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

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SUMMARY OF OPTIONS FOR THE INTERNATIONAL DIMENSION OF THE COMMITTEE'S WORK

Document prepared by the Secretariat

OVERVIEW

1. Following successive decisions of the WIPO General Assembly in 2003, 2005 and 2007, the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee") has provided that "no outcome is excluded," including the possibility of an international instrument or instruments; the mandate has also laid emphasis on the "international dimension" of the Committee's work (WO/GA/30/8, para. 93). The Committee has agreed to incorporate the international dimension into its substantive agenda items (WIPO/GRTKF/IC/6/14) and has reviewed a series of detailed resource documents that provide background information on the international dimension and set out objective options for the Committee to address this dimension (WIPO/GRTKF/IC/6/6, WIPO/GRTKF/IC/8/6, WIPO/GRTKF/IC/9/6, WIPO/GRTKF/IC/10/6, WIPO/GRTKF/IC/11/6, WIPO/GRTKF/IC/12/6 and WIPO/GRTKF/IC/13/6). Committee participants have welcomed and increasingly referred to these documents in reviewing the options for the Committee's work as its current mandate reaches its conclusion.

2. This document is essentially a reproduction of the content of WIPO/GRTKF/IC/13/6. It provides a brief synopsis of this extensive background material in the event that the Committee may wish at its current session to consider (i) practical options for advancing the

international dimension of its work and (ii) possible forms of outcomes of its work addressing the international dimension.

INTRODUCTION

3. The Committee has discussed three aspects of potential outcomes of its work:
 - (i) what should be the *content* of the outcome – the question of substance, or what subject matter, focus and level of detail should the outcome have (including the substantial element of its international dimension);
 - (ii) what should be the *nature, format or status* of the outcome – the question of what the format or nature of an outcome should have, and what legal or political status and legal, political or ethical implication should the outcome have, including any international legal implications;
 - (iii) *how* should the Committee work towards the outcome – the question of what procedures or processes, and what forms of consultation, would help lead to understanding on the content and status of any proposed outcome; and what timelines or interim steps should apply.

4. Document WIPO/GRTKF/IC/9/6 provided a detailed and systematic summary of these three aspects. The present document is limited to a brief overview of the options for the format or status of an outcome from the Committee's work, addressing the options discussed in each Committee document on the international dimension:¹
 - (i) a binding international instrument or instruments;
 - (ii) authoritative or persuasive interpretations or elaborations of existing legal instruments;
 - (iii) a non-binding normative international instrument or instruments;
 - (iv) a high level political resolution, declaration or decision, such as an international political declaration espousing core principles, stating a norm against misappropriation and misuse, and establishing the needs and expectations of TCE/TK holders as a political priority;
 - (v) strengthened international coordination through guidelines or model laws; and
 - (vi) coordination of national legislative developments.

The options are illustrated here by reference to examples under each of these broad categories. No judgment or assessment is made as to the legal status of any instrument or text. These categories are descriptive and not exhaustive: the same instrument may be classed under different categories. This analysis does not prejudice or predetermine any choice by the Committee, recognizing that this is a matter entirely for the Committee to determine in line with the requirements of WIPO Member States.

¹ Initially, WIPO/GRTKF/IC/6/6, paragraph 34; see also WIPO/GRTKF/IC/8/6, WIPO/GRTKF/IC/9/6 and WIPO/GRTKF/IC/10/6.

OVERVIEW OF OPTIONS

5. A key question for Committee participants has been whether, and if so, how, an outcome from its work should be binding as international law. In practice, a range of options is applied in cognate areas of law and policy. For instance, in the field of human rights, the website of the Office of the United Nations High Commissioner for Human Rights notes:

In addition to the International Bill of Rights and the core human rights treaties, there are many other universal instruments relating to human rights. ...The legal status of these instruments varies: declarations, principles, guidelines, standard rules and recommendations have no binding legal effect, but such instruments have an undeniable moral force and provide practical guidance to States in their conduct; covenants, statutes, protocols and conventions are legally-binding for those States that ratify or accede to them.

