

# WIPO



**WIPO/GRTKF/IC/6/6**  
**ORIGINAL:** English  
**DATE:** November 30, 2003

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**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
GENEVA

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

**Sixth Session**  
**Geneva, March 15 to 19, 2004**

**TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND  
GENETIC RESOURCES: THE INTERNATIONAL DIMENSION**

*Document prepared by the Secretariat*

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## SUMMARY

1. The WIPO General Assembly has requested the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') to consider in particular the international dimension of its work.<sup>1</sup> This document provides background information that may be relevant to this aspect of the Committee's mandate. It therefore reviews the international dimension of intellectual property (IP) in general, including the emergence and evolution of international legal instruments concerning the protection of IP. On this basis, it considers some aspects of the international dimension that may be especially relevant to IP and genetic resources (GR), traditional knowledge (TK) and folklore (in this document, expressions of folklore and traditional cultural expressions (TCEs) are used as synonyms).<sup>2</sup>

2. IP has long had an international dimension, reflecting agreement in the mid-nineteenth century that effective and appropriate IP protection was dependent on a degree of international coordination and cooperation. The first major question to be dealt with at the international level was the recognition of foreign right holders as having access to national IP systems on a par with domestic nationals – generally (but not exclusively), this was resolved by the national treatment principle (or the 'right of assimilation'). The international dimension of IP protection led to the creation of practical mechanisms to facilitate the obtaining and administration of IP rights, particularly when foreign right holders faced particular difficulties (leading to recognition of rights of priority, and the elaboration of international application and registration systems). The international dimension has also increasingly seen the progressive development of substantive standards, setting international standards for how IP should be protected at the national level (such as minimum standards for protection), and how other interests, such as third parties and the general public, should be safeguarded (such as through exceptions to IP rights and remedies for the abuse of IP rights).

3. The development of international law and institutions for IP in general therefore provides potential insights for consideration of the international dimension of IP aspects of TK, TCEs (folklore) and GR in particular. This document discusses a range of overlapping possibilities of potential relevance to the Committee's mandate, which are briefly summarized below.

(a) Interaction with other elements of international law: the Committee is working within a cross-cutting area of international law and policy development, in which a number of international treaties are already in force. The Committee may therefore need to continue its consideration of the interaction of IP issues with international law and institutions in such fields as the environment, human rights, access to genetic resources, and the preservation of cultural heritage.

(b) Current international IP law and standards that apply to TK and TCE subject matter: – international standards determine in part how national laws protect IP and respond to other policy interests. The Committee's work has highlighted a number of areas where existing treaties and other legal and administrative mechanisms are now used, and can be used more effectively, to protect the interests of the holders of TK and TCEs, and may be able to consider these further.

(c) Interpretation and extension of existing international standards, and the development of new international standards, including harmonization of the protection of TK and TCEs under national law: there have been calls for the further development of international legal standards (including through a new international instrument or instruments), which would promote

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<sup>1</sup> Document WO/GA/30/8, paragraph 93.

<sup>2</sup> See discussion in document WIPO/GRTKF/IC/6/3.

international coordination and would more closely determine how IP aspects of TK, TCEs and genetic resources would be protected under national legal systems, including through establishing harmonized minimum standards for protection.

(d) International mechanisms for enabling nationals of one country to enjoy IP rights in a foreign jurisdiction – this is one of the foundational elements of the general international dimension of IP law. In respect of the development of rights in TK and TCEs, including through *sui generis* national systems, there is a legal and practical legal question, with a strong international dimension: to what extent can, and should, holders of TK and TCEs under a particular national system have rights recognized under *sui generis* systems in foreign countries.

(e) International policy coordination: clarification of national policy options, convergence of national policy positions, and the development and articulation of common policy positions and objectives, can be an element of the international dimension of IP in general, and may help promote consensus and more effective outcomes concerning the relationship of IP and TK, TCEs and genetic resources.

(f) International notification and registration: the international dimension of IP in general includes the establishment of international mechanisms to enable or facilitate notification or registration as the basis for recognizing an IP right under national law; these mechanisms have already been used to some extent for the protection of IP rights associated with TK and TCEs.

(g) International technical and administrative cooperation (including classification and documentation standards): the international dimension of the IP system includes cooperative mechanisms for the facilitation of administrative tasks and technical standards on such matters as classification and documentation. The existing international systems for technical and administrative coordination have already been used for TK subject matter. International technical standards, notably the International Patent Classification (IPC) and the documentation standards of the Patent Cooperation Treaty (PCT) system, are also being revised and adapted to deal with TK subject matter. Specific data standards for TK have already been adopted by the Committee.

(h) International coordination of mechanisms for the collective administration and management of IP rights: for right holders, including holders of IP rights associated with TCEs and TK, management and enforcement of rights can require cooperative and collective mechanisms, which have an important international dimension, allowing individual right holders to derive from protection of their works in foreign jurisdictions in a practical manner. This is notably part of the international dimension of the exercise of copyright and related rights, and this may be applied in practice to existing international standards concerning the rights of performers of expressions of folklore.

(i) Settlement of international disputes: the international dimension of IP law includes several mechanisms for settling disputes which are strictly international in character (disputes between states), and these may form part of the international dimension of IP protection related to at least some TK or TCE subject matter.

(j) Settlement of private disputes: where private disputes have an international dimension, in particular when they involve rights, acts or interests attached to more than one jurisdiction, there is a role for private international law concerning IP, and for alternative dispute settlement mechanisms. In particular, there may be a role for alternative dispute settlement approaches relating to international disputes relating to TK or TCE subject matter, as proposed by the Asian

Group. In addition, there are private international law or choice of law issues concerning disputes with an international dimension.<sup>3</sup>

4. The international dimension of the IGC's mandate therefore potentially covers policy, legal, technical and practical elements, which may interact in various ways with national and regional laws and institutions. In general, international and regional instruments of various legal and policy characteristics have been used to promote international cooperation and coordination under each of these aspects of the international dimension of IP.

## I. INTRODUCTION: THE INTERNATIONAL DIMENSION

5. The WIPO General Assembly recently decided that the 'new work [of the Committee] will focus, in particular, on a consideration of the international dimension of those questions, without prejudice to the work pursued in other fora' and 'requested the International Bureau to continue to assist the IGC by providing Member States with necessary expertise and documentation.'<sup>4</sup> As a possible reference tool for this 'new work,' this document provides background information on the international dimension of intellectual property (IP) law, with a focus on aspects of potential relevance to IP and genetic resources, TK and folklore (TCEs). For convenience, this subject matter will be referred to in general as 'the international dimension of the Committee's mandate.' The document briefly considers the international dimension of IP protection in general, before surveying in more detail the implications for this specific subject matter. This background discussion is necessarily selective and illustrative, is not comprehensive, and is not intended to interpret this reference to the 'international dimension' nor to determine the scope or direction of discussion of this matter.

6. Considering the international dimension of IP necessarily entails distinguishing the international and national elements of the overall IP system. IP is essentially protected through rights recognized and exercised under national laws (regional laws may also apply, and for the sake of simplicity in this document any reference to national laws also refers to applicable regional laws). As a rule, it is at the national level that right holders are recognized as having legal identity (or legal personality), that they are given standing to take legal action, and that they are considered entitled to be granted or to hold an IP right; and it is ultimately under national law that IP rights are legally recognized (though international arrangements can facilitate applying for rights, can facilitate their registration and recordal and in some jurisdictions can form the basis for rights directly exercised by individual right holders), and national legal mechanisms allow IP right holders to take action to restrain infringement of their rights and to secure other remedies such as damages. Contracts and agreements that affect the ownership, licensing and other dealing in IP rights are also concluded and enforced under national laws.

7. The protection of IP associated with TK, TCEs and GR, whether through conventional IP rights, *sui generis* adaptations or extensions of IP rights, or through distinct systems of *sui generis* rights, therefore ultimately takes place at the national level. Any general approach to the IP protection of this subject matter, including its international dimension, necessarily entails consideration of what legal tools and mechanisms are required at the national level, how they should operate, and what legal and operational contributions the international dimension can make to protection at the national level. It also requires a shared understanding of the role, and the limits

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<sup>3</sup> Discussed, for example, in the technical study concerning patent disclosure issues, document WIPO/GRTKF/IC/5/10.

