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

### Tenth Session

Geneva, November 30 to December 8, 2006

#### OPTIONS FOR GIVING EFFECT TO THE INTERNATIONAL DIMENSION OF THE COMMITTEE'S WORK

*Document prepared by the Secretariat*

#### OVERVIEW

1. This document is one of a series of overviews of the options and practical means for giving effect to the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee'). It updates and summarizes past background material with a focus on the options for the form or nature of an outcome from this work.
2. The Committee's current mandate runs to the end of the 2006-2007 program and budget biennium. While in theory this gives the Committee a mandate to continue to the end of 2007, in practice the current status and future mandate of the Committee is expected to be considered by the WIPO General Assembly when it convenes in September 2007. After its current (tenth) session, the Committee could hold one further session prior to that Assembly meeting; accordingly, an eleventh session is tentatively scheduled for July 2 to 10, 2007, subject to confirmation. This leaves open the possibility of the Committee agreeing at its eleventh session on a specific outcome and an objective and program of possible future work for decision by the General Assembly (and any other relevant WIPO body) in September 2007.

3. The Committee's mandate provides that no outcome is excluded, including the possibility of an international instrument or instruments; the mandate also lays emphasis on the international dimension of the Committee's work. In past discussions possible outcomes, three aspects of the Committee's work have been considered:

- (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 summarized for the Committee the current state of play of discussion concerning these three aspects and factually outlined the options that had been considered. This summary and its previous versions were welcomed by a number of delegations,<sup>1</sup> and may remain relevant background for the Committee's deliberations. It is therefore circulated, in unaltered form, for continuing reference by the Committee. The present document summarizes past discussion in providing an even briefer overview of the possible forms of an outcome, without prejudging the content and policy issues to be addressed by such an outcome.

5. Document WIPO/GRTKF/IC/6/6, considered at the sixth session, and subsequent documents in this series, set out the possible approaches concerning the format or status of an outcome as follows:<sup>2</sup>

- a binding international instrument or instruments;
- a non-binding statement or recommendation;
- guidelines or model provisions;
- authoritative or persuasive interpretations of existing legal instruments; and
- an international political declaration espousing core principles and establishing the needs and expectations of TCE/TK holders as a political priority.

These options are briefly reviewed below. This section is not intended to prejudge or predetermine any choice by the Committee, but to review the material previously presented to the Committee, recognizing that this is a matter entirely for the Committee to determine in line with the requirements of WIPO Member States. Examples are given for the sake of illustration; it is stressed that in providing these examples under these broad categories, no judgment or assessment is made as to the legal status of any instrument or text referred to. These categories are also illustrative only, and are not exhaustive, so that the same instrument may be considered as being relevant to different categories.

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<sup>1</sup> WIPO/GRTKF/IC/9/14 Prov, paragraphs 15 and 79; WIPO/GRTKF/IC/8/15, paragraphs 86, 93, 99, 101, 103, 134, 150.

<sup>2</sup> WIPO/GRTKF/IC/6/6, paragraph 34.

(i) *A binding international instrument*

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. The IGC and the WIPO General Assembly do not have themselves have the capacity to create binding international law. 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.

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. A related option is the development of authoritative or persuasive interpretations of existing legal instruments (e.g. guiding or encouraging the interpretation of existing obligations in such a way as to enhance the desired protection of TK and TCEs/EoF against misappropriation and misuse); depending on the context and the approach taken, this option may not necessarily be binding in itself, but may 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.<sup>3</sup>

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<sup>3</sup> 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.

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 Treaty (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 such instruments in areas of relevance to the work of the Committee, listed below. Several of such instruments were subsequently developed into binding instruments. It should be noted that the Universal Declaration of Human Rights was itself drafted as a non-binding instrument. The concept of a non-binding or soft-law instrument may overlap with political declarations and other

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; 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 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.

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.

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 (as noted, these are similar in their normative content to the focus on 'misappropriation and misuse' within the IGC<sup>4</sup>). 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 many national laws in this area. A proposal to update the WIPO-UNESCO Model Provisions in the light of practical experience was put to the Committee at its third session but was not accepted by all Committee members.<sup>5</sup> 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.

12. A number of other influential international instruments on the protection of TK and TCEs/EoF 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

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<sup>4</sup> As discussed in WIPO/GRTKF/IC/8/6

<sup>5</sup> WIPO/GRTKF/IC/3/10, paragraph 162

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.’

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 on may be to encourage and support such coordination of national and regional initiatives, where this is desired by the governments concerned. Informal feedback 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.

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); WIPO/GRTKF/IC/9/INF/4 (protection of traditional cultural expressions); WIPO/GRTKF/IC/9/INF/5 (protection of traditional knowledge); Comparative Summary of *Sui Generis* Legislation for the Protection of Traditional Cultural Expressions (WIPO/GRTKF/IC/5/INF/3); Comparative Summary of Existing National *Sui Generis* Measures and Laws for the Protection of Traditional Knowledge (WIPO/GRTKF/IC/5/INF/4).

*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: (i) to review and draw on the above material during its tenth session when considering its work on traditional cultural expressions/folklore, traditional knowledge and genetic resources; and, (ii) in particular, to consider the legal status or form of any outcome on the protection of traditional knowledge and traditional cultural expressions/folklore in view of the possibility of a draft outcome being presented to the WIPO General Assembly in September 2007 as referred to in WIPO/GRTKF/IC/10/4 (paragraph 35) and WIPO/GRTKF/IC/10/5 (paragraph 34).*

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