(i) *A binding international instrument or instruments*

6. A binding instrument would oblige Contracting Parties to apply the prescribed standards in their national law, as an obligation under international law. Possible vehicles include stand-alone legal instruments, protocols to existing instruments or special agreements under existing agreements. Past WIPO treaties have become binding under international law through the choice of the parties concerned to adhere to the treaties; other states are not bound by the treaty as such (in some cases, they have chosen to apply the standards created by a treaty without formally adhering to it as a matter of law, for instance in the field of industrial property classifications). A distinct treaty-making process would be required (typically, a diplomatic conference) to negotiate such an instrument. The treaty would become binding only on those countries which elect to adhere to them through a distinct act of ratification or accession.

7. Binding instruments may have the character of framework or policymaking conventions, providing a basis or policy platform for further normative development and for greater convergence and transparency of national policy initiatives. Specific international legal mechanisms with more precise obligations may then be negotiated as protocols under the original framework agreement.

IGC context: Many delegations have called for the development of international binding instrument or instruments as the ultimate outcome of the Committee's work, and an outline for such an instrument has been tabled by a regional group (WIPO/GRTKF/IC/6/12). The Committee and the WIPO General Assembly do not themselves have the capacity to create binding international law, and a distinct process would be necessary both to conclude such a text and for such a text to enter into force with legal effect on those countries which adhere to it.

Examples in related fields: Convention on Biological Diversity, Convention on the Safeguarding of Intangible Cultural Heritage, FAO International Treaty on Plant Genetic Resources for Food and Agriculture, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, ILO Convention 169, International Covenant on Economic, Social and Cultural Rights.

Examples in intellectual property: Singapore Trademark Law Treaty, Patent Law Treaty, WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty.

(ii) *Interpretations or elaborations of existing legal instruments*

8. Authoritative or persuasive interpretations of existing legal instruments may require, guide or encourage the interpretation of existing obligations to enhance the desired protection of TK and TCEs against misappropriation and misuse. Options range from a legal protocol to an existing treaty to a non-binding persuasive statement. They may nonetheless be influential in interpreting treaty standards and in giving practical guidance to domestic policymakers on the basis of agreed international standards. It may give more precise guidance on how to implement international standards, without creating distinct obligations. Without reflecting on the precise legal status of this text, it may be noted that, among other things, the Doha Declaration on TRIPS and Public Health includes guidance on how the TRIPS Agreement should be interpreted.²

IGC context: The Committee has considered the possibility of interpreting or adapting existing international general rules against unfair competition explicitly to include acts of misappropriation, which may be done through a form interpretation or extension of the Paris Convention Article 10*bis* by analogy. Existing instruments on protection of copyright and performers' rights are also relevant to aspects of misuse or misappropriation of traditional cultural expressions, and such existing instruments may be interpreted or applied to strengthen this linkage.

Examples in related fields: General Comment No. 17 (2005) "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights)".

Examples in intellectual property: Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks; Agreed statements of the Diplomatic Conference that adopted the WCT and WPPT, 1996 (WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions).

(iii) *A non-binding normative international instrument*

9. A non-binding ("soft-law") instrument could recommend or encourage States to give effect to certain standards in their national laws and in other administrative and non-legal processes and policies, or could simply provide a framework for coordination among those States which chose to follow the agreed approach. Options could include an authoritative recommendation or a soft-law instrument. Other international organizations have developed

² Paragraph 5(a): In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

such instruments in areas of relevance to the work of the Committee, listed below. Several of such instruments were subsequently developed into binding instruments. The Universal Declaration of Human Rights was drafted as a non-binding instrument. The concept of a non-binding or soft-law instrument may overlap with political declarations and other forms of political commitment. There is considerable overlap between a non-binding instrument and related outcomes such as model laws and provisions.

IGC context: As noted, no instrument emerging from the Committee or adopted by the General Assembly could have binding legal effect in itself. In an early session, the Committee declined a proposal to update an existing non-binding instrument, the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions. The Committee has done extensive work on objectives and principles of protection of TCEs and TK, on options and mechanisms for protection of TCEs and TK, on guidelines for examination of TK-related patents, and on guidelines for IP aspects of access and benefit sharing, material which may in some form be forwarded to the WIPO General Assembly and other WIPO bodies for adoption or recognition as non-binding guidance and as the basis for further normative development.