<sup>4</sup> Document WO/GA/30/8, paragraph 95

on the role, of international mechanisms, whether they are legal, policy, administrative or capacity-building mechanisms. This is not to diminish the international dimension of IP protection, but to set it in a practical and operational context.

8. Even if its protection ultimately hinges on the operation of national laws, the nature of IP has long demanded international cooperation, including through international legal instruments, but also through a wide range of other international systems and processes. In fact, it has been considered necessary to craft an international dimension to intellectual property protection since the mid-nineteenth century, firstly through a series of bilateral trade and IP agreements, and then through the first multilateral treaties on intellectual property (the Paris Convention on the Protection of Industrial Property ('Paris') concluded in 1883, and the Berne Convention for the Protection of Literary and Artistic Works ('Berne') in 1886).

#### *Recognition of foreign right holders*

9. The initial impulse towards these landmark multilateral treaties on IP came in part from recognition of the need for consistent recognition of foreign right holders in national jurisdictions, and the consequent desire for a multilateral framework to allow reasonable non-discriminatory access to the IP system for foreign right holders. Accordingly, a major effect of the creation of the Paris and Berne Unions was to ensure that countries in each Union provided non-discriminatory access to their industrial property or copyright systems for nationals of all other countries.

10. The standard set then, which is still the cornerstone of international IP law, is the principle of 'national treatment' (or the 'right of assimilation'): an eligible foreign right holder should enjoy the same rights as domestic nationals. The Paris Convention (Article 2) accordingly provides that 'nationals of any country of the [Paris] Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals' and the Berne Convention (Article 5) provides that '(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention,' and that 'protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.'

11. Apart from national treatment, there are other approaches to using international legal means to recognize the IP rights of foreign nationals. Under reciprocity or reciprocal recognition, whether a country grants protection to nationals of a foreign country depends on whether that country in turn extends protection to nationals of the first country; the duration or nature of protection may also be determined by the same principle. Under a mutual recognition approach, a right recognized in one country would be recognized in a foreign country by virtue of an agreement between the two countries. Also of potential application to the recognition of rights of foreign IP holders, is the 'most-favoured-nation' principle, a key element of international trade law since the nineteenth century. This was explicitly applied to IP protection through the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which provides (subject to exceptions) that: '[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a [WTO] Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.'

*Interaction between national IP systems*

12. Another important early clarification at the international level concerned the relationship and interaction between national laws and rights granted under different jurisdictions, and the degree to which national laws operate independently of one another. Generally speaking, rights granted under different national legal systems are recognized and exercised independently, and validity of any IP right in one country is not dependent on its validity elsewhere. So as far as protection of copyright works is concerned, the Berne Convention (Article 5.2) provides that the enjoyment and the exercise of rights ‘shall be independent of the existence of protection in the country of origin of the work’ and that ‘apart from the provisions of [the] Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.’ A similar rule applies to the protection of patents: ‘Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not.’ Similarly, the Paris Convention (Article 6) provides for independence of trademark registration procedures: “an application for the registration of a mark filed by a national of a country of the Union in any country of the Union may not be refused, nor may a registration be invalidated, on the ground that filing, registration, or renewal, has not been effected in the country of origin” and a mark duly registered in one country “shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin.”

13. International standards do provide some forms of linkage between protection in the country of origin, and protection in other jurisdictions. For example, Article 1(2) of the Madrid Agreement and Article 2(1) of the Protocol thereunder make the international registration of a trademark under the Madrid system for the International Registration of Marks dependent on the existence of a national registration or application for exactly the same mark and the same goods or services in the name of the applicant for the international registration.<sup>5</sup> The Lisbon Agreement (Article 2) requires, among other conditions, the protection of appellations of origin “recognized and protected as such in the country of origin,” and the TRIPS Agreement (Article 24.9) specifies that there is “no obligation ... to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.”

*National discretion in applying international standards*

14. The evolving international dimension of IP law has continued to respect a key distinction between the articulation of international standards and principles, and the choice of national legal mechanism to give effect to what has been agreed. This often gives countries wide areas of discretion in how and by what legal tools and doctrines they give effect to international standards. For example, the agreement on a general principle of national treatment in the first text of the Paris Convention gave scope for wide variation within the laws of the initial signatories of the Convention, two of which did not have patent laws at all. Even where international obligations create minimum substantive standards for national laws, it is accepted that the choice of legal mechanisms is a matter of national discretion. The WTO TRIPS Agreement provides

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<sup>5</sup> The Paris Convention (Article 6<sup>quinquies</sup>) also provides a mechanism for basing the trademark right on a registration in the country of origin: ‘every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union... Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin, issued by the competent authority,’ although the more general practice under the Paris Convention is for independence of patent rights.

(in Article 1.1) that “[WTO] Members shall be free to determine the appropriate method of implementing the provisions of [TRIPS] within their own legal system and practice.”

15. For some forms of IP protection, a wide range of legal mechanisms is available to give effect to general standards established at the international level. The characteristic or definitive form of protection of IP is through exclusive rights based on predetermined boundaries, but some standards for IP protection allow for mechanisms expressed in more general terms. For example, some international requirements for protecting IP are variously expressed in terms of the ‘possibility of preventing’ certain acts,<sup>6</sup> requiring Contracting States to ‘take adequate measures to prevent’ unauthorized distribution,<sup>7</sup> or specifying that ‘legal action required for ensuring the legal protection ... may be taken ... under the provisions of national legislation (1) at the instance of the Competent Office or at the request of the public prosecutor (2) by any interested party, whether a natural person or a legal entity, whether public or private.’<sup>8</sup>

16. In some instances, international instruments explicitly set out the range of options for the form of protection, through a broad range of IP laws or other areas of law, including criminal law. Some existing *sui generis* forms of protection allow a very wide choice of legal mechanisms under national law to give effect to general protection standards articulated at the international level. For example, under the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC), Article 4, ‘[e]ach Contracting Party shall be free to implement its obligations ... through a special law ... or its law on copyright, patents, utility models, industrial designs, unfair competition or any other law or combination of laws.’ The Phonograms Convention<sup>9</sup> provides that its means of implementation ‘shall be a matter of domestic law ... and shall include’ protection by means of one or more of ‘the grant of copyright or other specific right,’ ‘the law relating to unfair competition,’ or ‘penal sanctions.’ Some *sui generis* IP rights are linked to other forms of IP right for particular functional purposes only: for example, in the Vienna Convention on the Protection of Type Faces (Article 11), the *sui generis* right in typefaces was deemed to be an industrial design for the purposes of claiming a right of priority under the Paris Convention.

17. These options may be relevant to clarifying the international dimension of the Committee’s mandate, in that a general requirement for protection and general international standards may in practice be implemented by a wide range of distinct national legal mechanisms, ranging over diverse forms of IP right, the general law of unfair competition, and the provision of criminal sanctions. These may be extended or adapted forms of existing IP rights, applications of legal doctrines already existing under national law (such as the cluster of legal doctrines generally associated with the suppression of unfair competition), and various general legal mechanisms beyond the scope of IP law proper (such as criminal law, the law of torts, contract law, employment law or administrative schemes for product label approval for certain products, such as wines and spirits). Protection requirements may simply be articulated in terms of those entitled to initiate legal action or to seek remedies in line with the general standards set out in the international instrument.

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<sup>6</sup> Rome Convention, Article 7.

<sup>7</sup> Satellite Convention, Article 2.

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

<sup>9</sup> Article 3.

*Addressing practical impediments to foreign right holders*

18. Another important element in the early development of international IP law was the recognition of certain practical difficulties faced by foreign right holders when their rights were obtained through formal procedures. If the validity of a patent, trade mark or industrial design right depended on the timely filing of applications, then applicants faced considerable hurdles in securing the early filing date necessary to safeguard their rights in countries other than their own. Hence the notion of a right of priority was introduced into the Paris Convention for such industrial property rights, so that a filing date in one country would have effect in another Paris Union country, provided an application was filed within a certain period of time.

