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

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OVERVIEW OF ACTIVITIES AND OUTCOMES
OF THE INTERGOVERNMENTAL COMMITTEE

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I. OVERVIEW

1. The WIPO General Assembly decided to establish the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') in 2000. The Committee held four sessions over 2001-2003. At its fifth session in July 2003, the Committee may need to discuss future directions of WIPO's work concerning intellectual property and genetic resources, traditional knowledge (TK) and folklore (or traditional cultural expressions (TCEs)). To facilitate consideration of future work and to provide background on the work of the Committee, this document draws together the main activities and outcomes of the Committee, and describes the interaction between the various components of the Committee's work and related program activities of WIPO. It also sets out some of the key issues considered by the Committee, to assist in clarifying the basis for future work.

2. In considering the relationship between intellectual property (IP) and genetic resources, traditional knowledge and folklore, the Committee has undertaken information gathering, policy discussion, and practical capacity building in these three policy areas. 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. The Committee's approach has also illustrated the benefits of interaction and feedback between the parallel processes concerning policy dialogue, pooling information and building capacity. This is shown in a concrete way in some of the key outcomes of the Committee. For example, the Committee has collected and analyzed extensive information about various national approaches to the protection of TK and TCEs. This at once creates an informed basis for policy discussions and provides a resource for assessing practical options for national and local programs aimed at strengthening IP protection of TK and TCEs. Similarly, the Committee 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 Committee has also created challenges for wider outreach, consultation and facilitated dialogue on issues that are both technically challenging and controversial. The Committee's work has built on the existing basis of 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 has complemented the formal proceedings of the Committee, with emphasis on the fostering of regional dialogue, and the enhanced participation of indigenous and local communities in WIPO activities. The Committee has provided a framework for interaction with other international processes concerned with IP aspects of TK, TCEs and genetic resources.

4. This document describes the Committee's activities and highlights the integral nature of its key outcomes, which include a set of practical tools:

- for assessing policy and legal options for IP protection systems for TK and TCEs;
- 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.

II. INTRODUCTION

5. The WIPO General Assembly¹ decided to establish the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the Committee) 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

6. Document WIPO/GRTKF/IC/1/3 provided a general survey of the issues for the consideration of the Committee at its first session and proposed general tasks. This also gave details of the background of existing work already undertaken by WIPO in this domain, and identified a range of possible tasks for the Committee to undertake. Following discussion on this document at its first session, the work of the Committee has proceeded along the general lines set out in this document, but has evolved in line with successive decisions of the Committee recorded in the reports of its four meetings to date.³

III. BACKGROUND

Distinctive aspects of the Committee's work

7. From the outset, it was apparent that the nature of the issues under consideration would present the Committee with some particular challenges. The work has ranged widely in subject matter and the approach taken. By July 2003, it will have considered almost eighty substantive documents and information documents, and has undertaken a series of wide-ranging surveys of national laws and other forms of practical experience with legal protection. The Committee has also overseen the creation and development of a set of practical tools for legal protection.

8. Stemming from the fact-finding missions undertaken by WIPO in 1998-99, the work of the Committee 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

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

² Seed document WO/GA/26/6 para. 14.

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

missions,⁴ distilling the input from consultations with some 3,000 stakeholders, remains an important resource for the Committee. The work of the Committee has also been complemented by a series of over twenty 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 VIII below).⁵ This emphasis on outreach and consultation with a broad set of interests and communities has also seen the involvement of non-governmental organizations. Over seventy NGOs have to date been given accreditation to participate in the work of the IGC, and work is underway to implement General Assembly and Committee decisions to enhance this participation further.⁶

9. To set this diverse set of activities in context, this section describes some of the distinctive aspects of the work of the Committee.

Cross-cutting issues

10. The issues before the Committee 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 *suigeneris* forms of legal protection beyond the conventional scope of IP rights. The Committee 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 Committee 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 Diversity⁷, the FAO International Treaty on Plant Genetic Resources for Food and Agriculture⁸ and existing and emerging instruments dealing with cultural heritage and cultural diversity⁹), and in terms of domestic law (so that Committee discussions covered contract

⁴ See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Mission on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001).

⁵ See documents WIPO/GRTKF/IC/3/15 (documents submitted by the African Group) and WIPO/GRTKF/IC/4/14 (documents submitted by the Asian Group).

⁶ “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.

⁷ See documents WIPO/GRTKF/IC/2/11 and WIPO/GRTKF/IC/3/12.

⁸ See document WIPO/GRTKF/IC/2/INF/2.