Examples in related fields: Universal Declaration of Human Rights, UNESCO Declaration on Bioethics and Human Rights, FAO International Code of Conduct for Plant Germplasm Collecting and Transfer, Declaration on the Rights of Indigenous Peoples, UNESCO declarations on bioethics and cultural diversity; FAO International Undertaking on Plant Genetic Resources and resolutions on issues such as farmers' rights; Decisions of the Conference of Parties of the CBD, including the Bonn Guidelines.

Examples in intellectual property: Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples; WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions.

(iv) High level political resolution, declaration or decision

10. One option, discussed in earlier documents, would be a high-level resolution, declaration or joint declaration by relevant WIPO assemblies. The themes of such a declaration might reflect current work on objectives and principles. For instance, it could: recognize the value and significance of TK and/or TCEs as “intellectual property”; stress the need to empower their traditional holders or custodians to defend their interests regarding TK/TCEs and to use them as the basis for sustainable cultural and economic development; establish core objectives and principles for protection; call on Member States actively to apply these objectives and principles as they work towards enhanced national and international protection; and establish goals for future work including a more specific instrument or instruments. Such an approach need not preclude nor retard subsequent development of binding international law, and in some cases such outcomes have been used as the basis for negotiations on binding instruments (one example is the development of the FAO International Treaty from the past non-binding International Undertaking). Past WIPO joint recommendations have been widely applied and followed, for instance in the field of

trade marks, and have been recognized and given effect in other legal instruments.

IGC context: The possibility of such an outcome has been raised in general discussion in the Committee. Options include a recommendation for a decision to be taken by the WIPO General Assembly (possibly jointly with other WIPO bodies) that would make a high level political statement, acknowledging the progress made to date, and would set the agenda for WIPO's future work in these fields.

Examples in related fields: Declaration of Alma-Ata International Conference on Primary Health Care; FAO International Undertaking on Plant Genetic Resources for Food and Agriculture; UNESCO Declaration on Cultural Diversity, 2001.

Examples in intellectual property: United Nations General Assembly Resolution 60/184 on International Trade and Development; Resolution 2000/7 of the Sub-Commission on the Promotion and Protection of Human Rights on Intellectual Property Rights and Human Rights; Joint Recommendation Concerning Trademark Licenses; Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples.

(v) *Strengthened coordination through guidelines or model laws*

11. Model laws or guidelines have in the past been used to express a shared international approach to assist in the coordination of national laws and policy development, without the adoption of a specific international instrument. This can provide the basis for cooperation, convergence and mutual compatibility of national legislative initiatives for the protection of TK and TCEs/EoF, and can also lay the groundwork for more formal international instruments. In practice, it may be difficult to distinguish between model laws or guidelines and the kind of soft-law norms discussed above. Several guidelines, frameworks and model laws already exist in areas of direct relevance to the work of the Committee. On the international level, in the 1980s, UNESCO and WIPO developed Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (these are similar in their normative content to the focus on 'misappropriation and misuse' within the IGC). Earlier, the Tunis Model Law on Copyright for Developing Countries of 1976 provided for protection of indefinite duration of national folklore. These models directly influenced the development of several national laws in this area. A proposal to update the WIPO-UNESCO Model Provisions in the light of practical experience since the 1980s was put to the Committee at its third session but was not accepted by all Committee members.³ These model provisions were intended to evolve into a draft treaty on protection of folklore, although at the time it was concluded that a treaty would be premature partly in view of the limited national experience with such provisions (considerable experience has since been gained by a number of countries). Nonetheless, they illustrate how model provisions may form the groundwork for the development of international legal instruments.

³ WIPO/GRTKF/IC/3/10, paragraph 162

12. A number of other influential international instruments on the protection of TK and TCEs have been prepared as non-binding instruments with potential capacity to determine the legal obligations established under national laws (these include the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, established in 2000, and the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture of 2002). These models have in turn contributed to the discussion and review of protection within the Committee and therefore to the development of the draft objectives and principles currently under consideration. In the past, it has been noted that “while this is very plainly a matter for Committee members to consider and determine, experience in other domains suggests the possibility of a phased approach, in which one mechanism for framing international standards and for promoting the desired approach to protection in national standards leads in turn to further elaborated or revised mechanisms, with increasing expectation of compliance and increasing legal effect.”