19. More elaborated international systems such as the Madrid and Hague international registration systems, and the Patent Cooperation Treaty, are, in essence, developments of this important mechanism, motivated by the recognition that seeking IP rights in multiple jurisdictions creates practical burdens both for applicants and for national authorities, and entails considerable duplication of administrative activities by various authorities. This provides public benefits by reducing the investment of public resources in duplicative administration and the checking of formalities, and creating more effective and useful public information resources.

20. The practical exercise and enforcement of IP rights can also pose major difficulties for right holders, especially when this involves multiple jurisdictions and when right holders have limited resources. This has given the administration of IP rights an international dimension, notably through international cooperation between national and legal mechanisms for the collective administration of copyright and related rights (such as performers' rights). The difficulty of enforcement of IP rights in multiple jurisdictions has also led to the development of quasi-international mechanisms for alternative dispute resolution. Alternative dispute resolution procedures responds in part to practical difficulties with conventional litigation for parties in more than one jurisdiction, and the international aspect of disputes over such IP-related subject matter as internet domain names. There is similarly an international dimension to the question of making more practicable the exercise of IP rights covering TK or TCE subject matter for the benefit of TK and TCE holders.

*Evolution of substantive international IP standards*

21. The subsequent evolution and development of international IP law has built extensively on this international framework, but these core elements of the international dimension have remained: recognition of national treatment, overall independence of rights granted under different national laws, national discretion to implement international standards through a variety of legal doctrines and mechanisms, a focus on practical hurdles faced by foreign right holders, and a need for administrative coordination. With the later revisions of the Paris and Berne Conventions, and the negotiation of new treaties within that framework (including special agreements within Paris and Berne, such as the Lisbon Agreement and the WIPO Copyright Treaty (WCT) respectively), the international dimension increasingly embodied substantive standards that determine the rights and exceptions to rights that are available under national IP laws. This movement towards substantive minimum standards took place over many years. In its earliest forms, the international framework had relatively little effect on substantive elements of national laws such as eligibility of subject matter for protection, criteria for protection, and the nature and scope of rights and exceptions, to the extent that two signatories to the original act of the Paris Convention did not have patent laws in place at that time.



22. This evolution extended to the international articulation of such substantive standards, whether as a formal expression of international law in the form of treaties, or through the articulation of guidelines, recommendations (including recommendations for the interpretation or implementation of treaty language), model provisions, political declarations, standards for documentation, classification and other technical matters, and examination guidelines. Other areas of international law, such as those concerning the protection of the environment,<sup>10</sup> the preservation of intangible cultural heritage,<sup>11</sup> labour standards<sup>12</sup> and human rights,<sup>13</sup> also have potential bearing on a comprehensive international law of intellectual property.

23. As noted, the origins of international law on IP lie in the bilateral agreements, including bilateral trade agreements, that were concluded in the nineteenth century. Bilateral and regional agreements and institutions remain an active and important aspect of international developments in intellectual property. Protection of TK and folklore (TCEs), as well as IP aspects of genetic resources, have been covered in a number of regional and bilateral agreements<sup>14</sup> or draft agreements. However, as it is directed to the work of the Committee, the present document will focus on the fully multilateral context.

*Implications for issues under the Committee's mandate*

24. The general background of the international IP system suggests that similar issues may arise in considering the international dimension of the Committee's mandate; an illustrative and non-exhaustive list could include:

(a) Approaches in international law to the recognition of foreign right holders in national legal systems and to determine the nature and extent of rights granted to foreign nationals (the various applicability of the principles of national treatment, reciprocity, and MFN);

(b) The relationship (if any) between rights granted in one jurisdiction and rights over the same subject matter in other jurisdictions, whether administrative (e.g. a right of priority) or legal (e.g. validity in one country dependent on validity in another country, or protection dependent on protection in the country of origin);

(c) International mechanisms to facilitate the obtaining of rights and to coordinate administrative processes (potentially ranging over international registration or notification systems, systems to facilitate the filing of applications for protection, classification and other technical standards, and data standards);

(d) International standards that may already apply to relevant subject matter, and the development and articulation of further standards, on such issues as definitions, eligibility for protection, nature, scope and duration of IP rights recognized, exceptions to rights, and enforcement and sanctions; and

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<sup>10</sup> e.g. Convention on Biological Diversity (Article 8(j)) and the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Article 16(g))

<sup>11</sup> e.g. UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003), and the role of UNESCO in relation to such treaties as the Rome Convention (1961), the Satellite Convention (1974) and the Phonograms Convention (1971)

<sup>12</sup> e.g. the relevant activities and standards of the International Labour Organization, for instance in relation to the Rome, Satellite and Phonograms Conventions (see footnote above).

<sup>13</sup> E.g. the Universal Declaration of Human Rights (including Article 27).

<sup>14</sup> e.g. Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization (February 24, 1999), Annex VII, especially Title II, Protection and Promotion of the Cultural Heritage; and Andean Community, Decision 391: Common Regime on Access to Genetic Resources.

(e) The range and scope of legal mechanisms available under national law to give effect to the standards defined at the international level, whether these are in the form of legislation (stand-alone legislation, or provisions within more general legislation), case law or common law, dispute settlement mechanisms, and administrative, civil or penal justice systems.

### III. INTERNATIONAL ASPECTS OF THE COMMITTEE'S MANDATE

25. Considering the international aspects of intellectual property in general, the international dimension of the issues before the Committee may include:<sup>15</sup>

- (a) coordination and clarification of linkages with other elements of international law;
- (b) consideration of current international IP law and standards that apply to TK and TCE subject matter;
- (c) interpretation of existing standards and development of new international standards that apply to the treatment of TK, TCEs and genetic resources under national legal systems, and clarification of the range of legal options available under national law to give effect to these standards;
- (d) international mechanisms for enabling nationals of one country to enjoy IP rights in a foreign jurisdiction;
- (e) coordination and articulation of common policy positions and objectives, and guidelines for achieving them;
- (f) international mechanisms for enabling or facilitating notification or registration as the basis for recognizing an IP right under national law;
- (g) administrative coordination, facilitation and cooperation in the operation of systems of IP rights under national law, including international classification and documentation standards;
- (h) international coordination of mechanisms for the collective administration and management of IP rights;
- (i) settlement of international disputes; and
- (j) settlement of private disputes involving more than one jurisdiction, through international or quasi-international means.

26. The present document provides a brief outline of each of these aspects and their possible application to the international dimension of the Committee's mandate. Practical and capacity-building issues under these various aspects may overlap with norm-setting and policy decisions. Various international instruments have been developed in other areas of IP law touching on most of these diverse aspects of the international dimension, and may provide existing mechanisms and models for development in relation to the protection of TK and TCEs, and IP aspects of genetic resources.

(a) Considering the full international law context

27. The international dimension of the Committee's mandate includes consideration of both existing international law in the field of IP, and of an array of international instruments in other areas of law. To some extent, the existing international law of IP has provided for standards and mechanisms that protect TK and TCEs, either through positive rights in TK/TCE subject matter, or through defensive measures that protect against acquisition of illegitimate or ill-founded IP rights.

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<sup>15</sup> This list of possible elements draws on the report of the deliberations of the SAARC Expert Workshop on Intellectual Property, Traditional Knowledge and Genetic Resources, November, 2003 (document forthcoming).

These forms of protection have been extensively documented in the Committee's past work. Participants in the Committee have also expressed the concern that other international legal instruments should be considered, and that there should be close cooperation with other international agencies and processes that have bearing on the Committee's mandate. International legal instruments that have been cited in particular include the Convention on Biological Diversity, the FAO International Treaty, and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. Ongoing international work that has been reported to the Committee includes implementation of the FAO Treaty (including the development of a model Material Transfer Agreement (MTA)) and the implementation of CBD provisions on access and benefit sharing and the protection of TK. Earlier debate in the Committee has also referred to discussions and negotiations within the World Trade Organization (WTO) concerning TK, genetic resources and folklore in the context of the WTO TRIPS Agreement. The international dimension of the Committee's mandate has therefore included a continuing process of dialogue and cooperation with other international processes, and WIPO has a well-established pattern of liaison, coordination and cooperation with the international agencies concerned. The General Assembly has indicated that the Committee's focus on the 'international dimension' of its work should be 'without prejudice to the work pursued in other fora,' suggesting a further necessary basis for consultation, coordination and reporting on developments elsewhere.