⁹ 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, a

law, environmental protection law, cultural heritage law, laws governing access to biological resources and protected territories such as national parks,¹⁰ 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

11. The main focus of the Committee'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 Committee 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 *suigeneris* IP systems, including distinct *suigeneris* 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.

Links between legal policy discussions and capacity -building

12. Another key feature of the Committee'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 Committee 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.

13. 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 be 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.

[Footnote continued from previous page]

draft Convention for the Safeguarding of Intangible Cultural Heritage being discussed at Unesco, Unesco's Declaration on Cultural Diversity, 2001, and emerging interest in an international instrument on cultural diversity.

¹⁰ For example, see document WIPO/GRTKF/IC/4/13.

14. 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 effect of the 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. Experience (for instance, as documented in the response to the WIPO questionnaire on TCEs of 2001¹¹) has shown 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.

15. In addition, the extensive information that has been gathered and exchanged within the Committee on the legal protection of TK and TCEs¹² 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.

IV. LEGAL AND POLICY ISSUES

16. The Committee 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 Committee, as background to the specific documents and outcomes from the Committee's work to date.

Policy objectives : preservation and protection

17. 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

¹¹ See document WIPO/GRTKF/IC/3/10.

¹² 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.

and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”¹³

18. 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 uses should be promoted with the approval and involvement of TK holders; and fourth that the benefits of this uses 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 *suigeneris* forms of protection) can be useful, but are unlikely to be sufficient in themselves. For instance, by giving right holder 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 benefits sharing. These objectives are related to one another, but require distinct ways of fusing IP mechanisms; the use of IP mechanisms needs in turn to form part of a coordinated protection/preservation strategy.

19. This example highlights 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,¹⁴ 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.

20. By contrast, ‘protection’ in the work of the Committee 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 Committee’s deliberations have covered several different concepts of protection, including the need for protection against:

¹³ 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).

¹⁴ 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).

- 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.

21. 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 Committee explored two 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 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;¹⁵ but the community can also use the same IP rights as the basis for their own commercial enterprise, 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.¹⁷ 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.

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22. The Committee 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.

¹⁵ For example, see *M*, Payunka, Marika and Others v Indo Furn 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>.

¹⁶ 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).

¹⁷ For example, the Maori Arts Board, *Te Waka Toi*, of New Zealand has developed the *Toi Iho*™ 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.artesaniadescolombia.com.co/> and the *Tairona Culture Case* (WIPO/GRTKF/IC/5/INF/2, Annex I).

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 Committee 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 systems that correspond with customary law restrictions on whom may access and use certain traditional knowledge.¹⁸

23. In summary, the range of positive protection measures for TK/TCEs considered by the Committee 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.

24. 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 Committee therefore considered the extent to which these underlying objectives could be

¹⁸ 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.

met through existing IP mechanisms, through the adaptation of the IP system, or through the development of new, *suigeneris* IP systems specifically designed to apply these general principles directly to the protection of TK or TCEs.

25. In relations specifically to TCEs, the Committee 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. In this regard, the need to clarify the contours and boundaries of the “public domain” was a key concern, as was the relationship between IP protection and these cultural policy objectives (see documents WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/5/INF3).

Preservation or protection?

26. The Committee’s discussion therefore highlighted the need for balance and coordination between preservation and protection, and a clear 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 folklore¹⁹ 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 or consent to the full implications of preservation. Concern to avoid this was widely voiced in the Committee’s discussions.

27. Various practical initiatives to address these concerns included the development of a draft toolkit,²⁰ a practical guide on the protection of TCEs,²¹ and a database of contrasts

¹⁹ 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 – continue 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>>.

²⁰ For example, see documents WIPO/GRTKF/IC/4/5; WIPO/GRTKF/IC/5/5.

²¹ For example, see document WIPO/GRTKF/IC/3/10, para. 155.

relating to the IP aspects of access to genetic resources.²² Technical discussion of TK databases has also addressed the need for appropriate security mechanisms,²³ and specific database initiatives demonstrated included access limitations.²⁴ The common thread of these 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

28. 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 Committee 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 Committee; these include 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);
- Trademark rights making use of TK/TCE subject matter (e.g., a trademark 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

²² 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>.

²³ For example, see documents WIPO/GRTKF/IC/4/14.

²⁴ 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 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.

commercial defensive publication services,²⁵ a practice of filing patent applications notwithstanding the view to gain patent rights but to ensure later patents on the same subject matter are not granted,²⁶ defensive trademark registers,²⁷ specific registers of prohibited material²⁸, and other defensive publication strategies.