IGC context: The objectives and principles for protection of TK and TCEs, developed on the basis of the Committee’s work and with its direction, have already been used widely as benchmarks for protection at the level of regional instruments, international processes and national legislation and policy processes. While not adopted or agreed in their current form, they may provide content for any guidelines or model laws or other “instruments”. The Committee earlier declined proposals to revise the WIPO-UNESCO Model Provisions for folklore protection and to prepare model provisions for patent disclosure mechanisms relating to genetic resources and TK. The Committee has agreed upon principles for the development of guidelines for IP aspects of access and equitable benefit sharing from genetic resources, and has reviewed successive drafts of the guidelines. The Committee has reviewed successive drafts of guidelines for examination of TK-related patents.

Examples in related fields: *Akwe: Kon* voluntary guidelines for the conduct of cultural, environmental and social impact assessment, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization; African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources; FAO International Code of Conduct on the Distribution and Use of Pesticides; UNIDO Code of Conduct for Environmental Release of GMOs.

Examples in intellectual property: Tunis Model Law, WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions, Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture; OECD Guidelines for the Licensing of Genetic Inventions.

(vi) Coordination of national legislative developments

13. Many countries are currently engaged in the development of new laws and policies in the protection of TK and TCEs/folklore. Those doing so have expressed strong interest in learning from other governments and regional bodies concerning their choices and experiences in implementing such measures. This is to ensure the application of “best practice” but also to promote consistency and comity between national laws, given the need for different national legal systems to interact appropriately. One effect of even draft international materials may encourage and support such coordination of national and regional initiatives, where this is desired by the governments concerned. Informal feedback and an increased level of requests for capacity-building support and input has suggested that many governments have chosen to move forward as a priority on developing national protection for TK and/or TCEs, but that they are concerned to ensure a consistent approach in which governments can share experiences in a structured way, ensure reasonable consistency, and avoid conflicting approaches. Some form of non-binding instrument may be a means to assist in this process. While drawing essentially on domestic laws, even distillations of national legislation and related texts can have a “soft-law” influence at the international dimension, by promoting coherence and compatibility between national laws, and strengthening the common basis for collective protection at the international level.

IGC context: The objectives and principles for protection of TK and TCEs to a large extent represent a distillation of actual practice of Member States legislating to protect aspects of TK and TCEs through IP and IP-related mechanisms – the documents provide extensive references explaining the sources in Member States’ laws. Extensive analyses of how Member States have implemented these principles and objectives are provided in WIPO/GRTKF/IC/9/INF/4 (protection of traditional cultural expressions) and WIPO/GRTKF/IC/9/INF/5 (protection of traditional knowledge). Other resources developed for the Committee include a Comparative Summary of *Sui Generis* Legislation for the Protection of Traditional Cultural Expressions (WIPO/GRTKF/IC/5/INF/3); a Comparative Summary of Existing National *Sui Generis* Measures and Laws for the Protection of Traditional Knowledge (WIPO/GRTKF/IC/5/INF/4); a first study prepared for the CBD on patent disclosure mechanisms relating to genetic resources and TK, based on an extensive survey of Member State practice; and questionnaires on protection of folklore/TCEs and TK.

Examples in related fields: National Reports under the CBD (<http://www.biodiv.org/reports/list.aspx>); Ethics Related Legislation and Guidelines, Global Ethics Observatory, UNESCO.

Examples in intellectual property: Survey of practices regarding biotechnological inventions (WIPO/GRTKF/IC/1/6).

Implications for future work

14. In line with the Committee's mandate, which specifies that its work should be "without prejudice to work in other fora", any decision of the Committee passed to the General Assembly may also clarify that it is without prejudice to future work within WIPO or elsewhere on these issues, and if Member States so chose may provide recommendations for further work and in particular work towards more specific international outcomes on the basis of the work of the Committee to date.

15. The Committee is invited to review the above options in determining possible outcomes for its work during the remainder of the 2008-2009 biennium and in the 2010-2011 biennium.

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