#### *The status of genetic resources*

28. Considering the full international law context highlights that the international dimension of the preservation, legal protection and regulation of use of genetic and biological resources is already well defined by two key treaties, the CBD and the FAO ITPGRFA. These treaties are supplemented by such advisory material as the Bonn Guidelines on Access to Genetic Resources and Benefit-sharing. Since genetic and biological resources, as such, are physical rather than intellectual or intangible resources, they are not in themselves the subject of intellectual property protection. Hence, an approach to the international dimension of the IGC's mandate may need to respect the distinct function and roles of these international institutions, and limited itself to IP aspects of access to and use of genetic or biological resources. This arises in two distinct contexts:

- Guidelines for IP aspect of the licensing of access to genetic resources (documents WIPO/GRTKF/IC/5/9 and WIPO/GRTKF/IC/6/5); and
- Defensive protection strategies to ensure that intellectual property rights are not illegitimately granted on subject matter associated with genetic and biological resources (discussed at length in document WIPO/GRTKF/IC/5/6, but also considered in documents WIPO/GRTKF/IC/5/10 and WIPO/GRTKF/IC/6/8).

The international dimension of both these contexts are discussed at length in the documents referred to. Hence this document will concentrate especially on the international dimension of TK and TCEs, referring to genetic or biological resources when appropriate.

#### (b) Existing international IP standards

29. The existing array of intellectual property treaties contain many provisions that correspond to reported practical experience in the protection of TK, TCEs as IP, and the protection of IP aspects of GR. A brief selection would include:

- The Berne Convention – economic and moral rights in artistic and literary works where these are expressions of traditional cultures, including anonymous and unpublished

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

30. The various surveys of protection of TK and TCEs developed for the Committee (such as documents WIPO/GRTKF/IC/5/3, WIPO/GRTKF/IC/6/3, WIPO/GRTKF/IC/5/7, WIPO/GRTKF/IC/5/8 and WIPO/GRTKF/IC/6/4) may therefore contribute directly to consideration of the international dimension of the protection of TK and TCEs. This is because they describe diverse ways of using and adapting existing international standards, employing international administrative systems, and applying the foundational principles articulated in existing international instruments, all for the effective protection of TK and TCEs.

31. A clearer view of the international dimension of IP and genetic resources, traditional knowledge and folklore may be provided by a review of the current international patterns of use of the IP system concerning relevant subject matter. Many case studies have been documented concerning the use of IP laws within existing international standards to protect IP relating to TK, TCEs and GR. There are no comprehensive measures of the extent of use, but some general indications may be given by general statistics. For example, for medicinal substances derived from plants (International Patent Classification sub-classes A61K 35/78, 35/80, 35/82 and 35/84), a total of 156 international patent applications were published between January 2002 and November 2003. The nationality of applicants displayed a widespread international pattern of activity, as follows:

Australia	1	India	9	Poland	2
Bulgaria	2	Israel	3	Republic of Korea	18
Cameroon	1	Italy	4	Russian Federation	1
Canada	3	Japan	28	Spain	6
China	14	Malaysia	1	Sweden	11
Croatia	1	Netherlands	3	Switzerland	3
France	3	New Zealand	1	United Kingdom	11
Germany	11			United States	27

(c) International standard-setting: norm-building and harmonization

32. The international dimension of IP protection includes ‘standards’ or ‘norms,’ including (but not limited to) binding obligations under international law. Strictly, international law governs the relations between States, but obligations and undertakings between States may be expressed in terms of expectations as to how IP is to be protected (and how the interests of others – such as third parties and the general public – should be respected) under the domestic laws of States. So international norms or standards applying to IP protection have diverse application: they may govern relations between States, they may identify general principles or procedural requirements, they may define how IP is to be protected under national law, they may establish the entitlement of foreign nationals to secure rights in a particular jurisdictions, and they may define how disputes are to be settled. International norms may have the effect of a binding obligation on at least those States which have accepted this legal status (including through accepting the obligations imposed by multilateral, regional or bilateral agreements), they may have status as customary international law, they may have non-binding persuasive effect, or they may have acceptance as a *de facto* norm (for instance, the classification treaties administered by WIPO have a wider *de facto* application internationally beyond those Member States which have formally acknowledged them as having binding effect through ratifying the relevant treaty).

33. One objective of the creation of new standards in the field of IP protection relating to TK and TCEs, and aspects of genetic resources, could be for the greater harmonization of the minimum standards of protection under national law. Existing IP systems in these areas are notably diverse.<sup>16</sup> Some participants in the Committee have called for the international harmonization of TK protection,<sup>17</sup> which may entail the creation of minimum standards or agreed definitions to be complied with in national legal systems for TK protection.

34. Proposals have been put forward for the development of new international norms and standards in the context of the Committee,<sup>18</sup> the WIPO General Assembly<sup>19</sup> and in various other fora.<sup>20</sup> The setting of standards, and the choice of mechanism, are essentially political questions, for WIPO’s Member States to consider and determine. Accordingly, the present document does not

<sup>16</sup> See for example the extended analysis of national policy and legal approaches in documents WIPO/GRTKF/IC/3/10, WIPO/GRTKF/IC/5/3, WIPO/GRTKF/IC/5/7, WIPO/GRTKF/IC/5/8, WIPO/GRTKF/IC/5/INF/2 and WIPO/GRTKF/IC/INF/4.

<sup>17</sup> E.g. report of the fifth session, WIPO/GRTKF/IC/5/15, paragraphs 16, 22, 80, and 126.

<sup>18</sup> See for example various proposals made in the Committee’s Fifth Session (document WIPO/GRTKF/IC/5/15, under ‘general statements’ and ‘future work.’)

<sup>19</sup> See document WO/GA/30/8, ‘Report of the WIPO General Assembly, paragraph 65 to 92, *passim*.

<sup>20</sup> For example, draft ‘Decision on Traditional Knowledge’ contained in WTO document IP/C/W/404 “Taking Forward the Review of Article 27.3(b) of the TRIPS Agreement, Joint Communication from the African Group.”

seek to promote any particular outcome nor to express any preference, but simply aims to catalogue and factually describe the available options. The range of options would include:

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

### *Binding international law*

35. A number of interventions in the IGC and in the WIPO General Assembly have called for a binding international instrument or instruments concerning at least some aspects of intellectual property and genetic resources, TK and TCEs /folklore, and this is a formal policy position of a number of delegations.<sup>21</sup> Other interventions have suggested this step would be premature, given the need to clarify the full scope and impact of existing intellectual property mechanisms, and to develop the conceptual basis for, and stronger international consensus on, intellectual property protection in the various fields of genetic resources, traditional knowledge and traditional cultural expressions. Some interventions have pointed out that these objectives are not necessarily incompatible, as interim work may strengthen the basis for future development of international law as a consensus outcome, the possibility of a ‘third pillar’ of the international IP system (alongside Paris and Berne) being mentioned as a potential outcome.<sup>22</sup> The point of view has also been expressed on behalf of a number of Indigenous NGOs that it was “premature to move forward to negotiations without the development of an informed understanding of what that regime might entail” and “that an internationally binding regime must be approached in an informed and thoughtful manner. An accelerated process would not necessarily produce the strongest instrument for the protection of TK... meaningful and effective participation of Indigenous Peoples was absolutely imperative to the Committee’s further work.”<sup>23</sup>

36. The development of a specific binding legal instrument, on some or all aspects of the IGC’s mandate, is accordingly one clear option for the elaboration of the international dimension of the Committee’s work, although there is no consensus on this option. Domestic and regional initiatives are being actively developed to create enhanced or new forms of IP protection for TK and TCEs.<sup>24</sup> Depending on the exact focus of such an instrument, it would have the benefit of providing a stronger and better harmonized international legal framework for the protection of IP associated with TK and TCEs, and IP related to genetic resources. One issue under consideration – especially in the light of debate in the Committee’s Fifth Session on the question of the future mandate<sup>25</sup> – is whether this would be a feasible goal in the context of the 2004-05 biennium, or whether an

<sup>21</sup> See, for example, the report of the fifth session of the Committee (document WIPO/GRTKF/IC/5/15, *inter alia* paragraphs 19, 123, 124, 127, 130, 135, 136, 137, 139, 141, 142, 148, 149, 151, 153, 164, 165 and 197).