29. The Committee 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 Committee discussed a wider 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 Committee developed various practical tools to assist defensive protection:

- a portal of online databases,²⁹ 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 matter³⁰ and of online databases³¹ containing TK material, based on widely-circulated questionnaires,³² as resources for those seeking ways of strengthening patent examination of TK-related subject matter by ensuring relevant prior art is taken into account;

²⁵ For example, see "IP.com's Prior Art Database" at < <http://www.ip.com/>>.

²⁶ 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 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).

²⁷ For example, the 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).

²⁸ 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)).

²⁹ The Traditional Knowledge Portal of Online Databases can be found at <<http://www.wipo.int/globalissues/databases/tkportal/index.html>>.

³⁰ See document WIPO/GRTKF/IC/3/5.

³¹ See documents WIPO/GRTKF/IC/3/6; WIPO/GRTKF/IC/4/10.

³² See documents WIPO/GRTKF/IC/Q.2; WIPO/GRTKF/IC/Q.3.

- a proposal for certain of these periodicals to be incorporated within the minimum documentation for the Patent Cooperation Treaty (PCT) system,³³ 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);³⁴ and
- a proposal for revision of the International Patent Classification (IPC) to include categories specifically for TK subject matter,³⁵ 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)³⁶).

30. 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 operated directly to support these interests and do not inadvertently undercut them. In the area of trademark law, defensive protection mechanisms discussed included identifying grounds for refusal of registering a trademark where its registration or use would offend a significant part of the relevant community.³⁷

31. The role and place of cultural heritage collections, databases and registers raises specific questions relevant to both defensive and positive protection of TCEs. The Committee 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.³⁸

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

32. The Committee’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

³³ Seed documents WIPO/GRTKF/IC/2/6, paras 77 to 81; WIPO/GRTKF/IC/3/5 and WIPO/GRTKF/IC/3/6.

³⁴ Seed documents PCT/CTC/20/4, paras 4 to 8 and 10.

³⁵ Seed document IPC/CE/32/12, para. 91.

³⁶ Seed document IPC/CE/32/12, paras. 83 to 91.

³⁷ For example, seed documents WIPO/GRTKF/IC/4/INF/2, Annex II; WIPO/GRTKF/IC/4/3, para. 139(ii).

³⁸ Seed document WIPO/GRTKF/IC/5/3.

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, whom 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. Similarly, the concern was expressed that traditional communities should be supported in their endeavor 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.

33. Various approaches to TK/TCE protection discussed in the Committee 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 recreated 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

34. The Committee'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 *suigeneris* 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 Committee'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.

35. Accordingly, the work of the Committee is leading toward two complementary outcomes:

- the strengthened capacity of TK holders and cultural custodians both to make effective use and adaptation of existing IP systems and to articulate and define 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; and
- a stronger empirical understanding of the nature of IP protection of TK and TCEs, so that policy discussions in WIPO and elsewhere, and national policymakers, are informed by the rich array of practical experience that has been developed at the national, regional and international levels, leading to a greater understanding of policy options and a stronger basis for international cooperation and legal and technical assistance, including the cooperative development of national and regional laws with the aim of better protecting TK and TCEs.

V. LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS

Scope and definition of legal protection

36. 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.³⁹ 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 stressed⁴⁰ 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

³⁹ See document WIPO/GRTKF/IC/3/9.

⁴⁰ "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 documents should be open-ended, to provide more examples of 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 the 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).

complementary tracks, at least as a methodological device. ⁴¹ 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. ⁴² 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 significance at the international level. Committee discussion 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.

37. 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 law ⁴³ and other policy instruments; ⁴⁴ they are also the object of protection of many national laws, including in copyright laws ⁴⁵ and distinct *suigeneris* laws for the protection of folklore. ⁴⁶ While there is no exhaustive definition of ‘folklore’ at the

⁴¹ 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 become 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.

⁴² 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 Mission 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).

⁴³ WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996) available at: < <http://www.wipo.int/lea/docs/en/wo/wo034en.htm> >.

⁴⁴ WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982.

⁴⁵ 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); Namibian 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 response 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>>

⁴⁶ 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

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.⁴⁷ In the documents it submit to the Committee, the Secretariat has adopted the practice of using these two terms synonymously.

38. ‘Traditional knowledge’ has been used in the Committee and in the earlier WIPO fact-finding missions as a broader and more diverse concept,⁴⁸ a convenient umbrella term that has been used to refer to a wider range of subject matter (TK *latosensu*). 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 knowledge, 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 materials 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 adopted⁴⁹ 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 surveys⁵⁰ and studies⁵¹ considered by the Committee on specific national

[Footnote continued from previous page]

47 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 Law 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).

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

49 “‘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” refer to knowledge systems, creations, innovations and cultural expressions which: have 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).

