional and intergovernmental organizations. This included technical support for regional normsetting activities. For example,

- at the request of Pacific Island States through the Secretariat of the Pacific Community (SPC) and the Pacific Islands Forum Secretariat (PIFS), the Secretariat has provided information and legislative drafting comments and advice in relation to the development of a Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture for Pacific Island countries. The Regional Framework was adopted by the Ministers of Culture of the Pacific Island countries at their meeting in September 2002, and was presented by the SPC as part of a series of oral presentations on national experiences with specific legislative systems for the legal protection of

folklore during the fourth session of the Committee.¹⁵⁰ In turn, the Regional Framework helped to shape the substantive work of the Committee on protection of TCEs and TK, such as the draft objectives and principles; and WIPO continues to support regional efforts to implement the Regional Framework;

- WIPO has provided continuous logistical support, technical advice and substantive input for 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;
- the South Asian Association for Regional Cooperation (SAARC) drew on WIPO technical materials 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.

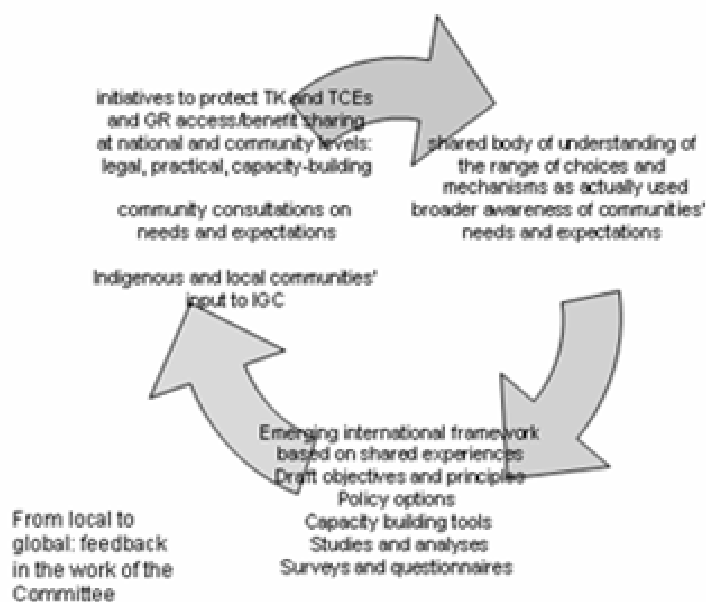
127. Further practical cooperation involving the materials developed by the Committee and issues has included:

- Partnerships with other agencies within the United Nations system on capacity building initiatives, including community-level support for the holistic protection and promotion of TCEs and TK;
- Convening over one hundred national and regional seminars or workshops in all regions of the world on the issues covered by the IGC;
- Extensive engagement with policy processes, NGO forums, and academic events exploring the range of issues addressed by the IGC;
- Several hundred practical training activities addressing aspects of TK, TCEs and GR specifically, or as part of a broader training program;
- Development and pilot testing of a distance learning course on TK;
- Further fact-finding missions and consultations to advance the base of knowledge and consultation that forms the basis of both the work of the IGC and related capacity-building activities;
- Advice on national and regional laws and legal measures, including policy options and legal mechanisms for the *sui generis* protection of TK and TCEs/EoF under national and regional law;
- Development of case studies and other publications to promote general understanding of the issues under consideration;
- Expert advisory missions to support national and regional policy making processes;

¹⁵⁰ See WIPO/GRTKF/IC/4/INF/2, Annex IV.

- Community-based capacity building projects, making use of draft materials developed under the aegis of the IGC, and complementing and developing these materials further;
- Consultation on and adaptation of capacity building materials, through national and community-level activities;
- Provision of tailored policy information, including tailored policy overview papers, comparative analysis of laws and legal options, and
- Participation in civil society and private sector forums and consultation processes on diverse policy areas connected with IGC issues.

128. This broad-based regional dialogue and technical cooperation aim, through careful coordination, to strengthen the consultative base and the practical relevance of the materials prepared for and considered by the Committee. This should ideally reinforce the positive feedback loop, between community and national experiences, on the one hand, and the international level of work undertaken by the Committee under its current mandate. The goal of this feedback loop is to make the policy debate practically relevant to the diverse communities it is intended to serve, and to ensure that practical activities are undertaken in full consciousness of the broader policy and legal environment.



[Appendix I follows]