<sup>22</sup> Document WO/GA/30/8, paragraph 66.

<sup>23</sup> Statement on behalf of the Arctic Athabaskan Council, the Assembly of First Nations, the Call of the Earth Circle, the Canadian Indigenous Biodiversity Network, the Indigenous Peoples Biodiversity Network, the Kaska Dena Council, the Pauktuutit Inuit Women’s Association, and the Tulalip Tribes of Washington, WIPO/GRTKF/IC/5/15, paragraph 172.

<sup>24</sup> For example, see the legislation surveyed in documents WIPO/GRTKF/IC/INF/2, WIPO/GRTKF/IC/INF/3 and WIPO/GRTKF/IC/INF/4.

<sup>25</sup> See the report of the fifth session, document WIPO/GRTKF/IC/5/15, paragraphs 122 to 209.

integrated process of policy development, norm-building, and capacity-building should continue. The development of national and regional approaches for the protection of TK and TCEs in the context of IP systems is continuing actively. This suggests, on the one hand, that some form of international coordination and articulation of common principles would avoid inconsistency and contradiction between these various approaches, while also clarifying the limits of the international dimension and the desirable and practical scope of national policy and legislative discretion. In some cases, domestic policymaking processes may be contingent on the emergence of a clearer international framework such as the creation of binding international law, since a patchwork of divergent national approaches could create practical difficulties for right holders, administrators and the public interest alike. One further consideration is that the protection of TK and TCEs is a fast-evolving area in policy and legislative terms, the subject of active exploration, stakeholder consultation and inquiry at the national, regional and international levels, and the expectations of stakeholders and understanding of legal and policy options are in a dynamic state. The benefits and drawbacks of this approach, as against the development of recommendations and similar outcomes, may be considered in the context of specific needs and longer term goals. The introduction to the WIPO program and budget for the biennium 1998-99 remarked that: “the pace of change in the intellectual property domain necessitates consideration of new options for accelerating the development of international harmonized common principles and rules on intellectual property law, so that the system is more responsive to the ever-changing demands placed upon it.” One possibility would be for a set of core principles to be developed and agreed upon, as the basis for the more detailed elaboration of principles, in the light of continuing practical experience and the increased consultation with the wide range of stakeholders concerned.

37. The goal of a legally binding instrument may call for clarification of the factors that make an instrument an expression of international obligations that bind a State. To be binding on a particular State, a norm must either have the force of customary international law or be an element of a treaty or other legal instrument that has been formally accepted by that State as creating binding obligations upon it.<sup>26</sup> Hence the negotiation of a treaty does not in itself create binding law – by the principle of consent, a State must expressly give consent to be bound by the treaty for it to have legal effect (in contrast to the effect of customary law). A number of treaties which are of potential background interest in the context of how new norms relevant to TK/TCEs may be developed were successfully concluded but subsequently failed to enter into force, apparently due to the lack of political interest in ratifying them or uncertainty about their scope or impact – for example, treaties on *sui generis* protection such as the Vienna Agreement for the Protection of Type Faces and their International Deposit (1973) and Geneva Treaty on the International Recording of Scientific Discoveries (1978). Some multilateral IP treaties have entered into force, but apply as binding law to a relatively small number of countries, and remain closer in character to a plurilateral agreement. Other treaties have been accepted as binding law by a large number of countries, but only over a long period (the Berne Convention was concluded initially in 1886, but only approached effectively universal international coverage over 100 years after that date). In other cases, the norms articulated by treaties may separately be considered binding international law through their status as customary international law, binding even those states which have not ratified the treaties in question. (For example, the Vienna Convention on the Law of Treaties is itself a codification of

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<sup>26</sup> One authoritative statement of binding law is the definition of the sources of law which the International Court of Justice may apply in disputes brought before it: “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

the customary international law governing treaties, and this customary law would be binding on states separately from their specific obligations under the Convention itself.)

38. Binding international instruments concerning intellectual property rights have included stand-alone treaties and ‘special agreements’ within the meaning of Article 20 of the Berne Convention and Article 19 of the Paris Convention. The WIPO Performances and Phonograms Treaty (WPPT) protects performances of expressions of folklore. It is a stand-alone agreement (i.e. not a special agreement within the scope of a broader convention or union), but is nonetheless part of a wider international legal matrix. Its copyright counterpart, the WIPO Copyright Treaty (WCT) is, by contrast, stated (in Article 1(1)) to be a special agreement under the Berne Convention. The Lisbon Agreement, a ‘special agreement’ under the Paris Convention, has been used to protect appellations of origin for products embodying TK. A number of provisions of the Berne and Paris Conventions may lend themselves to further development in relation to some aspects of protection of TK and TCEs. For instance, Berne Convention provisions on unfixed<sup>27</sup> and ‘anonymous’<sup>28</sup> works are generally viewed as being potentially relevant to the protection of copyright works developed in a traditional context, where oral transmission and uncertainty over authorship are more likely than in a conventional setting. Berne Convention provisions on moral rights (Article 6*bis*) may also have some application to misrepresentation of the source of TCEs and derogatory use of TCEs. The Paris Convention provisions on unfair competition have been mentioned as a potential analogue or model for the protection of TK.<sup>29</sup> The general provisions in Paris on the suppression of unfair competition have in fact already provided part of the legal basis for IP protection of integrated circuit designs,<sup>30</sup> phonograms,<sup>31</sup> indications of source,<sup>32</sup> undisclosed information<sup>33</sup> and geographical indications.<sup>34</sup> Both the Paris and Berne Conventions are potential vehicles for clarifying the availability of rights for foreign nationals, in particular, through the principle of national treatment. Inasmuch as TCEs are protected through copyright, the Berne Convention provides for national treatment; equally, inasmuch as certain aspects of TK can be protected by some industrial property rights, Paris obligations relating to national treatment already apply.<sup>35</sup> Hence the consideration of the international law dimension of the Committee’s mandate raises the possibility of clarifying existing coverage of specific protection for TK and TCEs under the principal international treaties, and the scope for articulating further provisions (such as special agreements) tailored for this subject matter.

### *Non-binding instruments*

#### *Recommendations*

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<sup>27</sup> Article 2(2).

<sup>28</sup> Article 15(4).

<sup>29</sup> See the report of the third session of the Committee, document WIPO/GRTKF/IC/3/17, paragraphs 227 and 249.

<sup>30</sup> Washington Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC), Article 4

<sup>31</sup> Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Article 3.

<sup>32</sup> Madrid Agreement for the Repression of False or Deceptive Indications of the Source of Goods.

<sup>33</sup> TRIPS Agreement, Article 39.

<sup>34</sup> TRIPS Agreement, Article 22.

<sup>35</sup> It is noteworthy that Paris Convention obligations concerning national treatment (Article 2) extend to industrial property generally. In addition, industrial property is defined in very broad terms in Article 1 of the Convention, relevant to the general field of TK, as applying ‘not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.’