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

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

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

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 *suig eneris* protection of TK which disclose a range of different approaches to defining this term in national law.⁵²

The subject matter of IP protection

39. 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 systems associated with a local or indigenous community, including customary laws systems;
- those distinct aspects of the traditional knowledge and expressions of culture that are protected by specific IP legal mechanisms beyond the customary context; and
- the actual subject matter of specific IP rights concerning TK or TCEs.⁵³

40. 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) need 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 *suigeneris* systems for TK protection focus on traditional ecological knowledge rather than traditional knowledge in a broader sense.

Forms of IP protection

41. 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;

⁵² 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.

⁵³ For example, see documents WIPO/GRTKF/IC/3/8 and WIPO/GRTKF/IC/3/9.

- 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 materials such as the names of IGOs, hallmarks and national symbols.

42. Practical protection scenarios⁵⁴ considered by the Committee illustrate how the protection of TK and TCEs may involve the use of a range of specific IP tools, potentially drawing on established IP titles as well as specific, *suigeneris* 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?

43. 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 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

⁵⁴ "A short fable may help illustrate the nature of TK and the availability of existing mechanisms of intellectual property that fits 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 rainforest 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 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 trademarks 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."

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 expressions 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 has 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 forms of protection: knowledge, expression and distinctive signs

44. 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.

- 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 *suigeneris* 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 TCE

45. 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,⁵⁵ 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 analysis⁵⁶ of the definition issue and a survey of approaches to definitions 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 to permit misappropriation or demeaning use 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 wider range of social, cultural, environmental and technological contexts; and
- identified by the community or other group as being traditional knowledge.

46. 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 irrelevant; 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).

47. 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:

“*expressions of folklore*” means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

⁵⁵ See the range of definitions cited in the Annex to document WIPO/GRTKF/IC/3/9
⁵⁶ 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 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.

- (i) verbalexpressions,suchasfolktales,folkpoetryandriddles;
- (ii) musicalexpressions,suchasfolksongsandinstrumentalmusic;
- (iii) expressionsbyactions,suchasfolkdances,playsandartisticformsorrituals; whetherornotreducedtoamaterialform;and
- (iv) tangibleexpressions,such as:
 - (a) productionsoffolkart,inparticular,drawings,paintings,carvings,sculptures,pottery,terracotta,mosaic,woodwork,metalware,jewelry,basketweaving,needlework,textiles,carpets,costumes;
 - (b) musicalinstruments;
 - (c) [architecturalforms].”

MechanismsforprotectingTK/TCEs

48. Beyondthequestionofdefinitionandclarificationofprotectedsubjectmatter,theCommitteediscussedawiderangeofmechanismsfortheIPprotectionforTK/TCEs.These canbebroadlycategorize dinthreegroups:

- existingIPsystemsappliedtoTK/TCEsubjectmatter(suchascopyrightprotection oftraditionalculturalworks ⁵⁷andof“worksderivedfromnationalfolklore” ⁵⁸and patentprotectionoftraditionalmedicalknowledge ⁵⁹);
- adaptationsand *suigeneris* elementsofexistingIPsystemstoensuretheir applicationtoTK/TCEsubjectmatter(forinstance,theincorporationofTKsubject matterintheIPC, ⁶⁰theprotectionofindigenoustextandimageryintrademark systems,⁶¹andtheawardofspecialdamagesassociatedwithculturaloffenseinthe breachofcopyrightinTCEs ⁶²);and
- standalone *suigeneris* IPsystems,whetherforthecontentofTK as such, ⁶³forthe protectionofTCEsorexpressionsoffolklore, ⁶⁴orforbothcontent andexpression ⁶⁵).

⁵⁷ Forexample,seeJanke,Terri“MindingCulture:CaseStudiesonIntellectualPropertyand TraditionalCulturalExpressions”availableat:

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

⁵⁸ Section1(3),TunisModelLawonCopyrightforDevelopingCountries(1976).

⁵⁹ Forexample,see“ChinaTraditionalChineseMedicinePatentsDatabases”availableat:

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

⁶⁰ SeedocumentIPC/CE/32/12,paras. 83to91.

⁶¹ Forexample,seetheprovisionsontheinappropriateregistrationofMaoritextandimagery, WIPO/GRTKF/IC/4/INF/2,AnnexII,paragraph10ff;seealsoUSPTO’sDatabaseofOfficial InsigniaofNativeAmericanTribes.See *supra*note26.

⁶² Forexample,see *M*,Payunka,Marikaan dOthersvIndofurnPtyLtd* (1994)30IPR209.The CarpetCase,oneofthesubjectsofthestudiesundertakenforWIPObyMs.TerriJankeentitled “MindingCulture:CaseStudiesonIntellectualPropertyandTraditionalCulturalExpressions” availableat <<http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>>.

⁶³ Forexample,PeruLawNo.27811(PublishedOnAugust10,2002);PortugalDecree -LawNo. 118/2002,ofApril20,2002.

Policy choices for sui generis protection

49. 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 relationships such as custody and guardianship) that form 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);

(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).

50. 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 under takings specific

[Footnote continued from previous page]

⁶⁴ For example, WIPO - *Unesco Model Provisions*, 1982; *Banigui Agreement*, 1999; *South Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*, 2002.

⁶⁵ For example see documents WIPO/GRTKF/IC/4/INF/2, Annex IV and WIPO/GRTKF/IC/5/INF3; 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).

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 knowledge⁶⁶) 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 their 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 law on TK or TCE protection, when this has the effects of creating retrospective claims

51. 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,⁶⁷ and there was a wide-ranging debate on the policy choices that were available in relation to *sui generis* TK. To clarify the options and their various advantages and drawbacks, the following issues were identified as a useful analytical framework:⁶⁸

- (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).

⁶⁶ For example, Portugal's Decree - Law No. 118, of April 20, 2002, document WIPO/GRTKF/IC/5/INF/2.

⁶⁷ 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,

⁶⁸ 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.

52. 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.⁶⁹ 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.⁷⁰ 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 laws 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.

53. The *sui generis* systems for TK protection reported to the Committee illustrate a diversity of approaches to the issues cited above.⁷¹ 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 patents 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 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.

54. 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

⁶⁹ 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).

⁷⁰ 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.

⁷¹ 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;

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 TK⁷² 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 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.

55. A second issue concerned the degree to which *sui generis* TK systems should build on existing IP law and legal concepts. The reared distinctive demand 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 expression 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.”⁷³ 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 than 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 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);⁷⁴ 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

56. The IP protection of TCEs 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.⁷⁵

⁷² Seed documents WIPO/GRTKF/IC/5/7 and WIPO/GRTKF/IC/INF/2.

⁷³ Seed document WIPO/GRTKF/IC/3/8, paragraph 58.

⁷⁴ 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.

⁷⁵ Seed document WIPO/GRTKF/IC/5/3.

57. Reflecting the wider range of practical experience already gained with the legal protection of folklore in national legal systems, the Committee's discussion of systems for the protection of TCEs extensively reviewed these national experiences⁷⁶ 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).

58. 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 that 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;
- (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.

59. 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.⁷⁷ The experience gained from a range of national approaches and case studies has been compiled and distilled in a series of working documents, the most recent being

⁷⁶ 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).

⁷⁷ 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.

WIPO/GRTKF/IC/5/3.⁷⁸ 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.

60. 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. The possibility for the defensive protection for only certain TCEs, such as sacred TCEs and/or others 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 discussed in a series of studies considered by the Committee, most recently document WIPO/GRTKF/IC/5/3.)

VI. OVERVIEW OF INTERGOVERNMENTAL COMMITTEE OUTCOMES

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

61. 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 material that draws together a wider range of national experience with IP protection of TK and TCEs, which at once provides a consolidated foundation for international discussion on new or adapted IP protection systems, and provides an informed basis for capacity building and national policy making processes.

Traditional knowledge

62. The Committee developed a series of studies on legal protection of TK, based on some 61 responses to two questionnaires.⁷⁹ This included surveys of national experiences with IP protection of TK,⁸⁰ analysis of the elements of a *sui generis* TK system,⁸¹ analysis of the definition of TK,⁸² and a composite study distilling this material into a single document.⁸³

⁷⁸ See also documents WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/4/4

⁷⁹ See document WIPO/GRTKF/IC/2/7 and WIPO/GRTKF/IC/Q.1

⁸⁰ See documents WIPO/GRTKF/IC/2/9, WIPO/GRTKF/IC/3/7, WIPO/GRTKF/IC/4/7 and WIPO/GRTKF/IC/5/7

⁸¹ See documents WIPO/GRTKF/IC/3/8 and WIPO/GRTKF/IC/4/8

⁸² See document WIPO/GRTKF/IC/3/9

⁸³ See document WIPO/GRTKF/IC/5/8

These documents included the tails 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 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.

63. 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. ⁸⁴ A database of patents granted on traditional medical knowledge illustrated another way of linking positive protection and TK databases. ⁸⁵

64. Extensive analysis was also given to the use of databases and other collections of information in the context of general defensive protection strategies. This focused 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 online databases ⁸⁶ and periodicals ⁸⁷ 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. ⁸⁸ 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) system ⁸⁹ and to expand the International Patent Classification to provide for more accurate and focussed searching for relevant TK during the patent examination process. ⁹⁰

65. Another 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).

⁸⁴ Seedocument WIPO/GRTKF/IC/3/17, para. 158.