39. Another form of tangible outcome is the development of non-binding normative guidance, which may be in the form of a non-binding instrument such as recommendations or a policy statement. This may be influential and have direct impact on domestic legislation, with potentially greater immediacy than some formal expressions of international law. It is relevant to areas of active policy debate and emerging normative development, including where the policymaking environment is dynamic or in evolution; as one standard text notes: “[t]he emergence of ‘soft law’ ... has to do with the fact that states in agreement frequently do not (yet) wish to bind themselves legally, but nevertheless wish to adopt and test certain rules and principles before they become law.”<sup>36</sup> One such ‘soft law’ mechanism that has been established in the general work of WIPO has been the development of Joint Recommendations. The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications has developed a series of recommendations (on the protection of well-known marks, on the protection of marks and other signs on the internet, and on trademark licenses). These recommendations have in turn been formally adopted as Joint Recommendations by the Assembly of the Paris Union and the General Assembly of WIPO, and published together with explanatory notes.<sup>37</sup> These recommendations provide guidance to national policymakers and legislators (and serve as possible reference points for regional organizations and regional or bilateral agreements). The WIPO Assemblies typically recommend that Member States consider the use of the recommendations developed by the Standing Committee. The application of the WIPO Recommendations in practice has been diverse and influential. For example, the recommendations on well-known marks have directly influenced domestic legislation,<sup>38</sup> judicial decisions, and bilateral and regional agreements.<sup>39</sup> It is possible that these recommendations may also be considered as influential when the relevant provisions of binding treaties are interpreted (in this case, the provisions of the Paris Convention and the TRIPS Agreement concerning well-known marks).

40. On this model, it may be possible to develop recommendations on some of the issues covered by the IGC’s mandate, namely ‘intellectual property issues that arise in the context of (i) access to genetic resources and benefit-sharing, (ii) the protection of traditional knowledge, innovations and creativity, and (iii) the protection of expressions of folklore, including handicrafts,’ and in particular concerning the ‘international dimension’ in line with the updated mandate. Depending on their contents (which may range over aspects of copyright and industrial property law), such recommendations by the IGC could be considered for adoption as a recommendation of the WIPO General Assembly, or as joint recommendations for adoption by the General Assembly and the Berne or Paris Unions.

41. Such an outcome, if it attracted consensus, would have the benefit of promoting clarity and consistency in national and regional approaches to the protection of TK and TCEs through IP mechanisms, and approaches to dealing with IP aspects of genetic resources. It may result in relatively faster convergence of policies as it does not require formal procedures for entry into force, which typically takes a number of years at least. It would also provide transparency and

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<sup>36</sup> P Malanczuk, ‘Akehurst’s Modern Introduction to International Law,’ Routledge, 1997 (seventh edition), p. 54.

<sup>37</sup> WIPO publication 833, ‘Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks’.

<sup>38</sup> The recommendations have reportedly influenced or been drawn on in trademark legislation in many countries, for example Honduras, Indonesia, the Kyrgyz Republic, the Russian Federation, and Spain.

<sup>39</sup> For example, the recommendations have reportedly been drawn on or applied in the Asia Pacific Economic Cooperation forum, Decision 486 of the Andean Community, the European Free Trade Association-Singapore Free Trade Agreement, the US-Jordan Free Trade Agreement and the US-Singapore Free Trade Agreement.

consistency in the technical advice and cooperation provided in relation to these areas, and act as a means of pooling international best practice and promoting effectiveness of legal measures. It may also promote greater consistency and more productive interaction between distinct regional and national initiatives, so that the benefits of enhanced mechanisms for protection of TK and TCEs are more widespread, and the costs of working with such systems are lessened for owners and users of material recognized under these systems.

42. A general parallel might be drawn with the development of the Bonn Guidelines adopted by the Conference of Parties of the Convention on Biological Diversity (CBD) as a voluntary means of providing guidance for the development of legislative, administrative or policy measures on access and benefit-sharing in relation to the CBD. In fact, the Bonn Guidelines, in dealing with some aspects of intellectual property and biological resources, already touch on some of the issues under consideration in the IGC. Notwithstanding their non-binding status in international law, the Bonn Guidelines have performed a harmonizing role, and may have *de facto* influence on actual access and benefit sharing arrangements.

#### *Declaration*

43. Another, more general form of normative outcome is a formal high-level declaration, to be adopted by a suitable forum (such as the WIPO General Assembly). For example, the United Nations General Assembly has issued a number of declarations relevant to IP protection that are influential but not binding law. The Conference of Parties of the CBD has issued a number of decisions that encourage Member States to adopt certain approaches or apply certain principles. The Declaration of the Alma-Ata International Conference on Primary Health Care (1978) helped form the basis of the Traditional Medicine program of the World Health Organization, which has been an important element of international cooperation and coordination in the area of traditional medical knowledge.<sup>40</sup> A declaration by WIPO Member States concerning some or all IP aspects of TK, TCEs, or GR could have a similar consensus-building, influential or catalyzing effect. Such a declaration is unlikely to provide the specific guidance and convergence of approaches that more detailed recommendations or model provisions would provide. Even so, a declaration could have the effect of registering international political consensus on core issues and core principles, and providing a basis for future more detailed work, while falling short of creating binding international law.

#### *Guidelines or model provisions*

44. One means of promoting understanding and convergence in a developing area of IP law is the creation of legislative guidelines or model provisions. For instance, in the area of unfair competition, WIPO has in the past developed Model Provisions on Protection Against Unfair Competition (1996) and a Model Law for Developing Countries on Appellations of Origin and Indications of Source (1974); BIRPI, its predecessor organization, produced a Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition (1967). More directly relevant to the international dimension of the Committee's mandate was WIPO's involvement in the development of the Tunis Model Law for Copyright in Developing Countries (1976) and the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1983); the latter provisions were in fact planned as the basis of an international treaty, but the experts concerned concluded at the time that this step was premature. Many States which replied to the 2001 folklore/TCE questionnaire indicated a need to develop new non-binding model provisions, guidelines or recommendations for

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<sup>40</sup> See <[http://www.who.int/health\\_topics/traditional\\_medicine/](http://www.who.int/health_topics/traditional_medicine/)>.

national laws, using the 1982 Model Provisions as a starting point. The results of the WIPO questionnaire and other WIPO activities showed several suggestions for the updating and modification of the Model Provisions (see 'Final Report on the Legal Protection of Expressions of Folklore,' document WIPO/GRTKF/IC/3/10). A proposal in this Report that new non-binding model provisions for national laws on the protection of expressions of folklore be developed was, however, not approved by the Committee at its Third Session (July 2002).

#### *Capacity-building tools*

45. The IGC has already approved the development of capacity-building tools such as a practical guide on the protection of TCEs, a toolkit for IP management when documenting TK, and the database of IP-related contractual provisions relating to genetic resources; these are in the process of development and can be expected to be finalized in the course of the 2004-05 biennium as tangible outcomes. The various surveys and studies undertaken under the aegis of the IGC, and reports on national legislation and other practical experience to the IGC, are also a valuable policy resource for analysts and national policymakers. By their nature such materials would not be appropriate as specific, consensus outcomes for an authoritative intergovernmental body, but are subsidiary or complementary materials, of practical application, that may also be useful input into policymaking discussions and consideration of the normative elements of the international dimension. In particular, documented experience with the protections of TK and TCEs at the national level should help clarify:

- the scope for coordination at the international level of approaches to TK and TCEs, and the common principles that could be distilled from practical experience and legal instruments; and
- the possibilities for interaction between different TK and TCEs protection systems and the possible approaches for recognition of the rights of foreign TK and TCEs holders.

#### *Substantive basis of norm-building: core principles*

46. One common element in each of the norm-building processes that have been outlined is the identification of certain core principles that would apply to use of the IP system to protect TK and TCEs, and to IP aspects of genetic resources. Parallel documents prepared for the Committee, namely WIPO/GRTKF/IC/6/4 (on traditional knowledge), WIPO/GRTKF/IC/6/3 (on expressions of folklore/traditional cultural expressions) and WIPO/GRTKF/IC/6/5 (on IP aspects of licensing genetic resources), discuss a number of such principles. These are derived from the general principles of the existing IP system and from the practical experience in the IP protection of TK and TCEs reported by many Member States in the earlier work of the Committee.

#### (d) Recognition of rights of foreign nationals through international law

47. One of the cornerstone elements of the international dimension of the conventional IP system is the mechanism for establishing the entitlement of foreign nationals to receive protection. As a rule, the international standard is for relatively open access to intellectual property systems for foreign nationals (provided that they are nationals of a country with relevant treaty commitments, e.g. a Member State of the Paris or Berne Unions, or a WTO Member). By virtue of the obligations under Paris, Berne, TRIPS and other IP treaties, the principle of national treatment applies in general to most categories of IP protection (subject to certain exceptions). In addition, WTO Members are required (also subject to certain exceptions) to apply the MFN principle at least in relation to the IP protection required under the WTO TRIPS Agreement. Some specific aspects of

IP protection (such as the duration of term of copyright protection) may also be determined in certain circumstances by the principle of reciprocity.

48. By contrast, some *sui generis* forms of IP protection established under national laws do not necessarily provide for automatic access by foreign nationals or protection for TK or TCEs held by foreign nationals. Some systems of registration and recognition of *sui generis* rights in TK or TCEs appear to be focused on right holders who are nationals of the country of protection, or who are communities recognized in that country (see for example the annexes to document WIPO/GRTKF/IC/5/INF/2, and the tables in documents WIPO/GRTKF/IC/5/INF/3 and 4). One model that has been applied has been for reciprocal protection to apply. For example, two laws, the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama of 2000 (and the related Executive Decree of 2001) and the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture of 2002 provide for protection of foreign materials .

49. In principle, access by foreign TK holders and TCE custodians to national *sui generis* protection systems may entail various forms of recognition. For instance, it may concern:

- recognition as eligible indigenous or local communities, or recognition of the legal identity of a collective or community as right holder;
- entitlement to be granted a right relating to TK or TCEs, including entitlement for TK, TCEs or related subject matter to be entered on a register;
- participation in any official mechanisms for the collective administration of rights;
- participation in benefit-sharing arrangements or other funds concerning the exploitation of TK or TCEs; and
- entitlements concerning enforcement of rights, including *ex officio* enforcement action taken by national authorities or public prosecutors.

50. Under some national laws, rights in TK or TCEs may be specifically reserved for certain classes of individuals or communities, identified and recognized under domestic law – for example, certain local or Indigenous communities. Hence, the availability of such rights to foreign individual or collective claimants may also be dependent on their compliance with similar or adapted criteria to be eligible right holders. This may entail clarifying whether eligibility of foreign right holders for rights or benefits reserved for particular categories of TK/TCE holders would be assessed according to the laws of the country of origin, or the laws of the country in which protection is claimed.

(e) Policy coordination

51. Part of the international dimension of IP protection, and the promotion of social and economic benefits from IP, is the coordination of relevant policy approaches by means other than through international instruments. International policy coordination has the effect of ensuring that the choices taken by national authorities are informed by a wide range of experience gleaned in other countries, that practical implementation of policy options is consistent and mutually supportive where appropriate, and that the benefits of the creation of awareness and capacity-building materials can be enjoyed by a wider range of beneficiaries than the initial target audience. Such coordination of policy approaches potentially includes:

- the exchange of information between Member States and other stakeholders (notably representatives of indigenous and local communities)<sup>41</sup> on domestic consultative and policy development practices, reflecting the particular concerns of traditional, local and indigenous communities;
- support for networks of TK holders and traditional communities in different countries;
- the development of information and capacity-building materials for the use of TK and TCE holders; and
- pooling of experience in supporting the use TK and TCE as the basis for community development, community-based enterprises and appropriate commercial partnerships.

(f) International notification or registration

52. Apart from international standards (binding or otherwise) concerning protection of IP at the national level, there are a number of practical mechanisms that facilitate and clarify the process of obtaining and protecting IP rights. For example, an international system can operate to register or to notify subject matter for which protection is claimed. This means that, by one central act, an applicant or interested party can put others on notice in potentially many other countries

53. There are several international registration or notification systems that already have application to subject matter relevant to TK and TCEs:

- the protection of armorial bearings, flags, and other State emblems, and official signs and hallmarks indicating control and warranty under Article 6*ter* of the Paris Convention;
- international registration of trademarks, including collective and certification marks, for traditional products and products of origin embodying TK under the Madrid system;
- international registration of appellations of origin for products embodying traditional knowledge under the Lisbon system; and
- international registration of original designs developed within traditional cultural framework under the Hague system.

There are a number of bilateral systems for recognition or notification, raising the question of whether reciprocal notification and protection for TK within a bilateral regime is a possibility, given the existence of reciprocity conditions in a number of existing TK laws.

54. The draft data standards already adopted by the Committee at its fifth session, based on document WIPO/GRTKF/IC/4/14 (“Technical Proposals on Databases and Registries of Traditional Knowledge and Biological/Genetic Resources”), may form the basis of the exchange of a system of communication of TK for the purposes of notification or registration in the event of international cooperation or coordination in this domain.

(g) Administrative coordination, facilitation and cooperation, including international classification and documentation standards

55. An important practical element of the international dimension of IP in general is the development of international mechanisms to facilitate administration of rights within national systems. This may include harmonization of formalities (such as through the Trademark Law Treaty and the Patent Law Treaty), the development of international mechanisms for a common international application process (such as the PCT), preliminary search and examination procedures

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<sup>41</sup> See document WIPO/GRTKF/IC/5/

(as the PCT provides for), or the international registration of IP rights with legal effect in national IP systems (such as in the Lisbon, Hague and Madrid systems). As noted above, inasmuch as conventional IP rights have been successfully applied to aspects of TK and TCEs, these international facilitation and coordination mechanisms are already available for the protection of this subject matter.

56. A specific operational aspect of the international dimension of the IP system is the development, maintenance and operation of international technical standards governing classification, data structures, documentation, administrative formalities, and search and examination practice. The effectiveness, efficiency and affordability of measures taken to protect TK and TCEs internationally may in part hinge on the application and adaptation of international standards in these areas. The Committee has already taken steps in this area, including:

- initiating the updating of the International Patent Classification to improve its coverage of TK subject matter<sup>42</sup>
- initiating the expansion of the PCT standards for the minimum documentation to be consulted in the context of international search and examination, to include explicitly documented TK<sup>43</sup>
- adopting international standards for databases and registries of TK and biological/genetic resources, on the basis of an Asian Group proposal<sup>44</sup>

57. The further consideration of the international dimension may entail reviewing these and other international standards to enhance their coverage and utility in relation to genetic resources, TK and TCEs.

(h) Collective administration and management of IP rights

58. Systems of collective administration and management of IP rights are well developed for copyright and certain related rights. These systems typically operate at a national level, and provide for collection societies and similar entities to administer, manage and enforce rights on behalf of right holders, who typically are not in a strong position to negotiate licenses, and monitor and enforce compliance, with those who are exploiting protected material. Since there is an international market for copyright works and related material such as recordings and performances, international systems have developed for cooperation between national or regional collecting societies. The availability of such collective mechanisms for the management and enforcement of rights, and their international dimension of the cooperation between such agencies, are highly important ingredients in the overall IP system, ensuring that the intended beneficiaries of IP protection do get effective access to the benefits.

59. Whatever legal means are decided upon, at the national, regional or international level, for the protection of TK or TCEs, an immediate question will arise as to how these rights can be managed and enforced in a way that is workable, consistent with the resources and capacities of right holders, and yet is effective on the international plane, so that the fruits of the IP protection of TK and TCEs can be enjoyed in practice by the intended beneficiaries. This may entail consideration of the practical lessons from existing systems for the collective administration of IP rights, and the

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<sup>42</sup> As set out in document WIPO/GRTKF/IC/5/9.

<sup>43</sup> As set out in document WIPO/GRTKF/IC/5/9.

<sup>44</sup> WIPO/GRTKF/IC/4/14, adopted by the Committee at its Fifth Session (WIPO/GRTKF/IC/5/15).

possible extension or adaptation of such mechanisms for the benefit of the holders of TK and TCEs.<sup>45</sup>

(i) Settlement of international disputes

60. One element of the international dimension of intellectual property law is the creation of mechanisms for the avoidance and settlement of disputes concerning intellectual property protection that are international in nature – that is, disputes between states, in particular parties to a treaty. International instruments concerning intellectual property protection typically include provisions for the settlement of disputes between parties. In many cases, the mechanism established, which is seldom used, is for disputes to be referred to the International Court of Justice: for instance, the Paris Convention provides that “[a]ny dispute between two or more countries of the Union concerning the interpretation or application of [the] Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement,” a provision which is potentially subject to a reservation by a country acceding to the Convention.<sup>46</sup> Other dispute settlement mechanisms have been developed. For instance the Washington Treaty on Intellectual Property in Respect of Integrated Circuits proposed a distinct dispute settlement mechanism entailing the use of consultations and expert panels (Article 14). Dispute prevention and settlement under the WTO TRIPS Agreement includes various reporting and transparency mechanisms for dispute prevention<sup>47</sup> and for the settlement of disputes through the procedures established under the WTO Dispute Settlement Understanding.