⁸⁵ Seedocument WIPO/GRTKF/IC/3/17, para. 160.

⁸⁶ Seedocument WIPO/GRTKF/IC/3/6.

⁸⁷ Seedocument WIPO/GRTKF/IC/3/5.

⁸⁸ The TK Portal of Online Databases:

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

⁸⁹ Seedocuments PCT/CTC/20/5; PCT/MIA/7/3 and PCT/MIA/7/5.

⁹⁰ Seedocument IP C/CE/32/12.

66. The Committee's discussion 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), through databases established 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.

67. This discussion also highlighted concerns about the need to clarify the purpose and the implications of documentation of TK and the inclusion of TK on 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 wider range of TK documentation projects currently planned or underway, 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.⁹¹ 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.

Cultural expressions / folklore

68. 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, 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 represented by the Secretariat of the Pacific Community. Approaches to defining TCEs and folklore were also reviewed in detail (WIPO/GRTKF/IC/3/9).

69. This material is available as a distillation of practical experience with the IP protection of TCEs for any future discussion 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,⁹² and for the current development of a WIPO Practical Guide on the legal protection of TCEs and related technical TK.⁹³ Further case studies have been

⁹¹ See documents WIPO/GRTKF/IC/4/5 and WIPO/GRTKF/IC/5/5.

⁹² 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.

⁹³ See Task 3 of document WIPO/GRTKF/IC/3/10, para. 168.

developed and published⁹⁴ 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.⁹⁵

Genetic resources

70. 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.

71. 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.

72. Building on earlier work within WIPO, and responding also to a request from the Conference of Parties of the Convention on Biological Diversity (CBD),⁹⁶ 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 aimed at providing input for policymakers.

VII. RELATIONS WITH OTHER INTERNATIONAL PROCESSES

73. 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.

⁹⁴ See WIPO/GRTKF/STUDY/1; WIPO/GRTKF/STUDY/2.

⁹⁵ See Task 4 of document WIPO/GRTKF/IC/3/10, para. 171.

⁹⁶ See document WIPO/GRTKF/IC/4/11 for details of earlier WIPO work and the CBD request.

United Nations Educational Scientific and Cultural Organization (UNESCO)

74. 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.

75. WIPO and Unesco's cooperation on this matter dates back to the development and adoption in 1982 of the Model Provisions⁹⁷ by a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore. The Model Provisions were 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.⁹⁸

76. In December 1984, WIPO and Unesco jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property. The Group of Experts was asked 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 appropriated draft. The discussions at the meeting of the Group of Experts reflected a general recognition of the need for international protection of expressions of folklore, in particular, with regard to the rapidly increasing and uncontrolled use of such expressions by means of modern technology, beyond the limits of the country of the communities in which they originate.

77. Pursuant to the recommendation made during the 1996 Diplomatic Conference, 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.⁹⁹ WIPO and Unesco organized four Regional Consultations on the Protection of Expressions of Folklore in 1999,¹⁰⁰ 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

⁹⁷ "Model Provisions for the National Law on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions" (1982). See also document WIPO/GRTKF/IC/3/10.

⁹⁸ See documents WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/4/3.

⁹⁹ See WIPO Publication Number 758 (E/F/S).

¹⁰⁰ 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.

provided a valuable framework and substantive input for the work of the Committee on protection of expressions of folklore/TCEs.

78. Most recently, the 31st Session of Unesco's General Conference adopted a Resolution concerning a new standard - setting instrument on the protection of traditional culture and folklore.¹⁰¹ The Resolution invited the Director - General of Unesco to submit to the General Conference at its 32nd session, scheduled to take place in late 2003, a report on the possible scope of such an instrument, together with a preliminary draft international convention.¹⁰² Work on this instrument is proceeding, with a third intergovernmental meeting planned for June 2003. As pointed out by Canada and OAPI in their comments on WIPO/GRTKF/IC/4/3, this process is directly relevant to the Committee's work on TCEs. WIPO follows the Unesco process and has invited Unesco to update the Committee on developments regarding the proposed convention.

Convention on Biological Diversity (CBD)

79. 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/9¹⁰³ and VI/20¹⁰⁴ 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:

- (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;¹⁰⁵
- (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;¹⁰⁶
- (c) As requested in Decision V/26 of the COP,¹⁰⁷ 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"¹⁰⁸ for the first meeting of the

¹⁰¹ 31C/Resolution 30.17 Member States formally expressed in written form their reservations in relation to the adoption of the resolution on this item: Argentina, Barbados, Denmark, Finland, France, Germany, Grenada, Greece, Mexico, Netherlands, Norway, Portugal, Saint Lucia, Spain, St. Vincent and the Grenadines, Sweden, Switzerland.

¹⁰² See <<http://unesdoc.unesco.org/images/0012/001246/124687e.pdf>> - Records of the General Conference - 31st Session - Paris, 15 October to 3 November - "Resolutions"

¹⁰³ See Decision IV/9 of the COP to the CBD, paragraph 17.

¹⁰⁴ See Decision IV/20 of the COP to the CBD, paragraph 36.

¹⁰⁵ See Decision IV/9 of the COP to the CBD, paragraphs 10(b) and 10(e).

¹⁰⁶ See Decision IV/9 of the COP to the CBD, paragraphs 14 and 16.

¹⁰⁷ See Decision VI/26 of the COP to the CBD, paragraph 15(c).

¹⁰⁸ See document UNEP/CBD/WG -ABS/1/4.

AdHocOpen -endedWorkingGrouponAccessandBenefit -sharingoftheCBD,whichledto thedevelopmentandadoptionofthedraftBonnGuidelines;

(d) TheExecutiveSecretaryoftheCBDtransmittedtotheCommitteetheReportof theCBDWorkingGrouponAccessstoGeneticResourcesandBenefit -sharing¹⁰⁹aswellas certainDecisionsofthesixthCOPtotheCBD,whichcontained,respectively,thedraftand finaltextsoftheBonnGuidelinesonAccessstoGeneticResourcesandtheFairandEquitable SharingoftheBenefitsArisingfromTheirUtilization(“theBonnGuidelines”);¹¹⁰

(e) TheCBDAdHocOpen -endedIntersessionalWorkingGrouponArticle8(j)and RelatedProvisionscontributedtothe compilationoftheWIPOInventoryof TK-relatedPeriodicals andtheInventoryofTK -relatedDatabases;¹¹¹

(f) In2002WIPOandUNEPsubmittedadraftStudytothesixthCOPontheroleof IPrightsinthesharingofbenefitsarisingfromtheuseofbiologicalresources;

(g) WIPOiscontributingtothe‘CompositeReportontheStatusandTrends RegardingtheKnowledge,InnovationsandPracticesofIndigenousandLocalCommunities’ currentlyunderpreparationbytheSCBD,asrequestedinDecision VI/10;¹¹²

(h) theCommitteewillconsideradrafttechnicalstudyonpat entdisclosure requirementsrelatingtogeneticresourcesandassociatedTK,¹¹³forpossibletransmissionto theseventhmeetingoftheCOP,asrequestedinDecisionVI/24;¹¹⁴

(i) theCBD Open-endedInter -SessionalMeetingontheMulti -YearProgrammeof WorkoftheConferenceofthePartiesupto2010 (MYPOW)hasrecommendedthatWIPObe invitedbytheExecutiveSecretarytofurthereexploredanalysetheroleofIPrightsin technologytransferinthecontextoftheCBD;¹¹⁵and

(j) asrequestedinDecisionVI /24andinaccordancewiththeMOU,WIPOwill provideassistancetotheExecutiveSecretaryoftheCBDinundertakingfurtherinformation gatheringandanalysisoncertainintellectualpropertyquestionsrelatedtoaccessstogenetic resourcesandbenefit -sharing;¹¹⁶

80. FurthercollaborationbetweentheSecretariatsoftheCBDandWIPOwithinthe frameworkoftheMOUmayincludethelinkingoftheCBDClearing -houseMechanism¹¹⁷ withcertaincomponentsoftheWIPOIntellectualPropertyDigitalLibraries(IPDL),¹¹⁸ pursuanttotherecommendationsissuedbytheCBD -MYPOWontechnologytransfer.¹¹⁹

¹⁰⁹ SeedocumentWIPO/GRTKF/IC/2/11.

¹¹⁰ SeedocumentWIPO/GRTKF/IC/3/12.

¹¹¹ SeedocumentsWIPO/GRTKF/IC/3/5andWIPO/GRTKF/IC/3/6.

¹¹² SeeDecisionVI/10oftheCOPtotheCBD,AnnexI,paragraphs15,23and24(d).

¹¹³ SeedocumentsWIPO/GRTKF/IC/4/11andWIPO/GRTKF/IC/5/10.

¹¹⁴ SeeDecisionVI/24 oftheCOPtotheCBD ,SectionC,paragraph4.