(j) Settlement of private disputes with an international dimension

61. There is international interest in making commercial, industrial and other use of genetic resources, TK and TCEs. This material may be used in research, in the development of new products, and in tradition-based creations, with or without the consent and involvement of the communities which have developed and provided the original materials. It is this international dimension of use and exploitation of these biological, intellectual and cultural resources that fuels demand for new IP rights. IP rights can help structure and define the kind of technological and commercial partnerships that lead to equitable sharing of benefits, and provide predictability and clarity to contracts and agreements governing use and benefit-sharing. Yet rights are potentially of limited value in the absence of a credible means of enforcing them and dealing with disputes. This is already a challenge within one single jurisdiction, and can become a major difficulty at the international level. TK holders may therefore encounter practical hurdles in monitoring and enforcing their rights, whether they are conventional or *sui generis* IP rights, or based on contracts and licenses. In effect, what Indigenous and local communities and other TK holders, may need above all is an effective and culturally appropriate mechanism for enforcing rights, seeking remedies for breaches, and settling disputes with commercial partners, with effect in multiple jurisdictions.

62. Conventional dispute resolution and the enforcement of rights under national judicial systems will likely remain the central mechanism for achieving such outcomes. Yet the international dimension of such partnerships and the disputes they may engender suggests also a role for

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<sup>45</sup> Drahos, P. (2000), ‘Indigenous Knowledge, Intellectual Property and Biopiracy: Is a global bio-collecting society the answer?’ *European Intellectual Property Review*, 22:245-250.

<sup>46</sup> Similar provisions are established in the Berne Convention (Article 33) and other treaties.

<sup>47</sup> TRIPS Article 63.

alternative dispute resolution with an international aspect. Accordingly, the Asian Group and China have proposed to the Committee that:

WIPO should study possibilities of offering alternative dispute resolution services, including but not limited to arbitration and mediation, which are particularly appropriate for the problems involving intellectual property issues related to traditional knowledge and folklore.<sup>48</sup>

63. There are salient aspects of international disputes over genetic resources, traditional knowledge and TCEs which may at once lend themselves to alternative dispute resolution and yet call for specially adapted rules for mediation or arbitration. These include:

- A strong international dimension, as the parties to the dispute are often in more than one jurisdiction, and the interests engaged typically span national boundaries;
- With the international dimension, a conflict of laws (or private international law) issue in determining the applicable law and in applying it effectively, notably when contractual obligations are concerned;
- A particular technical difficulty in interpreting and applying customary law and other non-formal codes, practices and protocols beyond their traditional scope, when respect for these may be a high priority for indigenous and local communities;
- A possible asymmetry of interests, resources and expertise between the party providing the material and the material using it; this includes the likelihood of a significant cultural and linguistic gap between the two parties;
- The need for unconventional remedies that may be more appropriate to the nature of the damage caused to the traditional communities (financial payment may be inappropriate if the offence caused is cultural and spiritual, and the invalidation of IP rights in benefit-sharing disputes may impair the access of the losing party long-term benefits) – alternative dispute settlement procedures may be better adapted to producing flexible and mutually beneficial outcomes, closer to the ethic of equitable sharing of benefits in a culturally sensitive manner;
- A dispute may hinge on cultural offence or a general claim of misappropriation which may not involve specific breach of existing statutory laws, either in the source country or the country where TK or TCEs are used, but the parties to the dispute may yet agree to some form of mediation with a view to mutual benefit – the dispute may revolve around religious, moral, cultural or ethical factors, rather than strictly legal issues;
- Similarly, even if they hold IP rights, including *sui generis* rights, holders of TK/TCEs or custodians of GR may find it difficult to gain effective access to formal judicial systems, particularly in multiple jurisdictions, and in view of cultural differences they may have difficulty in defining and conveying their central interests and concerns in a formal legal environment in a foreign court.

64. The adaptability of alternative dispute settlement mechanisms means that a flexible, culturally sensitive procedure can still yield a result that provides legal certainty, predictability and mutual confidence, since the outcome may be legally binding. It provides for mutual interests to be identified and promoted, so that dispute settlement can be a positive outcome for the two parties, and indeed may form the basis for a continuing relationship as a sustainable form of equitable benefit-sharing. It may be difficult or procedurally burdensome in formal legal proceedings to establish the standing, legal identity or personality, and legal or equitable interests which may be necessary to form the basis of a successful legal action, especially when recognition of legal

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<sup>48</sup> Document WIPO/GRTKF/IC/2/10; see also the discussion relating to alternative dispute resolution concerning access to genetic resources in document WIPO/GRTKF/IC/2/3.



personality or of other interests is in part structured by customary law considerations – this may be easier to establish under the national law of the country in which a traditional community is based, than for a dispute with an international dimension, in which case the legal and practical difficulties are likely to be magnified. Alternative dispute settlement would provide a flexible and adaptable means of recognizing and giving effect to customary law considerations, particularly if procedural rules were established to facilitate this recognition (as well as to deal with other distinctive elements of disputes involving traditional holders of TK, TCEs and GR).

#### IV. CONCLUSION

65. This document explores the extent of the international dimension of IP protection, and on that basis discusses the implications for the international dimension of the mandate of the Committee. IP protection in general, and protection of TK and TCEs, and the IP aspects of genetic resources, operate ultimately at the level of national law (or regional law in some cases). It is under national law that IP rights are defined, held and exercised, that legal remedies are available, and that exceptions and limitations to rights are defined and exercised. Any conception of how TK and TCEs are to be protected as intellectual property needs to consider the kind of outcomes and specific remedies that are required under diverse national jurisdictions.

66. The international dimension of protection may be conceived as a means of focussing, coordinating, interlinking, facilitating and harmonizing essentially national approaches. Given the international nature and global context of concerns about misappropriation and misuse of TK and TCEs, and IP aspects of genetic resources, the international dimension of protection is a significant priority for many Member States, and specific international steps have already been taken by various bodies within WIPO on the basis of the work of the Committee. The work of the Committee has also highlighted how the existing international IP framework can be applied effectively to help meet the objectives set for protection of TK and TCEs, and to deal with the IP aspects of genetic resources.

67. Concerning the Committee's future consideration of the international dimension of its work, it may be possible either:

(i) to deal in turn with the substantive policy and legal aspects of TK, TCEs and genetic resources in a comprehensive manner, following the existing Committee's agenda items on these issues, and for each of these elements of its work, clarifying the role of national law and national legal systems, various regional approaches and international mechanisms, rather than dealing with the international dimension in isolation; or

(ii) to isolate those aspects of IP related to TK, TCEs and genetic resources that are strictly international in character, and to consider these separately from the Committee's consideration of the substantive protection of TK and of TCEs, and IP aspects of genetic resources, at the level of national law and national IP systems.

68. Before any choice between these two options is made, one approach would be to identify those aspects of the Committee's mandate that are strictly international in character, and to clarify their relationship with the objectives of TK and of TCE protection. Discussion of the international dimension could then be drawn on as required during the Committee's substantive debate on the protection of TK and of folklore/TCEs, and of intellectual property aspects of genetic resources.

69. *The Intergovernmental Committee is invited:*
- (i) to take note of the contents of this document;*
  - (ii) to identify those aspects of the Committee's mandate that are international in character; and*
  - (iii) to draw on these considerations as needed when deciding on possible outcomes of the Committee's substantive debate on the protection of traditional knowledge, of folklore or traditional cultural expressions, and of intellectual property aspects of genetic resources.*

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