¹¹⁵ SeedocumentUNEP/CBD/COP/7/5,Annex,Section4,paragraph2(e).

¹¹⁶ SeeDecisionVI/24 oftheCOPtotheCBD ,SectionC, paragraph3.

¹¹⁷ See< <http://www.biodiv.org/chm/default.aspx>>

¹¹⁸ See <<http://ipdl.wipo.int/>>

¹¹⁹ SeedocumentUNEP/CBD/COP/7/5,Annex,Section4,paragraph2(b).

Food and Agriculture Organization of the United Nations (FAO)

81. 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.¹²⁰ In this context, WIPO has collaborated extensively with FAO during the negotiation for the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), which establishes a Multilateral System of Access and Benefit-sharing.¹²¹ At its first session, the Intergovernmental Committee reached general agreement on undertaking a possible task on IP issues relating to this Multilateral System,¹²² taking into account the conclusions of the FAO negotiations.¹²³ 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;¹²⁴

(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;¹²⁵

(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;¹²⁶

(d) WIPO has contributed to the first meeting of the Interim Committee for the International Treaty and has been invited by the Interim Committee to send one representative to an Expert Group on the Terms of the Standard Material Transfer Agreement to provide technical assistance at the request of the Expert Group;¹²⁷ and

(e) The FAO Commission on Genetic Resources for Food and Agriculture has requested that WIPO be invited to cooperate with the FAO in preparing a study on how IP rights may affect the availability and use of material from the International Treaty and the International Network of *Ex-situ* Collections under the Auspices of the FAO.¹²⁸

82. 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

¹²⁰ See document WIPO/GA/26/6, paragraph 21 (iii).

¹²¹ 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.

¹²² See document WIPO/GRTKF/IC/1/3, paragraphs 48 to 54 (Task A.3).

¹²³ See summary of the Chair at paragraph 128 in document WIPO/GRTKF/IC/1/13.

¹²⁴ See Verbatim of the Thirty-first Session of the FAO Conference, Rome, November 2 to 13, 2001.

¹²⁵ See documents CGRFA/WG-PGR-1/01/REPORT and CGRFA-9/02/3.

¹²⁶ See document WIPO/GRTKF/IC/2/INF/2.

¹²⁷ See document CGRFA/MIC-1/02/REP, Appendix D, paragraph 8.

¹²⁸ See document CGRFA-9/02/REP, paragraph 31.

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.¹²⁹

VIII. REGIONAL DIALOGUE AND TECHNICAL COOPERATION

83. Many activities on IP more generally, such as symposiums, seminars, conferences and advisory missions undertaken by the WIPO Secretariat now include folklore and TK as a topic. The WIPO Secretariat has received a number of requests for specific forms of legal-technical assistance, directly relevant to the approved task, 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.

84. Regional workshops, expert meetings and other consultations¹³⁰ have also led to tangible outcomes which have formed part of the Committee's documents. For instance, regional consultations, held with the support of the Secretariats of WIPO, the 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. Similarly 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 Proposal on Databases and Registries of Traditional Knowledge and Biological/Genetic Resources" submitted for the Committee's consideration at its fourth session.

85. In addition to cooperation at the request of Member States, technical cooperation was also undertaken in partnership with intergovernmental organizations. 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.¹³¹

86. Within the context of the Secretariat's general development cooperation functions, the WIPO Secretariat has provided assistance in relation to national programs concerned with intellectual property aspects of genetic resources, traditional knowledge and folklore,

¹²⁹ See "Report of the FAO/Tor Vergata Expert Workshop on Public Agricultural Research: The Impact of IPR on Biotechnology in Developing Countries." Rome, June 24 – 27, 2002.

¹³⁰ See documents WIPO/GRTKF/IC/4/4 and WIPO/GRTKF/IC/5/4 for a comprehensive description of the technical assistance provided by the WIPO.

¹³¹ See WIPO/GRTKF/IC/4/INF/2, Annex IV.

including providing input to the drafting of several national *sui generis* laws, as well as the Pacific Regional Framework.

IX. CONCLUSION

87. This document seeks to identify some of the key areas of policy discussion and some of the key outcomes from the work of the Committee over four sessions in 2001 and 2002. This may be useful background information from the point of view of clarifying the issues and providing an overview of the extensive documentation that has been developed under the aegis of the Committee. The Committee may also wish to draw on this information in considering possible future directions for work within WIPO on IP protection relevant to traditional knowledge and traditional cultural expressions, and IP issues relating to genetic resources.

88. The Committee is invited to take note of the contents of this document and to consider it as the basis for future work within WIPO on intellectual property aspects of genetic resources, traditional knowledge and folklore.

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